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ETHICS IN ADR: THE MANY "Cs" OF PROFESSIONAL RESPONSIBILITY AND DISPUTE RESOLUTION†

Carrie Menkel-Meadow*

I have been teaching both alternative dispute resolution ("ADR") and professional responsibility for a long time, and I will devote the majority of this essay to reporting on some of the enormous changes and developments in this field. However, I will begin with a mea culpa at a higher level of ethical consciousness than the rules that govern us, or are about to govern us, typically use. I have spent the last five years of my life writing ethical rules for ADR, and I am worried about the future of this field. There are many changes occurring in ADR, and I now fear that, because of all the activity, we are about to encounter the possibility of "conflicts of laws" with respect to ethics in the practice of alternative dispute resolution. If we do not already, we soon will have many different rule systems governing our practice, some of which explicitly conflict with each other and others of which are implicitly or indirectly in conflict.

This field, which I prefer to call "appropriate" dispute resolution,[1] was intended to be flexible, make the world a better place, and encourage different models of problem solving—not only adversarial ones, but conciliatory ones. Yet appropriate dispute resolution is now becoming as complex, law-laden, and law-ridden as the traditional practice of law.

From the outset, I have been a strong proponent of the need for rules, regulations, and best practices standards because I care that ADR is practiced "appropriately." We now call it "appropriate dispute resolution," rather than "alternative dispute resolution," precisely to signal that different processes may be appropriate for different kinds of disputes or in different types of settings. By using that label, we also acknowledge that we must make choices about how to conduct different processes appropriately. We are looking for the most appropriate way to try to resolve disputes, plan transactions, solve international crises, and deal with community and individual human prob-

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†Reprinted, with permission, from 28 FORDHAM URB. L. J. 979 (2001). This essay is based on transcribed remarks delivered at the Association of American Law Schools' Annual Meeting, Joint Session of the Sections on Professional Responsibility and Alternative Dispute Resolution.

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[1] *See* Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way—We Earn It!*, 4 NEG. J. 55, 62 (1988) (introducing the phrase "appropriate dispute resolution").

lems. Therefore, ADR really is intended to encompass more than just alternatives to a litigation system.

This broadening of ADR presents the most troubling of the issues in the development of the field in ethics, which is one of jurisdiction. Who has, or ought to have, ethical control over the practice of this multi-disciplinary field, that draws from the teachings and standards of many different professional and non-professional structures and ideologies? There, too, mea culpa. I have been published widely as someone who is concerned about the unauthorized practice of law.[2] I do believe that some forms of evaluative mediation and, these days, hybrid forms of arbitration, multiparty dispute resolution, consensus building—many of the new practices—ultimately prompt third-party neutrals to opine on the law, suggest legal conclusions, or advise people in ways that, although they do not create a technical lawyer-client relationship, do implicate the giving of legal advice and may cause some people to rely inappropriately on the statements of third-party neutrals. Thus, I am concerned about liability issues and whether some dispute resolution practitioners' activities constitute the unauthorized practice of law.[3] I will not focus on that issue in this essay, other than to recognize it as one of the issues posed by the question of determining who ought to regulate this multi-disciplinary practice. Moreover, for those lawyers who want to encourage non-lawyers to contribute their additional learning and teaching, how should we combine these multiple disciplines?[4]

Turning to the major ethical concerns in the practice of ADR, we may simplify the discussion a bit by considering what I call the "Four Cs of Ethics and ADR." The first "C," which is largely absent from the rules, is the issue of counseling about ADR. Every lawyer ought to have an ethical obligation to counsel clients about the multiple ways of resolving problems and planning transactions. A few states have included this obligation in precatory lan-

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[2]*E.g.,* Carrie Menkel-Meadow, *Is Mediation the Practice of Law?*, ALTERNATIVES, May 1996, at 57. Whenever I make arguments about the unauthorized practice of law, I think of my good friend, co-mediator, and co-trainer, Howard Gadlin, who is a psychologist by training. *E.g*., THE CONFLICT RESOLUTION INFORMATION SOURCE, THE GUIDE TO DISPUTE RESOLUTION PRACTIONERS AND RESEARCHERS (containing Dr. Gadlin's biographical information), http://crinfo.org/documents/h-bio/Gadlin_H.htm. When I complain about non-lawyers opining on the law, Dr. Gadlin suggests that perhaps lawyers should be charged with the unauthorized practice of psychology, since they attempt to facilitate parties' communication with little or no training and, often, little or no skill. For an effort to provide some communication skills generically, *see* DOUGLAS STONE ET AL., DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST (1999).

[3]*E.g*., OFFICE OF THE EXECUTIVE SEC'Y, SUPREME COURT OF VA., GUIDELINES ON MEDIATION AND THE UNAUTHORIZED PRACTICE OF LAW (1999) [hereinafter, VIRGINIA GUIDELINES], http://www.courts.state.va.us/drs/upl/preface.html.

[4]Several organizations have attempted to draft ethical rules to transcend disciplinary boundaries. *E.g*., AM. ARBITRATION ASS'N ET AL., MODEL STANDARDS OF CONDUCT FOR MEDIATORS (1994), http://www.adr.org/rules/ethics/standard.html.

guage,[5] although very few have done so in required language.[6] I think that this ethical obligation should be mandatory, and I have suggested this in my idealized Ten Commandments of Appropriate Dispute Resolution.[7]

The second "C" of ethics and ADR is confidentiality. Although our current ethics rules do not address confidentiality in detail,[8] there is much regulation of confidentiality issues at the state level,[9] and there soon will be regulation at the federal level, as well.[10] Indeed, Attorney General Janet Reno appointed a federal agency to coordinate federal ADR,[11] and the *Code of Federal Regulations* and *Federal Register* soon will contain proposed regulations for confidentiality in federal ADR.[12] These new regulations raise a whole host of issues for those of us who are interested in the law of privilege, evidence, and the Freedom of Information Act. At both the federal and state levels, the ethical issues about confidentiality in ADR conflict with "sunshine laws" and other open government policies,[13] and demonstrate the competing values that inform ADR. Again, the question remains: Who should resolve those issues?

The debate over Rule 4.2[14] presents another interesting issue with relevance to whether state ethics rules govern federal lawyers and law enforcement officials. If the federal government has a regulatory scheme for confidentiality or other issues, what do state ethics rules, state evidence rules, or state mediation privileges have to do with ADR practice at the federal judicial or regulatory

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[5]*See* Marshall J. Breger, *Should an Attorney Be Required To Advise a Client of ADR Options?*, 13 GEO. J. LEGAL ETHICS 427 (2000).

[6]*Id.* at 462 app.I.

[7]Carrie Menkel-Meadow, *Ethics and Professionalism in Non-Adversarial Lawyering*, 27 FLA. ST. U.L. REV. 153, 167-68 (1999).

[8]The current version of the *Model Rules of Professional Conduct* does not treat any of the substantial ethical issues with respect to lawyers serving as third-party neutrals. The traditional protection of confidentiality of lawyers and clients, Rule 1.6, applies only to those in the privity of lawyer-client relationships. MODEL RULES OF PROF'L CONDUCT Rule 1.6 (1999). Typically, parties and third-party neutrals are not in this lawyer-client relationship. Rule 2.2, which attempts to deal with the lawyer serving as "intermediary" between two clients, simply assumes that the clients have no confidentiality as between them if they are both using the same attorney. MODEL RULES OF PROF'L CONDUCT Rule 2.2 (1999).

[9]*See, e.g.,* NANCY ROGERS & CRAIG MCEWEN, MEDIATION: LAW PRACTICE AND POLICY (2d ed. 1994).

[10]Notice, Confidentiality in Federal Alternative Dispute Resolution Programs, 65 Fed. Reg. 83,085 (Dec. 29, 2000).

[11]FED. ALTERNATIVE DISPUTE RESOLUTION COUNCIL, REPORT ON THE REASONABLE EXPECTATIONS OF CONFIDENTIALITY UNDER THE ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996 (2000), http://www.financenet.gov/financenet/fed/ iadrwg/confid.pdf.

[12]Notice, 65 Fed. Reg. at 83,085.

[13]*See* Charles Pou Jr., *Ghandi Meets Elliot Ness: 5th Circuit Ruling Raises Concerns About Confidentiality in Federal Agency ADR,* DISP. RESOL. MAG., Winter 1998, at 9 (discussing the balance between openness for oversight and confidentiality for potentially volatile issues); Christopher Honeyman, *Confidential, More or Less: The Reality, and Importance, of Confidentiality Is Often Oversold by Mediators and the Profession,* DISP. RESOL. MAG., Winter 1998, at 12 (arguing that claims of "confidentiality" can be exaggerated unnecessarily).

[14]Rule 4.2 provides that "a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter," unless the lawyer is authorized by law or given consent by the other lawyer. MODEL RULES OF PROF'L CONDUCT Rule 4.2 (1999).

level? These conflicts of laws/conflicts of rules issues are quite complex. The Honorable Wayne Brazil, a former law professor and current magistrate judge who developed one of the most advanced ADR programs in the federal courts, is a notable founder in our field who has had to deal with these issues.[15] In a recent case, Judge Brazil addressed some of these questions about which level of regulation governs confidentiality of mediation in the federal courts.[16]

This leads me into the third "C," conflicts of interest, as well as into conflicts of rules and laws. We have multiple levels of regulation in ethics and ADR for conflicts of interest for third-party neutrals, lawyers who participate as party representatives and advocates, and former, present, and potentially future parties and clients in ADR proceedings.

There are substantive laws, ethics rules, and court rules about ADR and conflicts of interests at both the federal and state level. At the state level, California, Florida, Massachusetts, Minnesota, New York, and Texas have been most active in addressing potential conflicts.[17] These particular states are notable because they have regulated conflicts of interest and confidentiality in substantive statutes providing for ADR or mediation in evidentiary rules,[18] as well as in procedural court rules.[19] So there are both substantive regulations, procedural rules, and court rules that exist at multiple jurisdictional levels. Determining whether an arbitrator or mediator has a prohibited conflict of interest (involving a former, present, or potential future client) may require consultation with a wide variety of rule systems, including formal law and the many rules created by private associations of mediators and arbitrators.[20]

Because I have written elsewhere about the complexity of conflicts of interest issues in ADR,[21] I will mention just some of the key controversies. The major issue, both at the policy and rule levels, is the extent to which the same individual should be allowed to perform multiple roles as mediator and

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[15]*E.g.,* WAYNE D. BRAZIL, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES (1985); WAYNE D. BRAZIL, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES (1988).

[16]Olam v. Cong. Mortgage Co., 68 F. Supp. 2d 1110 (N.D. Cal. 1999) (noting the tension between federal court rules that mandate confidentiality and state law).

[17]ROGERS & MCEWEN, *supra* note 9, at app.A (summarizing provisions of state confidentiality statutes).

[18]*E.g.,* CAL. EVID. CODE § 2025 (West 2000); *see also* ROGERS & MCEWEN, *supra* note 9, at app.A (detailing the evidentiary issues that arise in mediations in areas such as discovery, evidence, public access, nonparties, and protective orders).

[19]*E.g.,* ADR L.R. 2-5(d) (N.D. Cal. 2000) (establishing procedure for determining conflicts of interest in ADR context).

[20]*E.g.,* AM. ARBITRATION ASS'N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (1977), http://www.adr.org/roster/arbitrators/code.html.

[21]*E.g.,* Carrie Menkel-Meadow, *Ethics in Alternative Dispute Resolution: New Issues, No Answers From the Adversary Conception of Lawyers' Responsibilities,* 38 S. TEX. L. REV. 407 (1997) [hereinafter Menkel-Meadow, *New Issues, No Answers*]; Carrie Menkel-Meadow, *The Silences of the Restatement of the Law Governing Lawyers: Lawyering as Only Adversary Practice,* 10 GEO. J. LEGAL ETHICS 631 (1997).

as advocate, at different times and in different cases, in order to encourage the expanded use of ADR. There is also a question of whether mediators, conciliators, arbitrators, and other dispute resolvers should be allowed to practice in law firms with others who perform the more conventional advocate's role, sometimes for the same or adverse parties.

Under our current ethics rules for lawyers,[22] this situation is very problematic. Should a mediator preside over a matter in which that mediator, or his or her partner, may later represent one of those parties in either a related, substantially related, or unrelated matter? Should there be a time frame limiting that representation, or should it be allowed to occur with client or party consent, or not at all?

If you have not been following the debate, this is where I sometimes fear I have wasted the last five years of my life arguing with the ABA Ethics 2000 Commission on the Evaluation of the Rules of Professional Conduct (the "Commission" or "Ethics 2000 Commission").[23] In my view, many ethicists, professional responsibility scholars, rule drafters, and practicing lawyers still do not get it—that is, they do not understand what ADR is all about. They do not recognize how the conceptions, purposes, and information flows of ADR practice differ from those of more conventional legal practice. At the same time, there is a risk that conventional advocates will use ADR to "game" the system, leaking information and manipulating the processes in ways that do need to be regulated.

The current report of the Ethics 2000 Commission, which will be presented to the ABA House of Delegates, has at least three ADR-related provisions. First, the new Preamble to the Rules recognizes that lawyers may serve as third-party neutrals and may exercise peacemaking, as well as advocacy, functions.[24] This is a useful, if mostly symbolic, step forward.

Second, the newly proposed Rule 2.4 formally recognizes the role of the third-party neutral within the context of services performed by lawyers.[25] The Rule only states that third-party neutrals may be used, and that lawyers behaving as third-party neutrals should describe their function and explain that they are not representatives of the parties. The Rule suggests that

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[22]MODEL RULES OF PROF'L CONDUCT Rule 1.7 (1999) (describing prohibitions and exceptions for conflicts of interest in representation); *id.* Rule 1.12 (explaining rules of representation for former judges and arbitrators).
[23]The Ethics 2000 Commission has completed its report of proposed changes to the *Model Rules of Professional Conduct,* which will go to the ABA House of Delegates this summer. ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, FINAL RULES PART TWO (Nov. 2000), http://www.abanet.org/cpr/e2k-final_rules2.htm1 (providing the proposed rule changes and full Commission report).
[24]*Id.,* Preamble [3].
[25]ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 2.4 (Nov. 2000), http://www.abanet.org/cpr/e2krule24.html.

lawyers serving as third-party neutrals should advise unrepresented parties to consult with lawyers if they either want legal advice or wish to understand the details and complexities of ADR processes. There were additional proposals about what might have been included in the rule, such as whether mediators and other third-party neutrals could give legal information or advice,[26] as well as whether mediators could serve as scriveners for agreements, drafting mediated agreements for the parties without running afoul of conflicts of interests or other rules.[27] Nevertheless, in the interest of simplicity, these suggestions were not incorporated into the final proposed rules.

The third issue treated by the proposed new rules is a departure from current standards or silences on the issue of conflicts of interest. The newly proposed Rule 1.12 treats mediators as arbitrators and judges have been treated by the rules in the past. The rule permits screening, which allows an attorney who serves as a mediator in a law firm to be screened so that his or her partners may subsequently represent one of the parties in the mediator's matter without obtaining client consent.[28]

I still think that the Commission does not understand some of the subtleties and complicated issues involved in determining whether matters are substantially related, unrelated, or even the same for purposes of determining conflicts of interest. In a sense, this new screening rule actually permits a troubling "gray area" in which a conflict still may exist, such as when a screened mediator's partner serves as an advocate in an adversarial proceeding after an unsuccessful mediation in that same matter. The Commission simply chose to draw some bright—perhaps too bright—lines and treat mediators and arbitrators in the same way, where perhaps there are some real differences.

The rule also singles out "partisan arbitrators" as being similar to advocates, even though partisan arbitrators are an entirely separate group current-

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[26]The *Model Standards of Conduct for Mediators* state that mediators never should give legal advice. *Eg.,* AM. ARBITRATION ASS'N ET AL., *supra* note 4, Rule VI, cmt.4. The Virginia standards state that mediators can give legal information, but not legal advice. VIRGINIA GUIDELINES, *supra* note 3. The distinction between these two has always eluded me, *see, e.g.,* Menkel-Meadow, *New Issues, No Answers, supra* note 21, at 454.

[27]The Judicial Council of Virginia has adopted ethical standards stating that, although mediators are not prohibited from drafting agreements between parties, they are obligated to encourage review by independent counsel prior to either party signing the agreement. JUDICIAL COUNCIL OF VA., STANDARDS OF ETHICS AND PROFESSIONAL RESPONSIBILITY FOR CERTIFIED MEDIATORS (OCT. 2000), http://www.courts.state.va.us/soe/soe.htm.

[28]ABA ETHICS 2000 COMM'N ON THE EVALUATION OF THE RULES OF PROF'L CONDUCT, PROPOSED RULE 1.12 (Nov. 2000), http://www.abanet.org/cpr/e2krule112.html. The proposed rule contains some ambiguity. It is "clear" ethical practice that mediators almost never serve as advocates in an actual, or substantially related, case that they have mediated. Current ethical disputes are about cases involving the same clients or parties in slightly or very different matters. From these principles, it would seem that a mediator's partners also should not be allowed to serve as representatives in the same or a substantially similar matter (in other words, the old imputation rule should apply here), but this result is not clear from the current version of the rule.

ly receiving a great deal of practitioner, if not scholarly, attention. Ethically, is the partisan arbitrator to be "just another lawyer" on the case, subject to the ethics rules for advocates, or is the partisan arbitrator to be more neutral?[29]

I want to explain why this screening rule is so significant. I personally did a 180-degree turn on this issue. As a strict ethicist and someone who deplored conflicts of interest in conventional adversary practice, I began my work in this field thinking that screens for mediators and arbitrators should not be permitted. I have since changed my mind completely, for policy reasons. Specifically, that policy should encourage both traditional adversary practice and the fourth "C," conciliation, within a single law firm.

The practice of law will be better informed if people are permitted to be mediators, arbitrators, and advocates within the same practice units, which in turn will provide greater information resources for clients and lawyers. My utopian hope is that the culture of law practice might change if third-party neutrals, conciliators, and advocates inhabit the same offices. Thus, I have spent a fair amount of the last few years trying to get the screen provision put in place.

I am concerned that there still are complicated issues not covered by the current draft of the rule. As an illustration, a few months ago I was training some extremely sophisticated intellectual property lawyers in mediation, and I talked to them about these ethics issues. Professional responsibility teachers will be shocked to learn that when I described the proposed screen of the new Rule 1.12 as a positive phenomenon, these practicing intellectual property lawyers, who serve as both advocates and mediators, understood this new rule as prohibiting them from engaging in their current multiple kinds of practice, where they previously had not been cognizant of the potential conflicts of interests issues. In other words, they had not even conceptualized the possibility that when a lawyer serves as a mediator in one matter, his or her partner cannot represent one of the parties in that mediation in a related, or even an unrelated, litigation matter.

It was quite clear to me that these senior distinguished intellectual property lawyers, who were members of the pre-Watergate generation that had not taken professional responsibility courses, did not even recognize a conflicts of interest issue when they were in the midst of one. It was surprising, given all the bar associations' continuing legal education requirements, how little these lawyers knew about conflicts of interest. Most of these quite prominent lawyers have been mediating and representing parties without using screens and thinking the entire time that this was perfectly permissible. When I said,

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[29] *See* Lawrence J. Fox, *The Last Thing Dispute Resolution Needs Is Two Sets of Lawyers for Each Party,* in CPR INST. FOR DISPUTE RESOLUTION, INTO THE 21ST CENTURY: THOUGHT PIECES ON LAWYERING, PROBLEM SOLVING AND ADR 47, 47–48 (2001).

"The good news is that now you are going to be able to perform both of these roles, provided you screen in appropriate cases," they looked at me in horror, realizing that they would now need to engage in all the complexities involved in screening, such as the segregation of files and fees and the prohibition on discussions with firm partners on screened matters.

I offer that example to demonstrate: (a) the lack of knowledge that still exists about our very basic rules of conflict of interest, and (b) the significant effort that will be required to apply the complex conflict of interest rules and screening to the ADR environment.

Finally, I will review a number of other very interesting developments in the regulation of ethical issues in ADR. For the last five years, I have had the honor to chair the Commission on Ethics and Standards of Practice in ADR ("CPR-Georgetown Commission"),[30] which develops some best practices in the field. This is where my heart really is, in trying to make the field responsible for acting appropriately and with good practices, while acknowledging that, perhaps, we are still too new and young to fully regulate what ought to happen. At the same time, we have been concerned with the *quality* of the field, and, in particular, with the role of lawyers who practice ADR in its myriad forms.

The CPR-Georgetown Commission has published two different documents,[31] which I think are quite useful for teaching professional responsibility to students and training practicing mediators, arbitrators, and other third-party neutrals.

The first document, which has been out for about a year and a half, discusses our proposed ethics rules for lawyers who act as third-party neutrals. This document concludes that mediators may be lawyers and, therefore, they should be subject to all the ethics rules governing lawyers who practice law or any other profession.[32] In a sense, this proposed rule, though far-reaching and complex, evades the question of what happens when mediators are not lawyers. It fails to address the potential competition that we lawyer-mediators may have with those who mediate from another discipline, and who may not be subject to our conflict of interest rules, fee rules, and other ethics rules.

The second document, *Draft Principles for ADR Provider Organizations*,[33]

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[30]The Center for Public Resources Institute for Dispute Resolution-Georgetown University Commission on Ethics and Standards of Practice in ADR [hereinafter CPR-Georgetown Commission] is co-sponsored by the Center for Public Resources in New York and Georgetown University and funded by the William and Flora Hewlett Foundation.

[31]CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE FOR THE LAWYER AS THIRD PARTY NEUTRAL (1999) [hereinafter CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE], http://www.cpradr.org; CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES FOR ADR PROVIDER ORGANIZATIONS (2000) [hereinafter CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES], http://www.cpradr.org.

[32]CPR-GEORGETOWN COMM'N, PROPOSED MODEL RULE, *supra* note 31.

[33]CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES, *supra* note 31.

is somewhat inspired by the wonderful work of legal ethicist Ted Schneyer.[34] This document is interesting because no other body has attempted a similar project. Essentially, *Draft Principles for ADR Provider Organizations* is an attempt to recognize one of the major changes in the legal profession, that is, that since organizations are providing legal services, there are situations in which these organizations should be responsible, both in liability and in ethics discipline, for the actions of their member service providers. The document also specifies some best practices for organizations that hold themselves out as either providers of ADR assistance, referrals, or direct services. These organizations would include such entities as courts, which maintain rosters of mediators and arbitrators; solo practitioners, like me, who hold themselves out as mediators, arbitrators, and consensus builders; and other third-party neutrals.

Draft Principles for ADR Provider Organizations has not been adopted by any regulatory entity, jurisdiction, state, or professional association, and so has no force of law. However, it does try to elucidate a series of best and responsible practices involving such issues as a graduated scale of information to be provided to parties in ADR.[35] For example, if parties in the dispute have greater involvement in choosing their provider of ADR services, because they reviewed résumés or interviewed candidates for mediators and arbitrators, then the referral organization would have a concomitant lesser responsibility for the assigned ADR provider. If an organization, like a court, assigns an ADR provider without party choice or input, then that referral organization should assume greater responsibility for ensuring competence, proper credentials, and training, as well as for assuring that the assigned person provides ethically permissible services.

This is fairly controversial material. For example, those who work in the dispute resolution field know the American Arbitration Association often handles complaints about conflicts of interest, including the circumstances under which an arbitrator should reveal financial interest, past cases, or other conflicts that may affect the arbitrator's ability to remain neutral. An organization referring providers of dispute resolution services has an uncertain responsibility in assigning a third-party neutral to a case, as this activity is currently unregulated. However, several organizations that maintain panels and lists of mediators, arbitrators, and other third-party neutrals have promulgated their own internal ethical regulations, though they vary widely.[36]

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[34]*E.g.,* Ted Schneyer, *Professional Discipline for Law Firms,* 77 CORNELL L. REV. 1 (1991) (discussing the law firm's role in regulating ethical behavior of lawyers and suggesting that discipline should be meted out at the firm level in appropriate cases).

[35]CPR-GEORGETOWN COMM'N, DRAFT PRINCIPLES, *supra* note 31.

[36]*E.g.,* JAMS-ENDISPUTE, ETHICS GUIDELINES FOR ARBITRATORS, http://www.jamsadr.com/ethics_for_arbs.asp; AM ARBITRATION ASS'N ET AL., *supra* note 4.

Draft Principles for ADR Provider Organizations also is concerned about quality control, particularly in information and competence. When an organization suggests an ADR process or recommends a particular provider, it has an obligation, in the CPR-Georgetown Commission's view, to provide a lot of information about what it all means—both information about the process itself, the choice of neutral, and the type and quality of the neutral.

I would say, in a sense, there is a fifth "C" in the Ethics of ADR, and that is choice. One of the values underlying *Draft Principles for ADR Provider Organizations* recognizes the fact that parties increasingly have less choice about whether to go to ADR and which provider to use. Therefore, the entity recommending ADR—or, to use another "C," coercing it, such as in the mandatory referrals of some courts—should have some responsibility for assuring the competence and integrity of the process.

The CPR-Georgetown Commission's *Draft Principles for ADR Provider Organizations* might be a useful document to teach and study. In particular, it might be interesting for professional responsibility students to take a look at the larger question of entity or organizational ethical responsibilities at the more general level and then to examine the specifics to see whether they would make different choices in these areas than the CPR-Georgetown Commission has made.

Draft Principles for ADR Provider Organizations also contains a very interesting taxonomy of all the different forms of ADR and all the different kinds of provider organizations, including courts, public entities, administrative agencies, private individuals, lawyers, and non-lawyers. It is a very nice way to educate people who do not know much about the field.

For people who are primarily professional responsibility teachers, rather than ADR teachers, scholars, or practitioners, if you do not learn this material, you are doing so at your own peril. This is one of the many ways in which the legal profession and legal practice is changing dramatically. Virtually every state and federal court requires some form of ADR at least to be considered by the lawyers in a litigation matter,[37] and, increasingly, transactions and contracts contain ADR clauses. So if you teach professional responsibility, I urge you to get up to speed on the content of ADR—its aspirations, visions, and hopes—and also to realize that if you are looking for some interesting, complex, and new issues to teach your students, you will not find a more fertile field for both your mind and heart than that of thinking about the possible technical violations in ethics and what constitutes good practice in ADR.

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[37] *E.g.,* AM. ARBITRATION ASS'N, STATE STATUTES, http://www.adr.org (providing ADR statutes in all fifty states and the District of Columbia); 28 U.S.C. § 651(b) (2000) (requiring all district courts to devise and implement ADR programs).

THE SUGGESTIBILITY OF CHILD WITNESSES†

Richard D. Friedman* and Stephen J. Ceci**

Young children have historically been viewed as particularly vulnerable to suggestion. Within the mainstream scientific community, scholars agree that young children are more susceptible than older individuals to leading questions and pressures to conform to the expectations and desires of others. At the same time, children may hesitate to disclose matters such as sexual abuse without significant prompting. In some circumstances, these frailties aggravate the already difficult task of determining whether a child's statement is truthful. This matter is of immense concern because of the large number of young children who are interviewed each year during the course of abuse and neglect investigations. The vulnerabilities of young children have far-reaching implications for the juvenile and criminal justice systems. Arguably, these vulnerabilities may affect how an investigator should interview the child, whether she should be allowed to testify in court, whether her hearsay statements should be admitted, whether expert evidence concerning her vulnerability should be admitted, and whether a criminal conviction based principally on her testimony should be allowed.

Recently, however, a number of scholars have vigorously criticized this mainstream view. These scholars have chastised scientific researchers for fueling what they deem to be a backlash against believing children's claims of abuse. They believe that for at least two reasons the results of the scientific research have little bearing on the real world. First, they argue that there is scant empirical evidence to support the assumption that child-abuse interviewers often employ highly suggestive interviewing techniques that are potentially damaging to the accuracy of children's statements. Second, they argue that these techniques, even if commonly used in interviews, would not result in suggestibility errors of the magnitude that scientific studies suggest. Those studies, Thomas Lyon says, "neglect the characteristics of child sexual abuse that both make false allegations less likely and increase the need to guard against a failure to detect abuse when it has actually occurred."

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In our full *Cornell Law Review* article, we summarize and analyze the principal findings of psychological research concerning children's suggestibility as well as other factors that may affect the credibility of a child's allegation of abuse. We demonstrate that what Lyon characterizes as a "new wave" of research is actually a broad and long-standing scientific mainstream. We argue that the results of this research do, indeed, raise significant concerns for the real world of abuse and abuse investigation and thus engender significant legal implications.

Part I of the full article briefly describes the history and current state of research into children's suggestibility. In this part, we argue that, although psychological researchers disagree considerably over the degree to which the suggestibility of young children may lead to false allegations of sexual abuse, there is an overwhelming consensus that children are suggestible to a degree that, we believe, must be regarded as significant. In presenting this argument, we respond to the contentions of revisionist scholars, particularly those recently expressed by Professor Lyon. We show that there is good reason to believe the use of highly suggestive questions remains very common, and that these questions present a significant possibility that children will make false allegations even on matters such as sexual abuse.

Part II develops a framework, using Bayesian probability theory, for considering the findings described in Part I. We argue that there is merit to the traditional—and constitutionally compelled—view that an inaccurate criminal conviction is a far worse result than a failure to reach an accurate conviction, and that this perspective should inform the design of legal systems. With this in mind, we explain that even relatively slight probabilities of false allegations are potentially significant. Moreover, we show that the very substantial probability that a child who has been abused will fail to reveal the abuse tends, perhaps counterintuitively, to diminish the probative value of an allegation of abuse when it is actually made.

In the discussion below, taken from Part III of the longer article, we turn to discussion of the legal implications of our analysis.

SUGGESTIVE INTERVIEW TECHNIQUES

Scientific research demonstrates that suggestive questions, including techniques such as coaching, bribes, and threats, increase the probability that the child will make an allegation of abuse regardless of whether it actually occurred. If in the end the child would make an allegation, then for two reasons it is preferable that this occur without suggestive questioning. First, an unprompted allegation is more powerful, persuasive evidence than a prompted allegation and therefore more likely to lead to a conviction if the defendant

is in fact guilty. For this reason, the self-interest of the investigative and prosecutorial authorities should lead them to avoid suggestive questions when possible. Second, if the child does make an unprompted allegation, it is unlikely to result in an inaccurate conviction, because in most circumstances children are very unlikely to make a false allegation without suggestive questioning.

It is preferable, therefore, to avoid suggestive questioning until the child has told all that she is likely to tell without suggestion. But for at least two reasons we do not believe that investigators should avoid suggestive questioning altogether. First, the information that they gain through suggestive questioning may be useful for purposes other than criminal prosecution—for example, the determination of custody arrangements or the appropriateness of a restraining order. Because the governing standard of persuasion is lower in these settings than in criminal prosecutions, information obtained by suggestion is more likely to be decisive than in a criminal setting. Second, even in criminal prosecutions, an allegation procured by suggestive questioning may, depending particularly on the strength of the rest of the case, be decisive in carrying the prosecution's burden of persuasion.

We recommend, therefore, that investigators avoid suggestive questions until they are confident that the child has told all she is likely to tell without prompting. Interviewers should attempt to limit repetition of closed (i.e., yes/no) questions within the interview, and investigative authorities should, to the extent feasible, avoid multiple interviews with multiple interviewers. Furthermore, interviewers should adopt categorical rules against the use of techniques that have been demonstrated to create particularly significant risks that a child will make a false allegation. Thus, interviewers should not offer rewards or other positive reinforcement for favored answers, threaten punishment or create negative reinforcement for disfavored ones, vilify the accused, or (unless the child has raised the matter first) refer to statements by the child's peers. Though suggestive questions are sometimes useful, the use of these techniques is always improper.

There is nothing particularly novel about these recommendations. Although some interviewers may ignore them in practice, they are essentially textbook principles, much elaborated in manuals for interviewers—including one by the National Center for the Prosecution of Child Abuse, in cooperation with the National District Attorney's Association and the American Prosecutor's Research Institute. Interestingly, for all that Lyon and other child advocates contend that suggestive questioning is often necessary to prompt an accurate statement and that (nevertheless) troublesome questioning does not often occur in real practice, they do not argue anything different. They do not, for example, argue that investigators should feel free to ask suggestive questions without restraint.

WITNESS TAINT AND COMPETENCE

In *State v. Michaels,*[1] the New Jersey Supreme Court held that if the defendant presents "'some evidence' that the [child's] statements were the product of suggestive or coercive interview techniques," then the prosecution must demonstrate by clear and convincing evidence at a pretrial "taint hearing" that, "considering the totality of the circumstances surrounding the interviews, the statements or testimony [of the child] retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques." If the prosecution fails to satisfy this burden, then the court must exclude the child's testimony, as well as her prior statements alleging abuse.

Some courts outside New Jersey have occasionally followed *Michaels* in requiring taint hearings, but more commonly courts simply consider these issues in determining the competency of the child to give testimony. For our purposes, the difference is not particularly significant. Either way, the bottom-line issue is whether the court should preclude the child from giving live testimony about the abuse because she has been subjected to a substantial degree of suggestion.

Although Ceci coauthored the amicus brief that some have credited with persuading the *Michaels* court, we agree in general with Lyon and John E.B. Myers that children's suggestibility should not usually prevent them from being heard as witnesses, even if the circumstances indicate that the child was subjected to strong forms of suggestion. We have two basic reasons for reaching this conclusion.

First, a child's statement alleging abuse has significant value in proving that abuse. Nothing we have said indicates the contrary. Our argument supports the proposition that the suggestibility of the child *may* account for her allegation of abuse in some circumstances. The allegation itself is thus not conclusive evidence that abuse occurred. But the allegation may yet be important, even decisive evidence, at least when there is other evidence supporting it. In our longer article, we have argued that in some settings there is a greater than minuscule probability that the child would make the allegation even though it was false, and therefore the statement is not conclusive evidence, or nearly conclusive evidence, that the abuse occurred as described by the child. But we have not argued that the statement should not alter a reasonable fact-finder's assessment of the probability of guilt. Plainly, it is often very significant evidence, even in the face of significant suggestion.

Second, we believe that the dignity of the child is fostered by allowing her to tell her story first-hand in the proceeding that will resolve the truth of her allegation.

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[1]642 A.2d 1372, 1378 (N.J. 1994).

Against these considerations, three basic arguments may be made for excluding the testimony of the child. We will call these the reliability argument, the best evidence argument, and the wrongful conduct argument.

1. According to the *reliability argument*, on which *Michaels* principally depended, if the child has been subjected to significant suggestion, her testimony may be so unreliable that it should be rejected. We certainly agree that often the child's testimony may not be reliable in the sense of being virtually conclusive. Indeed, in some circumstances, the testimony may not even be reliable in the weaker sense that the denominator of the likelihood ratio—the probability that the child would testify as she has even though the testimony is false—is very small. But notwithstanding some judicial statements to the contrary, reliability in neither sense is, or should be, the general standard for the admissibility of live testimony. Rather, the governing principle is that, at least within broad bounds, the credibility of witnesses is for the jury to determine.

In an earlier age, courts excluded the testimony of many potential witnesses, including the parties themselves, on the ground that bias or some other factor would make their testimony unreliable. The modern, vastly preferable view recognizes that such an exclusionary approach has huge costs in loss of valuable information. Cross-examination, impeachment, rebuttal, and recognition by the fact-finder of defects of the testimony—sometimes with the assistance of expert testimony—are the mechanisms that we hope will prevent the testimony from leading the fact-finder astray. Testimony of the parties is extremely unreliable, if for no reason other than self-interest, but it is universally allowed today. Indeed, a criminal defendant has a constitutional right to present his own testimony, even, in at least some circumstances, if it has been tainted by suggestion. In general, witnesses who claim firsthand knowledge do not have to pass through a reliability screen, even when testifying against a criminal defendant. Witnesses with a grudge against the defendant, witnesses whose perception of the events at issue may have been impeded by stress, bad lighting, or weak eyesight, witnesses with faulty memory, and witnesses who have been offered some inducement (such as a reduction of sentence) to testify—all these are allowed to testify about what they assert they perceived, without the court first determining that their evidence is reliable. Courts should not hold the testimony of children to a more stringent standard.

A reliability standard for the admissibility of testimony misconceives the basic theory of evidence. To warrant admissibility, an individual item of evidence does not have to point reliably in the direction the proponent claims. "A brick is not a wall," and every witness need not hit a home run, in the classic aphorisms. That is, a single piece of evidence, including the testimo-

ny of a witness, does not have to support the prosecution's entire case but need only provide one of the building blocks for the case. Prosecution evidence, not reliable in itself because there is a substantial probability that it would arise even if the defendant were innocent, may in conjunction with other evidence make an overwhelming case.

The better standard is whether the prejudicial potential of the evidence outweighs the probative value. It must be constantly borne in mind that the child's testimony that abuse occurred does have substantial probative value. Even if the child was subjected to strong forms of suggestion, the child is significantly more likely to testify to a given proposition if that proposition is true than if it is false, and no research suggests otherwise. In some cases, that probative value may be decisive.

What then of prejudice? The principal prejudice concern is that the jury will overvalue the testimony by so much that the truth-determination process is benefited by exclusion. But to our knowledge, the scientific research provides no indication that juries are likely to overvalue the testimony of a child to this degree. It may well be that, especially absent explanation of the research on suggestibility, a jury would tend to underestimate the probability that the child would make the allegation if it was false (the denominator of the likelihood ratio). Such an error would tend to cause the jury to over-assess the probative value of the testimony. It is much more doubtful, however, that the jury would over-assess the probative value to such an extent that admission of the evidence is worse for the truth-determining process than denying the jury access to this information. After all, jurors are capable of understanding the problem of suggestibility and taking it into account in assessing the testimony, and experimental evidence suggests that they do. Excluding the evidence, which has some probative value, guarantees that the jury will under-assess it. Those who argue for this result, notwithstanding the usual rule that credibility is for the jury, should have the burden of demonstrating that the uncertain prospect of jury over-assessment is significant enough to warrant exclusion.

Moreover, treating a witness as incompetent is a blunderbuss, which should be used only with great caution. We believe that other methods can usually limit the danger of juror overestimation without relying on this weapon. Two of these methods are discussed below. One is expert explanation of suggestibility to educate the fact-finder as to the vulnerability of the evidence. The other, for extreme cases only, is judicial refusal to enter judgment of guilt if the child's allegation provides the only substantial evidence pointing to guilt and the court concludes that there clearly is a significant danger that the allegation was the product of strong suggestion.

We acknowledge that in some contexts, such as coerced confessions and identifications made after official suggestions, courts have spoken of unreli-

ability of testimony as a factor warranting exclusion. We think, however, the argument is generally misplaced, and that, to the extent exclusion is appropriate in those contexts, it is better justified by the two other arguments discussed below.

2. The *best evidence argument* does not rely on the proposition that the evidence is more prejudicial than probative. Rather, it is based on the "best evidence" principle, the proposition that exclusion of proffered evidence is warranted in some settings because it may induce the creation of better evidence. To the extent that interviewers—whether private individuals or government agents associated with the prosecution—regularly conduct interviews of children with the anticipation that prosecutors will use them in abuse cases, the threat of exclusion of the child's testimony for undue suggestiveness may inhibit them from being so suggestive. We believe that this factor, rather than concerns about trustworthiness, underlies the doctrine—invoked often but rarely with success—that in-court eyewitness identification testimony may be so tainted by prior suggestiveness as to be constitutionally inadmissible.

This consideration plays a significant role in the realm of child witnesses. Nevertheless, given the affirmative considerations weighing in favor of admissibility, we do not believe it usually suffices to justify exclusion of the child's testimony.

For one thing, many professional interviewers, even those inclined to assist the prosecution, may already have considerable incentives not to conduct interviews in an unduly suggestive manner. Strong suggestiveness, as we have pointed out, is in some circumstances counterproductive in that it reduces, rather than increases, the useful information yielded by the question. It also makes the child's statements less persuasive. Moreover, strong suggestiveness opens the statements up to attack by defense experts and defense counsel. In this light, it is not clear that the threat of exclusion will add very much incremental incentive to avoid undue suggestion.

Furthermore, as we indicated in Part I, suggestive questioning has a proper role in investigations of child abuse, because in some settings it generates reports of abuse that open-ended questions might not. Investigations often look not only towards criminal prosecutions, but towards civil proceedings aimed at protecting the child and others. It may be unfair to the interviewer, and in any event it will likely chill her investigation, if she is put on a tightrope — one step too passive, and she may miss a truthful report of abuse; one step too aggressive, and the court will exclude the child's testimony.

A best evidence rule, using the harsh sanction of exclusion of evidence, depends on predictability, which requires that a rule operate in a crisp, bright-line manner. We have argued that categorical rules are possible with

respect to ploys, such as bribes, threats, ridicule, and peer pressure, that research has shown to create particularly significant risks of false allegations. Generally, however, delicate, fact-based judgments are more appropriate in this area than bright-line rules. Interviewers must take the circumstances of the particular case into account in deciding the degree of suggestiveness appropriate at any given point in a given interview. The interviewer must balance the risk of losing information by remaining too open-ended against the risk of producing false information by being too suggestive.

In short, the best evidence argument may warrant excluding the child's testimony in extreme cases, in which any reasonable interviewer should know that her questioning was unduly suggestive. We believe, however, that it would be difficult or impossible to make the court's decisions both predictable and sensible if they exclude the child's testimony in less extreme cases.

3. The *wrongful conduct argument* contends that the prosecution should not benefit from evidence that it or those associated with it secure by acting in a reprehensible way. It thus resembles the argument made by Justice Holmes and others in support of the exclusionary rule for evidence secured by unconstitutional search, that it is "less evil that some criminals should escape than that the government should play an ignoble part." We do not dispute the principle, but we believe it has rather narrow application in the realm of child interviewing. When an interviewer recklessly or intentionally follows a course that raises a significant risk of leading a child to a false memory of abuse, the interviewer's conduct may be deemed sufficiently wrongful to provide a strong argument for exclusion of the child's testimony. But we do not contend that this degree of irresponsibility characterizes most interviews, even most highly suggestive ones.

In sum, the arguments for exclusion of the child's testimony have substantial weight only in extreme cases, and even then only the best evidence and wrongful conduct arguments carry significant force. The reliability argument, the one principally emphasized by *Michaels*, is unpersuasive. Thus, in extreme cases, when the interviewing technique violates clearly established norms or amounts to an intentional or reckless usurpation of the child's memory—and *Michaels* appears to have been such a case—exclusion is justifiable. In other cases, it is not.

HEARSAY

Often the child makes an allegation before trial, but does not testify at all at trial or does not testify to the full substance of the earlier allegation. If the prosecutor offers the prior statement into evidence the defendant will likely object that it is barred by the rule against hearsay and by his right under the

sixth amendment to the Constitution to "be confronted with the witnesses against him."

In recent years, most jurisdictions have relaxed the application of the hearsay rule so far as it would exclude out-of-court statements by children that allege abuse and are offered to prove the abuse. Some courts have accomplished this end by stretching the limitations on the hearsay exceptions for excited utterances and for statements made for medical diagnosis or treatment. Others have invoked the residual or "catch-all" exception to the hearsay rule now expressed in Federal Rule of Evidence 807. Also, some states have adopted hearsay exceptions specifically tailored for children of "tender years." Because the Supreme Court has, to a large extent, conformed the confrontation right to the prevailing law of hearsay, the Confrontation Clause as now construed poses only a slight additional barrier to admissibility; the Clause will be satisfied if the statement fits within a hearsay exception that is deemed "firmly rooted" or, if the statement fails to meet that test, if it is deemed to have sufficient "particular guarantees of trustworthiness."

Indeed, the Court has repeatedly stated that hearsay law and the confrontation right protect "similar values," and the principal value perceived is the need to weed out unreliable hearsay evidence from the reliable. According to the Court, the confrontation right is "primarily a functional right that promotes reliability in criminal trials." Thus, jurisdictions taking a receptive attitude towards hearsay statements by children alleging abuse against them have done so on the grounds that the statements are reliable. In the case of a statement made by a very young child, two factors have been particularly influential—first, the apparent absence of a motive for the child to lie and, second, the apparent unlikelihood in some settings that the child could develop a plan to deceive or to concoct her account if it did not in fact reflect abuse she had actually suffered.

The scientific research, however, indicates that in some circumstances children's statements are not particularly reliable. Compared to general hearsay, a statement made by a child who has been subjected to strong forms of suggestion may be notably *un*reliable. The apparent absence of a motive to lie is of significance only to the extent the defendant, in attempting to reconcile the fact that the child made the statement with his theory that the statement is false, contends that the child lied. The defendant may, however, contend principally not that the child lied but that suggestive questioning led her to believe honestly that the assertion was truthful. Also, suggestive questioning may make it far more plausible that the child would state a false account of abuse that one would not otherwise expect from a young child who was not abused. For obvious ethical reasons, researchers have refrained

from trying to inculcate false memories of abuse; however, there is ample anecdotal evidence that field interviewers sometimes ply child witnesses with information that could be construed as indicative of sexual abuse. Some of this information, if later incorporated into the child's disclosure, would be considered outside her ordinary realm of knowledge, and so viewed by fact-finders as a strong indication that abuse occurred.

We emphasize two points. First, we are not arguing that all children's statements are unreliable. How reliable a statement is depends on all the circumstances, including—as we have suggested above and throughout our longer article—the nature of the interviewing process to which the child has been subjected. For example, sometimes a child, without any prompting, articulates a detailed and plausible account of abuse soon after the alleged event and, still without prompting, consistently adheres to that account. In such a situation, the child's statement may be very reliable.

Second, even if the statement appears unreliable, that does not necessarily mean that a court should exclude it under an ideal doctrine of hearsay and confrontation. Friedman has argued for some years that the law of hearsay and confrontation is in a most unsatisfactory state. The chief errors, in his view, lie in conforming the confrontation right to the law of hearsay and in perceiving both as based principally on the need to improve the reliability of evidence. This conjunction results both in hearsay law that is often overly restrictive and in a confrontation right that is insufficiently protective of defendants. We do not attempt to develop this argument in full here. But a system that, according to Friedman, would be far superior to the present one could admit many hearsay statements by children without making the admissibility decision depend on a determination of reliability.

EXPERT EVIDENCE

Traditionally, courts have been loath to allow expert witnesses to testify about factors affecting the credibility of percipient witnesses. Courts were afraid that experts would usurp one of the central functions of the jury, to evaluate the credibility of witnesses. In recent decades, however, courts have been more willing to allow experts to testify about factors that might affect the credibility of a witness in a given situation and that might otherwise be insufficiently understood by a jury. In criminal cases, either the prosecution or the defense may urge the need for expert testimony. For example, a defendant may introduce expert testimony on the vulnerabilities of eyewitness testimony. A prosecutor might introduce expert testimony concerning rape trauma syndrome to help explain the complainant's delay in making her allegation of rape.

Similarly, in child sexual abuse cases, prosecutors often offer, and courts often admit, expert evidence to bolster the complainant's credibility. As Myers has stated, "Courts permit expert testimony [among other reasons] to explain why sexually abused children delay reporting abuse, why children recant, why children's descriptions of abuse are sometimes inconsistent, why some abused children are angry, why some children want to live with the person who abused them, why a victim might appear 'emotionally flat' following the assault, [and] why a child might run away from home. . . ."

Myers endorses the use of such testimony, which often fits within the rubric of child abuse accommodation syndrome, on the ground that "[t]o the untutored eye of a juror, such behavior may seem incompatible with allegations of sexual abuse." We agree that such testimony on behalf of the prosecution is proper at least after the defendant attacks the child's credibility — and sometimes even before, if the grounds on which the jury might doubt her credibility are already apparent.

Often, however, it is the defense in child sexual abuse cases that wishes to introduce credibility-related expert testimony, usually to show that the child's statements may have resulted from suggestive questioning. Many courts have admitted such testimony, but some courts still exclude it or confine it rather narrowly. Lyon, while not expressing any opinion on the frequent use by prosecutors of expert testimony to bolster a child's credibility once it has been attacked, expresses doubt about the need for defense expert testimony on suggestibility.

We believe that if evidence supports the conclusion that an interviewer subjected the child to a given set of suggestive influences, then the court should allow the defense to present the testimony of a well-qualified expert as to the plausible effects of those influences.

The research on suggestibility discussed in this article gives an expert ample basis on which to express an opinion that should easily satisfy the "gatekeeping" scrutiny of the trial court as outlined by *Daubert v. Merrell Dow Pharmaceuticals Inc*.[2] Indeed, if the "general acceptance" test of *Frye v. United States*,[3] which still prevails in some states, is sensibly applied, such expert opinion should easily satisfy that test as well. As Part I of our full article shows, this research has used the scientific method of testing, has been extensively subjected to the rigors of publication and review, and has gained broad acceptance in the scientific community. Naturally, as in any area of the social sciences (and some of the hard sciences as well), there is not unanimity on all significant points, and on some points there is a range of inter-

[2]509 U.S. 579, 597 (1993).
[3]293 F. 1013, 1014 (D.C. Cir. 1923).

pretations. But a court should not exclude testimony by a qualified expert reflecting an opinion held by a clear majority, or even by substantial proportion, of professionals in the field simply because others hold divergent views. If that were the standard for exclusion, fact-finders would virtually never have the benefit of the experts' knowledge. Thus, we find unpersuasive the rather mysterious opinion of the eighth circuit in *United States v. Rouse*,[4] which held that the trial court had acted within its discretion in allowing the defense expert to testify on the basis of his own research, but not on the basis of the research of others.

The question remains whether, and when, an expert's opinion may assist the jury sufficiently to warrant admissibility. Ultimately, this question depends on an assessment of the probative value and prejudice of the expert evidence. Lyon contends that "jurors likely already know" that "children are suggestible." This argument may seem odd, coming near the end of a long article contending that children are not as suggestible as some interpretations of the research indicate. But Lyon's point seems to be that, while children are indeed suggestible to some degree, jurors do not need expert advice to tell them that, and such advice may in fact cause jurors to overestimate substantially the degree of suggestibility. Myers makes a similar point, saying that "some adults" think children are more suggestible than they actually are.

One can easily accept the proposition—which Lyon supports with survey evidence—that many, even most, potential jurors understand that children are more suggestible than adults, and yet recognize the value of expert evidence. Two points are fairly obvious. First, the same surveys reveal that a substantial number of jurors probably do *not* recognize this suggestibility differential. Second, recognizing that children are suggestible, or more suggestible than adults, says little about *magnitude*—how suggestible they are. Perhaps more fundamentally, our full article shows that the suggestibility of children is not a one-dimensional matter that can be summarized adequately by saying that children are [pick your adjective] suggestible. How plausibly a given child might have alleged abuse even if the abuse did not occur depends on the particular situation, including the extent and nature of the suggestive influences to which the child was subjected. There is no reason to assume that the average potential juror, much less the overwhelming majority of jurors, has a good understanding of all the insights that decades of psychological research have yielded. For example, research shows that repeated questions may have a pronounced effect on a child, and that children subjected to suggestive questioning rather frequently make false statements about physical events that would be of central concern to them.

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[4] 111 F.3d 561 (8th Cir. 1997).

Furthermore, there is little reason to assume that expert evidence on this subject will be unduly prejudicial. There is no plausible basis for believing that allowing the defense to present expert testimony will bias the jury in favor of the defendant, in the sense of making the jury impose an inappropriately high standard of persuasion on the prosecution. The danger to which Lyon seems to be pointing is the possibility that the jury will give excessive weight to the expert's testimony of suggestiveness. But there appears to be no sound basis for concluding that this danger is real—and that the jury will not only overvalue the expert's testimony but will do it so much that the testimony will be substantially more prejudicial than probative. Juries have convicted defendants in many cases in the face of expert testimony on suggestibility presented by the defense.

In assessing the danger of overvaluation, it is important to bear in mind a major theme stressed both by Lyon and by us: The degree of a child's testimony is extremely dependent on the particular circumstances of the case. Thus, if the defense expert is performing her function properly, she will testify only to suggestive influences that the jury could reasonably conclude, on the basis of all the circumstances, were present in the case. For example, if there is no basis for concluding that the child was threatened with negative consequences for failure to describe abuse, then research on the effects of such threats would be irrelevant to the case and should not be included in the expert's testimony. If the defense expert does not exercise self-restraint, the court can ensure that her testimony does not stray beyond the case at hand.

And, of course, the prosecution is not toothless. The prosecutor may cross-examine the defense expert. In doing so, the prosecutor should attempt to expose any overgeneralizations that the expert has made or any dubious assumptions on which the materiality of her evidence depends. Moreover, as stated previously, if the defense impeaches the child's testimony, whether by expert testimony or otherwise, the court should allow the prosecution to present its own expert testimony supporting the child's credibility. Likewise, this testimony should be limited to the issues made material by the setting of the case—specifically, to the grounds raised explicitly or implicitly by the defense for being skeptical of the child, or to those that would likely appear plausible to the jury even absent the defense's contention. In short, the adversarial system, through the use of cross-examination and rebuttal witnesses, is resilient and can adequately expose the weaknesses of expert opinions offered by either side.

There does not seem to be any substantial reason to assume that jurors will tend systematically to overvalue defense expert evidence significantly but undervalue prosecution expert evidence—and to do so by enough to warrant exclusion. Some jurors may be confused by the "battle of the

experts," of course, and some might unthinkingly treat conflicting expert evidence as a wash, which they can safely ignore. But these are always potential problems when expert witnesses contest each other, whatever the subject. Such problems do not justify insisting that the fact-finder make decisions of enormous importance on the basis of intuition, uninformed by the insights that decades of scientific research have to offer.

VIDEOTAPING INTERVIEWS

The issue of videotaping interviews with a child witness has generated much discussion. Myers has ably summarized many of the factors for and against videotaping.[5] On the positive side of the ledger, Myers notes that videotaping gives an interviewer incentive to use proper techniques and preserves a record of such use. Perhaps because he is writing from the vantage point of the interviewer, Myers does not mention another equally important argument: If the interviewer does use suggestive techniques, the videotape will reveal it. We have emphasized that the degree to which a child's suggestibility accounts for her allegation of abuse depends very largely on the extent and nature of the suggestive influences to which she has been subjected. If all interviews with the child are videotaped, it will substantially reduce, and in some cases effectively eliminate, uncertainty on this score. An interviewer's notes are an unsatisfactory alternative; if historical accuracy is the goal, there is no substitute for electronically recording interviews.

Of course, informal communications with the child, such as by her parents or teachers, will not ordinarily be videotaped. These informal communications are often significant sources of suggestion. Similarly, though it might be feasible for a therapist to tape sessions with a child if there is suspicion of abuse, taping therapy sessions as a matter of course would probably be inappropriate. Moreover, even if therapy sessions could be appropriately recorded, the patient-psychotherapist relationship is privileged, which would probably preclude evidentiary use of the tape. Thus, in many cases, a practice of videotaping investigative interviews does not expose all serious possibilities of suggestiveness. But the intractability of some aspects of the problem is a weak argument against mitigating the problem where that is possible. Videotaping considerably narrows the problem of determining the extent of suggestive influences to which the child is subjected, and that is a great benefit.

The arguments on the other side of the ledger are, once again, based in large part on the fear that the jury will overvalue the evidence in favor of the

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[5] 1 JOHN E. B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 1.33, at 85-96 (3d ed. 1997).

defense. And once again, we believe that keeping potentially useful information away from the jury is an inappropriate means of ensuring that the jurors will not place too much weight on it. The prosecution has ample opportunity, through the interviewer and expert witnesses, to counter any argument raised by the defense.

Judge Richard Posner has argued the sheer length of interviews leaves an unattractive choice between presenting hours of tape to the jury and risking distortion through editing. But this concern is present whenever a significant amount of evidence is scattered throughout a much larger amount of minimally probative chaff. In practice, we may expect each side to select the excerpts it feels presents its case in the most favorable light and to present evidence and arguments minimizing the importance of the excerpts used by the other side. The court has authority to restrain the parties if the process consumes too much trial time in relation to the probative value of the evidence.

Thus, in accord with most professionals in this field, we believe that it is good practice for official interviewers to videotape interviews conducted with children during an investigation or prosecution of suspected child abuse. Moreover, we believe that, absent exigent circumstances, interviewers should be required as a matter of law to tape such interviews. This is the standard practice in many jurisdictions, and there is no reason why it should not be made mandatory.

In jurisdictions where taping is not required as a matter of law, courts may nevertheless craft evidentiary rules based on a "best evidence" principle that give interviewers strong incentives to follow the practice. The most stringent of these rules would exclude the child's statements, or even her testimony, if the interviews were not taped (again, and throughout this discussion, absent exigent circumstances). This rule, although harsh on its face, would quickly amount in effect merely to an almost absolute requirement of taping. Officials would quickly learn that it is easier to tape than to invite exclusion of evidence, and as a result, very little evidence would actually be excluded. A somewhat softer rule, followed by some courts, makes the failure to videotape the interview a significant factor in determining admissibility of the child's statements or testimony. Other variations would seek to impose the costs of failure to videotape the interview on the prosecution, but without relying on exclusion. Thus, given the failure to record, a defense expert could be allowed to testify as to the potential effect of all suggestive influences to which the child may have been subjected. The court might also instruct the jury that the interviewer failed to follow proper practice and that the jury should take the failure into account in evaluating the possibility that the child's statement or testimony was the product of suggestion.

GUIDANCE AND CONTROL OF THE JURY

Finally, we come to the end of a trial. Judges in criminal cases in federal court, and in some other jurisdictions, are free to comment to the jury on the weight of the evidence, including factors bearing on the credibility of witnesses. Thus, if a witness is a drug or alcohol abuser, or a former accomplice of the defendant, or if she has received or hopes to receive favorable treatment in return for her testimony, the judge may comment on how these factors affect her credibility. Similarly, judges often comment generally about the factors that are believed to affect the credibility of eyewitnesses.

Suppose, then, that a child testifies or makes an admissible out-of-court statement alleging abuse, and evidence supports the conclusions that she was previously subjected to highly suggestive influences. The question arises whether the judge should comment on these influences as potentially affecting her credibility. In most cases, we do not believe that any judicial comment—either supporting or adverse to the child's credibility—is necessary. We believe it usually suffices if the court affords the parties adequate opportunity to present expert evidence on the likely impact of these influences. In an egregious case involving highly suggestive influences, some judicial comment might be appropriate.

Along with the power to comment on the credibility of witnesses, a trial court also has the authority in a criminal case to refuse to enter judgment on a verdict of guilt, and to remit the prosecution to a new trial, if it is persuaded that the verdict is contrary to the great weight of the evidence. In making this determination, the court is free to consider the credibility of witnesses. Therefore, an accused might argue that a child's statement or testimony is so tainted by suggestion that a verdict of guilty cannot stand. We believe that this argument should usually, but not always, fail.

Suppose that the case is marked by two factors. First, apart from the child's testimony or prior statements, the prosecution has insubstantial evidence as to at least one element of the charge, most likely to the fact of abuse. Second, the child was subjected to highly suggestive influences. As Part II of our full article shows, the first factor means that the prosecution must rely heavily on the child's allegation. Indeed, the allegation must carry the prosecution's case the very large distance from the presumption of innocence to the constitutionally mandated standard of proof beyond a reasonable doubt. And the court might conclude, on the basis of the second factor, that the probability that the child would make the allegation even though it is false cannot reasonably be perceived as minuscule. Putting these two considerations together, the court might well conclude that a jury could not reasonably find that the prosecution satisfied its standard of persuasion.

If prosecutors select cases appropriately, cases with both these features will be rare. The judicial power to reject a verdict, even if usually kept in reserve, can be a powerful force ensuring that the prosecutors do indeed make careful selections.

CONCLUSION

Research on the suggestibility of children reveals that the degree to which children are suggestible depends to a large extent on how investigators conduct interviews. It also indicates that abuse investigations are often conducted in such a way as to enhance the dangers of suggestibility. We have presented a set of policy recommendations that we believe are consonant with those findings. These recommendations are, we believe, even-handed, reflecting a bias for neither the prosecution nor the defense. The proof of our even-handedness may be that we have exposed ourselves to a two-flank attack. Prosecutors may complain about our recommendations that in some circumstances children's statements regarding abuse should be regarded as unreliable for hearsay purposes, that courts should often be receptive to expert evidence emphasizing the suggestibility of children, that videotaping of interviews should be mandatory, and that occasionally the weakness of a child's statement or testimony should cause the court to refuse to enter a judgment of guilt. Defense lawyers, on the other hand, are likely to complain about our recommendation that, in all but egregious cases, the child should not be rendered incompetent to testify because she was exposed to strongly suggestive interviewing techniques.

We suspect that scholars who have recently challenged the legal significance of the psychological research emphasizing children's suggestibility are not motivated principally by antipathy to policy proposals such as the ones we have presented. Rather, we suspect that they are concerned about a matter of mood. In an earlier day, children's statements were often not taken seriously. As a result, child sexual abuse was underreported and underprosecuted. Thus, there is a concern that scientific research emphasizing that children are suggestible will be taken for more than it is worth and lead us back to pervasive and unwarranted devaluation of children's statements and testimony.

We recognize this concern. But we balk at any approach that makes it more difficult to recognize, and thus mitigate, problems in the way children alleging abuse are interviewed. And we confess that we do have a bias of an intellectual sort, which underlies our predilection in favor of allowing both the child and experts to testify. Accurate fact-finding, we believe, is not best achieved by trying to maintain and regulate the fact-finders' ignorance. The best cure for possible misunderstanding is not to keep an area in darkness, but rather to bathe it in light.

THE JURY AND POPULAR CULTURE†

Jeffrey Abramson*

I. INTRODUCTION

Ours has not been a culture that likes to tell stories about juries out-of-school. Whether from respect for the sanctity of juries, the awe of their oracular mystery, or just plain fear of what lay inside Pandora's box, the law regards the jury room as virtually off limits to journalists and outside observers.[1] Even screenplay writers and novelists rarely make jury deliberation central to the drama. There are exceptions of course, John Grisham's *The Runaway Jury* being the most famous contemporary example; the teleplay *Twelve Angry Men* is an older exhibit.[2] However, deliberation is still largely a subject waiting for its dramatist. In fiction, as in real trials, the jury remains on the sidelines, an audience rather than an actor, passive rather than active.

In contrast, we have vast popular literature about jury selection, devoted to all types of lore about the cunning of lawyers and the strategies of that already legendary figure, the paid scientific jury consultant. A familiar feature of trial coverage is the running tally that reporters offer about how many accountants versus social workers, women versus men, whites versus Hispanics have been selected to date. This box score is updated daily and repeated throughout trial coverage, resonating with the prevailing view that the real drama in jury trials is played out during jury selection.

Legal thrillers offer rich and nuanced portraits of victims (the heroes and the fakes), lawyers (the crusaders and the parasites), communities (their prejudices and their sufferings), whistleblowers (their fates and their fortunes), witnesses (their fears and their foibles), the cop (the crooked and the honest), and the reporter (the insider and the outsider). However, jurors appear mostly in stock and supporting roles such as the bribed or intimidated juror in a

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[1]In the 1950s, the University of Chicago Jury Project received permission to record secretly the deliberations of five federal civil juries in Wichita, Kansas. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY vii (1970). Congress quickly passed an electronic eavesdropping statute that henceforth made the presence of any recording device inside a federal jury room a felony. *Id.* That law, and its state equivalents, assured that the jury would remain the least known component of American government. *Id.* In 1986, Wisconsin did grant the Public Broadcasting Service permission to film the deliberations of a criminal jury. *Frontline: Inside the Jury Room* (April 8, 1986). In 1997, CBS broadcast portions of jury deliberations from four criminal trials in Arizona. William R. Bagley, Jr., *Jury Room Secrecy: Has the Time Come to Unlock the Door?*, 32 SUFFOLK U. L. REV. 481 (1999).

[2]JOHN GRISHAM, THE RUNAWAY JURY (1996); *Twelve Angry Men* (MGM/UA 1957).

Mafia trial, the planted juror in a big tobacco lawsuit, the juror in mid-vendetta or love affair, and the juror out of his league or over his head.

If we look behind the stock-in-trade jury characters, however, popular portrayals of civil jury trials do capture great public debates about injury and claiming in America, as well as debates about blame and responsibility. "I'm having a hard time understanding why we're supposed to make this woman a multimillionaire," a Grisham juror says of a smoker suing the tobacco companies.[3] The remark resonates with the struggle jurors frequently go through to reconcile the deep cultural norms about work and reward with the legal norms about liability and compensation. Jury work is about constituting and reconstituting those norms, and the best of the courtroom dramas at least place us, the audience, in the position of the jury.

In what follows, I will outline the three great narratives by which civil litigation unfolds in recent bestsellers and blockbuster movies. Let me call the first narrative the populist or Jacksonian story.[4] In this narrative, as much as the common people would prefer to stay out of politics and off juries, sometimes they are simply needed to clean out a corrupt system. The common person responds to the moral heroism of deserving victims whose water, air, or lungs have been poisoned by corporate giants. The moral claims of the victims are so overwhelming, the behavior of the corporations so arrogant, that even lawyers are transformed by civil litigation from sleazy sharks into crusaders for a cause. This populist depiction of the morality tale inside many a civil trial has been the central story line in a cluster of recent hits. The first example is *A Civil Action*,[5] a nonfiction account of the jury trial of W.R. Grace and Beatrice Foods for causing cases of childhood leukemia in Woburn, Massachusetts, by contaminating the town's wells with carcinogenic chemicals.[6] The second is *Erin Brockovich*,[7] about one woman's discovery of how Pacific Gas and Electric Company poisoned the water of a California town and then conspired to cover up its torts.[8] The third example is *The Runaway Jury*, the Grisham novel about corrupt Big Tobacco executives trying to buy a jury in an anti-smoking trial.[9]

The timing of these "David and Goliath" books and movies on civil trials is itself interesting. Since the 1970s, a second narrative, the Hamiltonian

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[3]GRISHAM, *supra* note 2, at 379.

[4]The names of key narratives of American politics and culture are taken from Walter Russell Mead's analysis of American electoral styles. Walter R. Mead, *The Jacksonian Tradition and American Foreign Policy*, NAT'L INT., Winter 1999/2000, at 5.

[5]JONATHAN HARR, A CIVIL ACTION (1996). References to the Woburn trial are based on the facts as presented in the novel, *A Civil Action*, and not the film version of the story.

[6]*Id.*

[7]*Erin Brockovich* (Universal Studios 2000) (dramatizing a fictional story based on actual events).

[8]*Id.*

[9]GRISHAM, *supra* note 2.

one, has told the most popular stories about civil litigation.[10] This story is all about the stupidity of setting economic policy through jury trials. Victims are rarely deserving and always litigious, lawyers prey upon the unfortunate, jurors are in over their heads, junk science breeds junk lawsuits, damage awards are a crap shoot, and the rich just cannot get justice. Hamiltonian stories are the mirror image of populist ones: the corporation or the doctor is the victim of unsavory lawyers serving shoddy victims. As to juries, the reigning Hamiltonian punch line is that "the only difference between TV juries and real juries is fifty IQ points."[11] The recent film, *The Sweet Hereafter*,[12] hits all the Hamiltonian high notes in its story about the unraveling of a community in a small town when the outside plaintiff's lawyer descends upon simple folk and overrides their initial honest reaction that accidents sometimes happen.[13]

The Hamiltonian view of civil justice seemed well entrenched through the early 1990s, as well-financed tort reform movements succeeded in capping plaintiff's lawyers' fees and setting ceilings on awards for noneconomic injuries. The insurance industry and medical associations were especially aggressive in waging a media campaign for the hearts and minds of prospective jurors. For instance, the Utah state medical association sent articles to physicians, presumably for distribution in waiting rooms, setting out the association's views that patients, not insurers, bore the cost of medical malpractice awards.[14] Trial judges responded by questioning prospective jurors about their exposure to such material, even though this meant breaking the usual rule that jurors should not be told a defendant carried liability insurance.[15]

Mark Galanter and others have pointed out that the Hamiltonian story about civil justice is often impervious to empirical evidence that civil juries are not as anti-business and anti-doctor as the plot line demands. The narrative has some of the staying power of folklore, anchored into a deep belief structure about the essential immorality of damage awards that sever the connection between work and reward.[16]

Although it is too early to tell, the tremendous changes in anti-tobacco litigation in the 1990s may signal broader changes in popular attitudes toward

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[10]Mead, *supra* note 4.
[11]This joke was told to me by Robert Daddario, owner of Daddario Insurance Brokers, Wellesley, Massachusetts.
[12]*The Sweet Hereafter* (Fine Line 1997).
[13]*Id*.
[14]Barrett v. Peterson, 868 P.2d 96 (Utah Ct. App. 1993).
[15]NANCY GERTNER & JUDITH MIZNER, THE LAW OF JURIES 3-41 (1997).
[16]Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 721-26 (1998); Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 849-99 (1998).

civil trials and verdicts. The Hamiltonian within jurors once convinced them that the story of smoking was a story of free choice, adequate warnings, and assumption of the risk of a hazardous habit. However, recent revelations about the efforts of tobacco companies to manipulate the addictive effects of nicotine and their conspiracies to hide those efforts, caused a paradigm shift from stories about free choice to stories about fraud and misrepresentation.[17] The scenario represents a third great narrative, the Wilsonian one, which suddenly seems to be the dominant story about civil litigation. Wilsonians do not believe in bottom-up change in the same way as populists.[18] While Wilsonians and populists both share a critique of concentrated economic power and its abuses, Wilsonians rely on the countervailing power of big government and professional elites.[19] Thus, an important part of the big tobacco story was the novel litigation strategy launched by state attorneys general in alliance with public health professionals. As a result, the story became big government taking on big business. The closest popular rendition of this story is *The Insider*, a film in which legal change drives popular change and litigation is carried by government and elites, not communities or the people.[20]

In this article, I take a closer look at the populist, Hamiltonian, and Wilsonian stories on civil litigation. However, allow me to make three quick preliminary points. First, these three narratives are not unique to the civil justice debate; they are also the three great movements of American politics. This overlap helps to explain why candidates frequently campaign on a pro- or anti-civil jury platform. Second, the best dramas about civil litigation are those, such as *A Civil Action*, that expose enduring tensions between our populist and Hamiltonian expectations about law.[21] Third, far too often the relation of jury to popular culture is reduced to a flat, stimulus-response model, as if jurors were the mechanical captives of the media and mere transmitters of static cultural norms. Certainly, judges conduct voir dire as if cultural images pour into the jury room. My favorite example of this occurrence is the 1997 anti-tobacco lawsuit where the judge felt obliged to ask jurors whether they had read John Grisham's skewering of big tobacco in *The Runaway Jury* and if so, were they aware that it was fiction.[22] I do not doubt that novels can influence jurors, but hardly in this direct, overnight,

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[17]*See* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 903-25 (1998) (describing the history of litigation against the tobacco industry).
[18]Mead, *supra* note 4.
[19]*Id*.
[20]*The Insider* (Touchstone Pictures 1999).
[21]HARR, *supra* note 5.
[22]Mather, *supra* note 17, at 928-29; GRISHAM, *supra* note 2.

poisoning way. In my judgment, the better view is to see jurors at work constituting legal norms, not merely imbibing such norms. In civil trials, cultural norms about work and responsibility, about the moral desert of victims are inevitably and rightly brought into play as jurors deliberate the standards of medical care, or the reasonable person standard as applied to artificial persons. What we do not have, in our fiction or in our journalism, are sustained accounts or imaginings of these deliberative moments where jurors bring cultural norms to bear on the interpretation of the evidence and the law. As great a script as *Twelve Angry Men* is, the story of twelve white men in ties judging the guilt of a Puerto Rican kid should not be the reigning image of the contemporary jury at work.[23]

II. THE POPULIST NARRATIVE: BOTTOMS-UP

Populism is a politics, often nostalgic, about honor, status, and their threatened loss. The populist moments in the United States are periodic and passing, mobilizing disengaged outsiders to redeem their honor and place in society against corrupt insiders and establishment elites who are destroying the people's simple way of life. For the populist, the people are a reservoir of traditional virtues tied to honesty, hard work, self-reliance, earning a living and taking responsibility for one's actions. For the most part, in politics as on juries, the moral virtues of the people-at-large are latent, most common folk preferring to avoid courts, lawyers, jury duty, and sometimes even the voting booth. However, there comes a time when the corruption of the world invades communities, calling David into action against Goliath, Cincinnatus from his farm, and Hercules to clean the mess out of the Augean stables.

Recent courtroom dramas have used public health menaces to show how downtrodden communities come reluctantly to litigation, unable to find justice otherwise. The ideal-type populist story starts from the bottom up, ordinary people realizing that they are victims of vicious corporations protected by legal elites. However, as in politics generally, sometimes it takes a Jacksonian-type hero to tap into the populist sentiments of the people and lead the charge against the established order. Consider the Hollywood movie *Erin Brockovich* and the nonfiction work *A Civil Action*, as two recent examples that tell populist stories about civil litigation.[24]

In *Erin Brockovich*, a sprawling Pacific Gas and Electric (PG&E) power plant looms over the rural, low-income community of Hinkley, California,

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[23]*Twelve Angry Men* (MGM/UA 1957).
[24]*Erin Brockovich*, *supra* note 7; HARR, *supra* note 5.

in the Central Valley.[25] To prevent corrosion to the plant's generators, the company treats them with a type of chromium that has carcinogenic effects on human beings.[26] However, the company disposes of the chromium in holding pools without bothering even to line the bottom of the pools adequately; the chromium seeps into the groundwater, causing various malignancies in Hinkley residents whose wells tap into the contaminated groundwater supply.[27] PG&E is aware of the problem but engages in a conspiracy to cover up its torts by telling residents half-truths, sending them to company-paid doctors who tell residents there is no connection between their ailments and the water supply.[28]

The Hinkley residents are the opposite of litigious, a sure sign of their moral stature. If anything, they are trusting to a fault, regarding PG&E as a good neighbor concerned enough to pay their medical bills.[29] However, Erin Brockovich, a temporary file clerk in a backwater, small general practice Los Angeles law firm, is not as trusting.[30] Erin knows all about how the legal system treats ordinary people, having recently tried to sue a doctor for ramming into her car in his speeding Jaguar.[31] The jury does not see a victim on the stand, only a twice-divorced, unemployed mother who dresses in short skirts and high heels.[32] They do not hear the facts, only her foul mouth. Once they hear the doctor worked in an emergency room, the jury puts the facts into the Hamiltonian narrative of an undeserving woman trying to make a quick buck at the expense of a doctor hurrying that day to save lives.[33] Although not from Hinkley, Erin is of Hinkley and the dismissed and diminished of the world.[34] Once she starts filing away folders showing PG&E buying the homes of Hinkley residents, Erin's common sense wonders why medical bills should be tucked into a real estate file.[35] She knows a rat when she sees one and is able to mobilize the community precisely because she is not a lawyer, but rather a victim speaking to other victims and a mother speaking to other mothers about protecting their children.[36] The litigation trail in *Erin Brockovich* thus starts without the presence of any

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[25]*Erin Brockovich*, *supra* note 7.
[26]*Id*.
[27]*Id*.
[28]*Id*.
[29]*Id*.
[30]*Id*.
[31]*Erin Brockovich*, *supra* note 7.
[32]*Id*.
[33]*Id*.
[34]*Id*.
[35]*Id*.
[36]*Id*.

lawyers.[37] We live in a world where people's injuries are severe, their medical needs great, and the responsibility of PG&E exists beyond doubt, though proving that responsibility is another matter.

The populism of *Erin Brockovich* works by trapping the audience in its own elitist, gender-based, clothing-driven judgments about people.[38] Like the jury, we judge Erin by her outfits; a smart woman could not possibly dress in such a way. We also mistake her male neighbor, the long-haired, bearded and tattooed biker, who could not possibly be sincere in his offer to baby-sit Erin's three children.[39] For most of the movie, we expect the pony-tailed man with a baseball cap smiling at Erin to be a stalker or a company goon. The mysterious man turns out to be a former PG&E employee who was smart and courageous enough to preserve incriminating documents management once asked him to shred.[40] The film is one big populist joke, all about how the genuine moral worth and smarts of ordinary people, the mothers of Hinkley, the employees of PG&E, the former beauty queen of Wichita, Kansas, are constantly being underestimated.

Erin Brockovich is romantic on the subject of litigation, but displays hostility toward lawyers.[41] "I hate lawyers, I just work for one," Erin explains in Hinkley by way of gaining people's trust.[42] The lawyer for whom Erin works is low enough on the legal status ladder that he can vaguely relate to ordinary people, although Erin has to pressure him just to stay for a cup of coffee with his clients. The higher up an attorney is on the legal chain, the less she or he is able to practice community-based litigation. There are no movement lawyers, no devotees of environmental causes coming to the aid of Hinkley, nor could there be in the eyes of this film. Litigation's worth depends on its generation from below, with law and lawyers being mere necessary instruments to put at the disposal of the people.

As the case develops, the small-time lawyer for whom Erin works finds it necessary to invite into the case an experienced attorney from the upper echelons to help him both financially and legally.[43] However, the establishment lawyer (male) and his young woman associate have no street smarts, they cannot relate to the people of Hinkley who start rebelling against representation by starched shirts and skirts.[44] Unfortunately, the film makes its populist points here in gender-biased ways, singling out the young woman asso-

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[37] *Erin Brockovich*, *supra* note 7.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Erin Brockovich*, *supra* note 7.
[44] *Id.*

ciate for ridicule, as if any woman who wears a suit to work is no longer "woman" enough to relate to housewives and mothers.[45] For instance, during an in-home interview with a family cuddling their cancer-stricken daughter on a couch, the big-firm woman lawyer tells them that she would appreciate it if they would refrain from embellishing their account with any emotions, since they are of no legal import.[46] Clearly, the populism here turns reactionary against women as lawyers, preferring the street-tough, one-of-us Erin. However, the film's larger message is that civil litigation worked in Hinkley despite the best efforts of big lawyers to sabotage the people's claims.

How did civil litigation work? The people of Hinkley expected to get a jury trial, to have people such as themselves deliver PG&E to judgment day.[47] However, the big lawyers suggest that binding arbitration will be quicker and more efficient.[48] It falls to the small-time lawyer to call the six hundred plaintiffs to a town meeting and sell them on the idea of arbitration. Although popular instincts favor the public face juries give to justice, the lawyer reminds them that PG&E will delay a jury trial for years and "many of you cannot afford to wait."[49] That is the last time anyone mentions a jury trial. The arbiter comes through with $330 million, enough for each of the Hinkley residents to secure their families financially in the face of looming medical catastrophes, enough for the small-time lawyer to move into a skyscraper, enough for Erin to receive a $2 million paycheck.[50]

The absence of a jury trial explains why, for all its populist sentiments, the film ends so quietly. The Hinkley residents do not hear of their victory in open court, there is no public celebration or mobilization, only Erin Brockovich driving to Hinkley to tell one mother with breast and uterine cancer that she will be receiving $5 million.[51] The award seems just but hardly compensation for cancer. In fact, the populist perspective persuades the audience that no amount of money would have been adequate. Yes, litigation needs to translate injuries into dollars, but seeing PG&E punished and held accountable is the moral compass in Hinkley.

I suppose that judges selecting jurors this week for toxic tort cases will be asking members of the jury venire whether any of them has seen *Erin Brockovich*.[52] However, screening out jurors pumped up for a time by one

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[45] *Id*.
[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] *Erin Brockovich*, *supra* note 7.
[50] *Id*.
[51] *Id*.
[52] *Id*.

particular populist-style movie is not going to keep from juries the presence of some of the deep populist norms the movie captures. Empirical research shows that most juries are not out to soak the rich, stick their hands into deep pockets and hand out other people's money to plaintiffs everywhere.[53] In fact, the morality of populism is strict and tight-fisted in ways that matter to civil litigation. Populists want their victims to be pure, and hardworking, self-reliant, and reluctant to go to lawyers or enter courtrooms. They want their injuries to be severe, caused by hazards the plaintiffs did not even know existed. At the same time, populists are fiercely suspicious of faceless corporations, the arrogance of power, and the lack of individual moral responsibility for the actions of the company.[54] In short, one of the ways civil jurors hear the evidence and interpret it is by comparison to the equities of the ideal-type populist morality tale told in the likes of an *Erin Brockovich*.[55]

Erin Brockovich is a trifle, and its influence, if any, will pass shortly.[56] Jonathan Harr's *A Civil Action* is another matter entirely, the rare bestseller that has crossed over into required reading for many law school students and undergraduates.[57] The book shows every sign of being as influential on public opinion about civil justice as Anthony Lewis' sympathetic recounting of Clarence Earl Gideon's attempt to get lawyers appointed for indigent defendants was on public opinion about criminal justice in an earlier era.[58]

Part of the attraction of *A Civil Action* to law students is the depiction of the mania and obsession of a lawyer for a single case, a mania that sometimes seems driven by money and egoism, other times by genuine beliefs in a cause.[59] *A Civil Action* is far more lawyer-centered than *Erin Brockovich*, and it intertwines one populist story about a small-time plaintiff's lawyer taking on big Boston Brahmin law firms with the larger populist story of East Woburn, Massachusetts, versus corporations suspected of polluting town wells with carcinogens.[60]

In real life, as in the book, the story begins when neighbors seek answers as to why a number of children have developed leukemia within a three block area in predominantly lower middle class East Woburn.[61] Since

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[53]*See* Galanter, *supra* note 16 (summarizing empirical research on juries); Vidmar, *supra* note 16.
[54]*See* Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 246-47 (1996) (summarizing research which indicates that jurors do hold corporations to a higher standard of responsibility than non-corporate defendants).
[55]*Erin Brockovich*, *supra* note 7.
[56]*Id*.
[57]HARR, *supra* note 5.
[58]ANTHONY LEWIS, GIDEON'S TRUMPET (1964).
[59]HARR, *supra* note 5.
[60]*Id*.
[61]*Id*.

leukemia strikes approximately thirty-one in every one million children, the cluster of cases in one neighborhood seemed suspicious and alarming.[62] The neighborhood was fed by two particular town wells and the water's foul taste and smell had long prompted complaints from residents. However, "it was the same story all the time," Anne Anderson, mother of a three-year old leukemia victim, told Harr. "There wasn't any problem with the water. It had been tested and it was fine."[63] Anderson remained suspicious that there might be a connection between the leukemia cluster and the town well water, but for some period of time, town officials, city engineers, and state public health departments rebuffed her inquiries. Even the leading authorities on childhood leukemia at Boston's famed Children's Hospital were slow to realize so many of their child leukemia patients came from the same area.[64] Eventually, state environmental inspectors found the two wells at issue to be "heavily contaminated" with trichloroethylene (TCE) and tetrachloroethylene (Perc), two solvents used to dissolve grease and oil on industrial equipment.[65] The Environmental Protection Agency listed both chemicals as probable carcinogens and the state ordered the wells to be immediately shut down.[66] At that time, there were at least twelve confirmed cases of childhood leukemia in East Woburn.[67] A report by the Center for Disease Control confirmed that the incidence of leukemia in East Woburn was seven times greater than should be expected. However, the Center could not establish a definite link between the cluster and the contaminated water.[68]

Long before they turned to lawyers and litigation, parents in Woburn sought answers and respect from nearly every organ of government one could imagine. Eventually, some parents turned to their minister and began organizing in church.[69] Only belatedly, when they were unable to track down those responsible for contaminating the wells, did they turn to lawyers and litigation. *A Civil Action* thus begins in the classic mode of a bottom-up populist story about an impoverished community seeking answers, not just money, from those responsible for poisoning the blood and marrow of their children.[70] "It started out in a pure manner," one mother recalled, insisting

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[62]NATIONAL CANCER INSTITUTE, CANCER NET, *Leukemia, at* http://www.cancernet.nci.nih.gov/Cancer_Types/Leukemia.shtml (last visited Apr. 6, 2001).
[63]HARR, *supra* note 5, at 24.
[64]*Id*. at 19-24.
[65]*Id*. at 36.
[66]*Id*.
[67]*Id*. at 41.
[68]*Id*. at 50.
[69]HARR, *supra* note 5, at 39-41.
[70]*Id*. at 123-46.

she was not after money. "I was doing this for my baby . . . . We didn't want what happened to us to happen to anyone else."[71]

What makes *A Civil Action* such an extraordinary legal document is the way the author then complicates the populist plot.[72] First, the parents virtually disappear from the book and Harr tells the story as if lawyers made crucial decisions at every point in the litigation in only nominal consultation with their clients. The lead lawyer, and center of the book's narrative, is Jay Schlichtmann, young but fresh from big victories in other personal injury jury trials.[73] Schlichtmann's motives are mixed at best. He is maniacal when it comes to serving the interests of his clients, laying out over $2.6 million of his own or firm money to prepare the Woburn case.[74] For a number of years, he clearly lives and breathes the case and puts everything else in his life on hold, watching his car be repossessed and his overdrawn credit cards canceled one by one.[75] He is also the outsider taking on the legal establishment, the young Jewish lawyer against the Brahmins, the near-solo practitioner against the big firms. However, many people in Woburn never knew what to make of Schlichtmann. He came across to some as "not really caring about [them], using them simply as a vehicle for his own ambition, for his own fame and fortune."[76] One mother felt as if Schlichtmann excluded her and the others from important decisions and patronized the families "as if he were talking to a group of children."[77] She stated that "[b]y the time I got through dealing with [him], I felt violated. The lawsuit made me feel dirty."[78]

One of Schlichtmann's first decisions was whom to sue, given that the Environmental Protection Agency Superfund cleanup in Woburn did not specify which of several industries located near the river surrounding the contaminated wells might be responsible for the pollution.[79] Schlichtmann's choice to single out a local tannery owned by Beatrice Foods and a local manufacturing plant operated by chemical giant W.R. Grace was defensible on the facts but driven also by the "deep pockets of the corporate defendants."[80] Harr writes that "[p]ersonal injury law is not a charitable enterprise."[81] Since Schlichtmann was working on a contingent fee basis and paying the investigation expenses himself, "it was crucial that the defendant

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[71] *Id*. at 453.
[72] *Id*. at 56-66.
[73] *Id*.
[74] *Id*. at 453.
[75] HARR, *supra* note 5, at 491.
[76] *Id*. at 453.
[77] *Id*.
[78] *Id*.
[79] *Id*. at 78.
[80] *Id*. at 79.
[81] HARR, *supra* note 5, at 79.

either have assets, preferably a lot of them, or a big insurance policy."[82] However, to the extent the trial was supposed to be a search for truth about who was responsible for the contamination, Harr wonders repeatedly whether litigation's translation of issues into money really is a good way to ferret out the truth.[83]

The portrait of the corporate lawyers defending their corporate clients is done more straightforwardly in the populist style. W.R. Grace's Harvard Law School trained lawyer "rarely descended to the level of personal injury law," and he set out to teach Schlichtmann "a painful lesson" about dealing with companies like Grace.[84] First, he removes the case to federal court. Then he moves to have the case dismissed as a "frivolous and irresponsible lawsuit" filed by a lawyer stirring up people to sue without a single shred of evidence that Grace was responsible for the contamination.[85] That motion is denied. Grace later was forced to admit to its lawyers that employees had dumped or buried far more of the chemical solvents than the company had reported to the EPA.

As the litigation proceeds and depositions are taken, Beatrice's lead counsel is shaken by a father's emotional recounting of the death of his son during an emergency automobile rush to the hospita1.[86] The lawyer comes out of the deposition to tell his minions that under no circumstances must any parent in the case ever be allowed to testify before a jury. Were that to happen, the lawyer concedes, the case simply is not winnable.[87]

The defense gets their wish when the judge bifurcates the trial, limiting phase one solely to testimony about whether Beatrice and Grace contaminated the wells.[88] Only if this "waterworks" phase of the trial were to show that Beatrice and Grace were responsible for the presence of contaminants in the water would there be any reason to continue with testimony about whether contaminated well water could be responsible for the leukemia and other ailments in the children of Woburn.[89]

At this point, *A Civil Action* exposes the tensions between our populist and Hamiltonian takes on civil juries.[90] On the one hand, by the time the

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[82]*Id*. "Both companies ranked high in the Fortune 500. In the lexicon of personal injury lawyers, they had 'deep pockets,' and this fact had weight for Schlichtmann . . . . To Schlichtmann, having Grace and Beatrice as defendants in the case was like learning that a woman his mother kept trying to set him up with had a huge trust fund." *Id*.
[83]HARR, *supra* note 5, *passim*.
[84]*Id*. at 98-99.
[85]*Id*. at 100.
[86]*Id*. at 154-55.
[87]*Id*.
[88]*Id*. at 286.
[89]HARR, *supra* note 5, at 287.
[90]*Id*.

case went to trial, litigation had discovered significant malfeasance and cover-ups at Grace and the Beatrice-owned tannery. Instead of using maybe just "a few teaspoons" of TCE over the years, as corporate Grace had told the EPA, individual Grace employees reluctantly admitted in their depositions routinely throwing waste products containing TCE into open ditches throughout the 1960s and burying at least six corroded fifty-five gallon drums of the solvent, and perhaps as many as fifty.[91] As to the leather tannery, records from the 1950s showed it already dumping tannery waste on the fifteen acres it owned along the river.[92] Neighbors referred to the area as the tannery's own "toxic waste dump" and told stories of trucks disposing of barrels marked with the red X for poison.[93] The revelations made during discovery are so shocking and cumulative that *A Civil Action* makes a powerful case for the importance of civil litigation as a way to break the corporate code of silence.[94] Indeed, deposition taking emerges in *A Civil Action* as high populist drama, as blue-collar workers for Grace realize they belong more to the affected community than the corporation.[95]

On the other hand, Harr's story switches from populist to Hamiltonian when the jury retires to decide its verdicts. Things might have gone better for the plaintiffs, Harr intimates, had the judge permitted Schlichtmann to open with the "human drama about the poisoning of the Woburn families."[96] In bifurcating the trial, the judge forced the plaintiffs to open with the "essentially bloodless" issues of geology and groundwater movement.[97] Trial testimony was mostly technical, requiring jurors to decipher expert accounts of the rate at which solvents dissolve, enter groundwater flow, percolate into aquifers, and emerge into well water.[98] Plaintiffs had to convince the jury not only that Grace and Beatrice dumped chemicals, not only that those chemicals migrated into the wells, but also that the migration occurred before children started to get sick.[99]

Reconstructing jury deliberations from interviews with several of the six jurors, Harr depicts them as confused, divided, and finally not up to the task.[100] Deadlocked for days, jurors resolve to reach a verdict only when the foreman tells them that "he is scheduled for heart bypass surgery and

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[91] *Id*. at 155-78.
[92] *Id*. at 185.
[93] *Id*. at 187-98.
[94] *Id*. *passim*.
[95] HARR, *supra* note 5, at 164-68.
[96] *Id*. at 287, 390.
[97] *Id*. at 286-87.
[98] *Id*. at 291-403.
[99] *Id*. at 286-403.
[100] *Id*. at 381-82.

will have to leave the jury in a few days."[101] The factions on the jury then essentially split the difference by agreeing to find Grace, but not Beatrice, responsible for contaminating the wells.[102] As to a specific question calling on them to fix the earliest date at which Grace chemicals substantially contributed to contamination of the wells, the jurors accepted one juror's suggestion of "September, 1973" even though "they had no idea what relation it bore to the question."[103] Since several of the plaintiffs' children had fallen ill of leukemia before September of 1973, the choice of date seemed arbitrary.[104]

The fault was not entirely the jury's inability to decipher the scientific evidence.[105] The questions the judge required them to answer "were all but impossible to understand" and they called on jurors to come up with more definite answers about dates of contamination than scientists themselves could give.[106] *A Civil Action* is especially harsh on the judge for structuring the trial purposely to keep jurors from hearing the moving stories of parents regarding their children's diseases.[107] Hamiltonian to a fault, the judge took a case about leukemia and turned it into a case about geology and groundwater.[108] The judge essentially took the jury out of the case, first by keeping the parents out of court, then by forcing jurors to determine not only whether Grace and/or Beatrice contaminated the wells, but exactly when the contamination occurred. The judge justified his decisions as necessary if law, not emotion, were to rule jurors. However, *A Civil Action* is an important populist document because it undermines the judge's claim to dispassion and neutrality. The judge's personal hostility to Schlichtmann is apparent throughout trial, as is his fondness and respect toward Beatrice's lead counsel, an old law school classmate of the judge.[109] To witness the partiality of the judge is to remember why we need juries in the first place.

Still, *A Civil Action* is a story without a happy populist ending. As to Beatrice, the jury probably got it wrong; an EPA report after the trial noted that "the Beatrice land was the most grossly contaminated area in the aquifer, and by far the largest contributor to the pollution of the wells."[110] More generally, *A Civil Action* suggests that truths of the sort the Woburn parents

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[101]HARR, *supra* note 5, at 391.
[102]*Id.* at 391-93.
[103]*Id.* at 392.
[104]*Id.* at 394.
[105]*Id.* at 456.
[106]*Id.* at 368-69.
[107]HARR, *supra* note 5, at 258-88.
[108]*Id.*
[109]*Id.* at 87-488.
[110]*Id.* at 456.

sought probably were not to be found in a courtroom, and that "perhaps the case was one that the judicial system was not equipped to handle."[111]

A Civil Action does spend more pages trying to reconstruct the jury's deliberation than do most books of this genre. Still, the one chapter devoted to the jury is entitled "The Vigil," and the drama stays with Schlichtmann as he keeps a lonely watch each day in the courtroom corridor waiting for the jury to return its verdicts.[112] Furthermore, *A Civil Action* reinforces the view that jury trials are a mystery, you never know what is going on in the minds of jurors until it is too late. The image of the jury as a "black box" is what drives popular culture to be fascinated with jury selection and lawyerly attempts to do the equivalent of stuffing the ballot box. During jury selection, Schlichtmann's profile of the ideal juror was a young housewife with children the same ages as the victims.[113] However, the defense challenged most such women for cause, arguing that "it's very difficult for any woman with small children to decide the case on the evidence rather than emotion, [it is] almost an impossible task."[114] In the end, only one juror selected had young children and she was an alternate.[115] Many prospective jurors were excused after acknowledging they would tend to believe big corporations were reckless with the environment.[116] The jury of six finally chosen consisted of three men, a telephone company foreman, a self-employed housepainter, and a postal worker, and three women, an unmarried clerk for an insurance company, a grandmother who drove a forklift part-time for a department warehouse, and a church organist.[117] Whether a group with these backgrounds was competent to decipher the geological evidence and the groundwater flow testimony remains an unanswered question in the book.

What we do know is that counsel on both sides assumed jurors do not decide cases entirely according to the evidence. That is why defense counsel worried so much about the sheer emotional impact of parents on the stand. That is why Schlichtmann paid attention to who led the jurors to the cafeteria to lunch, who smiled at him, who seemed the sort of man unlikely to go against the majority, whom he just liked instinctively, and whom he distrusted for being "thin [and] rather severe-looking."[118] This inside detail about what it supposedly takes to win a jury trial is a skeptical commentary on the populist expectations for litigation. A case that promised to expose

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[111] *Id*. at 369.
[112] *Id*. at 377-401.
[113] HARR, *supra* note 5, at 281.
[114] *Id*. at 282.
[115] *Id*. at 284.
[116] *Id*. at 282.
[117] *Id*. at 284, 382.
[118] *Id*. at 382.

polluters and determine the cause of the Woburn leukemia cluster ended with a confusing jury verdict, the granting of a new trial to Grace and an eventual $8 million settlement that provided families with some money but no satisfaction that anyone had ever been brought to justice or made to admit responsibility for their children's ills and deaths.[119] As the minister who first helped organize the Woburn community put it, "taking Grace's money without a full disclosure by the company, or any expression of atonement, cheapened everything."[120] He recalled the words of one mother near the beginning, "that what she wanted was for J. Peter Grace to come to her front door and apologize."[121]

III. THE HAMILTONIAN NARRATIVE: BOTTOM FEEDERS

Hamiltonianism is the politics that popularized the slogan, "What's good for General Motors is good for America." Traditionally the politics of big business, it is increasingly the politics of small business when it comes to civil litigation. Hamiltonians judge the jury solely in terms of economic efficiency and rationality; they have no use for the jury's wider democratic aspiration to reflect social values or even to forge new norms. If we have to live with civil juries at all, Hamiltonians want their verdicts predictable, and their damage awards capped. Especially when it comes to complex commercial litigation, Hamiltonians have been arguing for some time that the new economy and new medical technology make jurors obsolete, amateurs out of their league when it comes to understanding statistical analysis in antitrust cases, probabilities and risk assessment in products liability trials, and standards of care among neonatologists.

Hamiltonians are the great distributors of stories about the supposed redistributive instincts of civil jurors, even when evidence suggests otherwise. Hamiltonians remain sure that jurors: (1) despise the rich, especially doctors, (2) have it in for big corporations, (3) love to put their fingers in deep pockets and redistribute other people's money, and (4) break deadlocks by deciding no harm will be done by holding defendants liable, since their insurance companies will pick up the tab.

The Hamiltonian story works by finding some "poster boy" to represent juries out of control. Anecdote is the best vehicle of ridicule and the Hamiltonians understand how to use the media's thirst for the latest scoop about jurors acquitting Imelda Marcos and then having roast pig with her at a

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[119]HARR, *supra* note 5, at 442-53.
[120]*Id.* at 452.
[121]*Id.*

lavish party that night, or about the jury that confessed that in calculating its $10.5 billion award to Pennzoil against Texaco it added "$1 billion to the award for each of the Texaco witnesses they had most despised."[122] Almost everyone will have heard the tale of how some jury in New Mexico awarded $2.9 million to a woman burned by McDonald's coffee.[123] Then there is the one about the woman who sued for loss of her psychic powers after a CT scan, the prison inmate who sued himself for violating his own civil rights when he went to prison for twenty years on burglary convictions, of the West Virginia employee who parlayed a complaint that she hurt her back opening a pickle jar into a $2.7 billion award of compensatory and punitive damages.[124] Peter Huber's articles in *Forbes* magazine popularized the term "junk science" to summarize the way frauds were supposedly driving litigation.[125]

Galanter and others have described in detail the "entrepreneurial publicity" machines and public relations offices churning out Hamiltonian stories about juries since the 1970s.[126] According to polling data from the early 1990s, business elites were particularly prone to hold a negative view about injured victims seeking big money, lawyers serving them, and juries instinctively favoring plaintiffs.[127] More generally, pollsters found that "the higher the family income and socioeconomic status, the more critical" adults were of civil litigation.[128] In contrast, "those who see lawyers in a more favorable light . . . tend to be downscale, women, minorities, and young."[129]

Such polling data raises serious questions about how juries deliberate. If income, educational level, and to some extent gender are predictors of who views civil lawsuits from a Hamiltonian rather than populist perspective, then jury justice is precariously poised on demography and on the fine tactics of jury selection. However, I suspect that the line between Hamiltonians and populists in America is more fluid than the polls indicate. Jurors across the economic spectrum will hear a mix of populist and Hamiltonian tales in many a victim's woes. After all, most Americans hold to the Protestant ethic,

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[122]STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 45 (1994).
[123]Galanter, *supra* note 16, at 731-34.
[124]*Id.* at 726-28; Stuart M. Gerson, et al., *Civil Justice Reform: What Now?*, 1996 NAT'L LEGAL CTR. FOR THE PUB. INTEREST, D.C. 1. Hamiltonian accounts of the McDonald's case conveniently leave out details such as the skin grafts the plaintiff needed or her initial rejected request for payment of her medical bills and other expenses, about $11,000. Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. CV-93-02419, 1995 WL 360309 (N.M. Dist. 1999).
[125]Galanter, *supra* note 16, at 728 (citing Peter Huber, *Junk Science in the Courtroom*, FORBES, July 8, 1991, at 68, and PETER HUBER, GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM 3-4 (1991).
[126]Galanter, *supra* note 16, at 731.
[127]*Id.* at 721.
[128]*Id.* at 720 (quoting PETER D. HART RESEARCH ASSOC., A SURVEY OF THE ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM 4-5 (1993)).
[129]*Id.*

to the moral value of hard work, of earning what you keep and keeping what you earn. Defense arguments about plaintiffs getting something for nothing, and lawsuits becoming lotteries, will resonate with these Hamiltonian receptors that transcend class in America.[130] For instance, in *A Civil Action*, the juror most resistant to holding the corporations liable was a self-employed house painter.[131] In John Grisham's *The Runaway Jury*, big tobacco defendants find an immediate ally in a retired army colonel and former smoker.[132] Since he "had the good sense to quit," he is irked by a plaintiff shirking responsibility for his own habits.[133] The juror sarcastically stated, "I think people should have more sense than to smoke three packs a day for almost thirty years. What do they expect? Perfect health?"[134]

Valerie Hans, Shari Seidman Diamond, and Neil Vidmar have all reported recent surveys that show broad segments of the American public espousing Hamiltonian views about a litigation explosion caused by unsavory plaintiffs' lawyers serving undeserving clients.[135] In a 1996 report of her research to date, Hans found that more than eighty percent of jurors interviewed believed that there were too many frivolous lawsuits. Only about one-third thought that plaintiffs generally have legitimate grievances. Jurors reported to Hans that they speculated on the motives of plaintiffs for bringing the suits at least as much as on the behavior of defendants.[136] Vidmar's research is consistent in finding a broad tendency for jurors to blame, rather than sympathize with, personal injury victims.[137]

One of Hans's most telling observations is how quickly the populist story unravels when jurors lose faith in the victim's credibility.[138] In *Erin Brockovich* and *A Civil Action*, litigation gives us the ideal-type victim, mothers with dying children. Judged against this image of the morally deserving claimant, real cases often disappoint jurors' populist expectations and leave them ripe for Hamiltonian conclusions.

The recent film, *The Sweet Hereafter*, tells the Hamiltonian story of the pied piper plaintiff lawyer who leads a simple community to moral ruin.[139]

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[130]*See* David M. Engle, *The Ovenbird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC. REV. 551 (1984).
[131]HARR, *supra* note 5, at 382-91.
[132]GRISHAM, *supra* note 2, at 87.
[133]*Id.* at 88.
[134]*Id.*
[135]Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 248, 257-61 (Robert E. Litan ed. 1993); Shari Seidman Diamond, *What Jurors Think: Expectation and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 299-300 (Robert E. Litan ed. 1993); Vidmar, *supra* note 16, at 854.
[136]*See* Hans, *supra* note 54, at 244-45.
[137]Vidmar, *supra* note 16, at 866-70.
[138]Hans, *supra* note 54, at 244-45.
[139]*The Sweet Hereafter*, *supra* note 12.

Like *Erin Brockovich* or *A Civil Action*, the film begins with an accident in a small, low-income community.[140] This time, however, there is no villainous corporation set against the town, only a school bus being driven cautiously along icy roads by the town's own loving bus driver, a middle-aged woman who keeps pictures of all the school kids in her house.[141] The school bus hits a patch of ice, skids through a guardrail, and crashes down a ravine.[142] Twenty-two children are killed, one teenage girl left paralyzed.[143] A father of two of the dead children was behind the bus when it flipped.[144] Despite his grief, he understands that the accident was no one's fault.[145] Also understanding are the rest of the parents, who originally stand in common grief with the devastated driver.[146] However, then an attorney from the big city arrives and sells some parents on the theory that there must have been a failure on the bus owing to defective equipment or negligent maintenance.[147] The attorney himself does not believe the claim but he sells it to parents on a "you owe it to your children to make sure this never happens to anyone else" sermon.[148] Some parents are reluctant, others are greedy in ways that begin to undermine the romantic view of the virtuous rural community.[149] The father of the paralyzed child had long dreamed of a rags to riches singing career for her, now he seizes on civil litigation as a replacement enrichment strategy.[150] The lawsuit eventually sets father against daughter, neighbor against neighbor. However, what else should one expect from the big city lawyer?[151] In a Hamiltonian metaphor for our time, the lawyer negotiates with his own daughter only by cell phone and has lost her to a life of drugs and finally to an HIV infection.[152] The lawyer's arrival in the small community is the arrival of all the vices that litigousness breeds.

IV. THE WILSONIAN NARRATIVE: TOPS DOWN

Wilsonian politics are not nostalgic the way populism sometimes is, romantically yearning for pre-corporate America. From the beginning of the

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[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *The Sweet Hereafter, supra* note 12.
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.*
[151] *The Sweet Hereafter, supra* note 12.
[152] *Id.*

last century, Wilsonians accepted that bigness and corporate entities were here to stay and were the coming sources of national wealth and rising standards of living. However, big business demanded big government to regulate and curb the abuses of concentrated economic power. Wilsonian politics and trust busting were born. Whereas the populist story is bottom-up, the people rising to rid their communities of Goliath, Wilsonian stories start with elites using the force of law and the power of government to engineer social change.

The Insider, a recent movie about the fatal combination of big media and big tobacco, is an example of the Wilsonian stories just now being constructed in the course of anti-tobacco litigation.[153] Allow me to set the scene. From 1965 (when the Surgeon General's warning first appeared on cigarette packs) until 1995, smokers or the families of deceased smokers filed more than seven hundred lawsuits against cigarette companies.[154] Only one jury in all those cases ever ruled for the plaintiffs, and that verdict was overturned on appeal.[155] In those years, the tobacco industry told the better story of who was responsible for a smoker's illness, at least as far as juries were concerned. Again, Grisham's *Runaway Jury* is a suggestive guide here.[156] The most prejudiced juror against the dying smoker is the ex-smoker who might think to himself: "The warning is on the pack, the product is lethal, I quit, he didn't, he got what he deserved."[157] Strange as it seems, tobacco companies successfully held the moral high ground in jury trials, crafting a defense around free choice, assumption of the risk, and responsibility for one's own acts. How was this hold of the tobacco industry over jurors to be broken?

To a certain extent, public opinion about smoking was already changing dramatically through the 1980s, thanks to the public's increased awareness that secondary smoke harmed the health even of those who chose not to smoke.[158] What was once seen as classic self-regarding action harming only the person smoking was fast becoming an other-regarding act with public health implications.[159] Bans on smoking in restaurants and public spaces began sprouting up in city after city.[160] However, *The Insider* suggests that litigation took a leading role in changing the story we tell about ciga-

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[153]*The Insider*, *supra* note 20.
[154]Mather, *supra* note 17, at 904-05.
[155]*Id.*
[156]GRISHAM, *supra* note 2.
[157]*Id.* at 88.
[158]Mather, *supra* note 17, at 905-06.
[159]*Id.* at 905.
[160]*Id.* at 906.

rettes.[161] The new litigation brought together several elites: state attorneys general, public health professionals, well-financed trial lawyers with a war chest accumulated from asbestos and other product liability litigation, disaffected executives from big tobacco, and liberal media types.

In the background of the action depicted in *The Insider* is a novel lawsuit filed in 1994 by the Mississippi State Attorney General to recoup the state's Medicaid and other expenses incurred by treating health problems attributable to smoking.[162] This was an ingenious paradigm shift, from the injuries of arguably undeserving smoking plaintiffs to the injuries of an innocent public nevertheless required to deplete the state treasury while money flowed into the coffers of big tobacco. The Mississippi Attorney General noted, "The industry cannot claim that a smoker knew full well what risks he took each time he lit up. The state of Mississippi never smoked a cigarette."[163] The new litigation was also an example of state power taking on private economic power.

In *The Insider*, the Mississippi lawsuit gets a boost when Jeffrey Wigand, a former executive at Brown and Williamson, gives deposition testimony that the heads of the big tobacco companies lied to Congress when they swore that, to their knowledge, nicotine was not addictive.[164] Wigand, the classic insider turned whistleblower, provided information showing not only that the heads of big tobacco knew nicotine was addictive, but that they authorized steps to spike the levels of nicotine to keep people hooked.[165] What was once a story about warnings and free choice henceforth became a story about misrepresentation, fraud, and the intentional marketing of an addictive drug.[166] In 1998, in the largest settlement of a civil lawsuit in history, the tobacco companies agreed to settle the outstanding claims of forty-six states for $206 billion.[167] In March of 2000, a San Francisco jury awarded a woman dying of smoking-caused illness $20 million in compensatory and punitive damages.[168] In a class-action lawsuit brought on behalf of all Florida smokers, a jury has already held companies responsible and is now considering damage awards that could run into the billions of dollars.[169]

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[161]*The Insider*, *supra* note 20.
[162]Mather, *supra* note 17, at 910.
[163]*Id.* at 911.
[164]*The Insider*, *supra* note 20.
[165]*Id.*
[166]*Id.*
[167]The tobacco industry had already agreed to pay $40 billion to settle the claims of four states. Mather, *supra* note 17, at 898. A previous settlement agreement reached in 1997 would have obligated the companies to pay $368.5 billion and to finance national anti-smoking programs, but that settlement required congressional and presidential approval and it fell apart. *Id.*
[168]*Judge Refuses to Overturn $21 Million Verdict Against PM and RJR*, 15 No. 13 ANDREWS TOBACCO INDUST. LITIG. REP., June 16, 2000, at 8.
[169]*Tobacco Companies Ordered to Pay $145 Billion in Punitive Damages*, 15 No. 15 ANDREWS TOBACCO INDUST. LITIG. REP., July 14, 2000, at 3.

Within the space of six years, the litigation launched by the Mississippi Attorney General has thus brought about tremendous change in the tobacco wars. New legal norms propelled elites into action and changed the way the public at large conceived of the equities between smokers and corporation. However, as opposed to the populist narrative of litigation rising up from the victims, the success here comes from state power taking on big tobacco. In this battle between big government and big tobacco, a key issue is who will get to big media. *The Insider* is a film about the lengths big tobacco went to enlist *The Wall Street Journal* and other conservative media outlets in its efforts to assassinate Jeffrey Wigand's character.[170] Capitulating to market pressures, CBS executives canceled a scheduled interview with Wigand on *60 Minutes*.[171] Only the skills of another consummate insider, *60 Minutes* producer Lowell Bergman, were able to save Wigand's reputation, call off *The Wall Street Journal*, and eventually get the Wigand interview aired on *60 Minutes*.[172]

All in all, recent developments in tobacco litigation fit a Wilsonian model where state power is necessary to check concentrations of private power and where litigation can hammer out new paradigms and new norms in ways that then activate others, change public opinion, and eventually show up in jury verdicts premised on a new moral narrative about smoking and responsibility. In addition, recent state lawsuits against gun producers seeking recovery of the costs of treating gunshot victims demonstrates how a legal norm starting with tobacco may have implications elsewhere.[173]

As of this writing, the end results of the new litigation strategies cannot be predicted. Some wonder where social engineering by litigation will go from here. Will there be lawsuits against the dairy industry for giving us cholesterol? Wilsonians worry about a new power elite of lawyers end-running the legislature and using "impact litigation" to pursue their own reform agenda, accountable to no public authority.[174] Doubts such as these show that the new litigation may produce a Hamiltonian counteraction. In March of 2000, the *New York Times* featured a front-page article tracing the flow of money from plaintiff lawyers enriched by the tobacco settlements to Democratic Party candidates committed to resisting tort reform legislation.[175] Two days prior, the Supreme Court ruled that the Food and Drug Administration

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[170]*The Insider*, *supra* note 20.
[171]*Id.*
[172]*Id.*
[173]*Smith & Wesson Signs Settlement Agreement with Government*, 11 No. 2 ANDREWS CONSUMER PROD. LITIG. REP. May 1, 2000, at 5; *Gun Makers Seek Dismissal of St. Louis Suit*, 10 No. 11 ANDREWS CONSUMER PROD. LITIG. REP., January 2000, at 9.
[174]Barry Meier, *Bringing Lawsuits To Do What Congress Won't,* N.Y. Times, March 26, 2000, §4, at 3.
[175]Leslie Wayne, *Trial Lawyers Pour Money into Democrats' Chests*, N.Y. Times, March 23, 2000, at A1.

(FDA) lacked statutory authority to regulate nicotine as a drug.[176] As a result, the battle continues over the best story to tell about civil litigation over tobacco. Is this suit the mother lode of all lawsuits, bringing windfall profits to elite lawyers but little health protection to the public? Or is tobacco litigation a triumphant display of the power of activist lawyers to take down a corporate menace in control of government all the way from jury to Congress?

V. CONCLUSION

This paper has set forth three narratives around which jurors construct facts and interpret the law in civil trials. Populists tell stories from the bottom up, victims recouping their honor by taking on the giant corporations destroying their communities. Lawyers are rarely the driving forces in populist narrative; they are more likely to be saved and uplifted by the company of ordinary people than the other way around.

Hamiltonians tell a mirror-image story, about victimized corporations and fraudulent plaintiffs served by the big industry of trial lawyers. The undeserving poor in popular welfare legends easily translate into the undeserving plaintiffs in popular jury lore. "Popular justice" is an oxymoron for Hamiltonians. Lawyers are no better than are pickpockets who like their pockets deep.

Wilsonians believe that law, lawyers, and trials can force and direct social change by pushing for new norms. Law never floats free of public opinion and cultural practices, but trials and juries can reconstitute norms in ways that energize social forces ready to apply the norms in practice.

There used to be a fourth narrative about juries and civil litigation. It was the story Alexis de Tocqueville told about the American jury, a more robustly democratic story than is told by any of the three surviving narratives.[177] I close by recounting Tocqueville's democratic discourse on the civil jury, as a way to show the limits of contemporary aspirations for the civil jury.[178]

Tocqueville purposely refrains from defending the jury, whether civil or criminal, as a way of deciding cases.[179] "If it were a question of deciding how far the jury, especially the jury in civil cases, facilitates the good administration of justice, I admit that its usefulness can be contested."[180] Indeed, already in the 1830s, the French visitor had heard arguments that the com-

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[176]Food and Drug Admin. v. Brown & Williamson, 529 U.S. 120 (2000).
[177]*See* ALEXIS DE TOQUEVILLE, DEMOCRACY IN AMERICA 270-76 (Anchor Books 1969).
[178]*See id.*
[179]*Id.* at 270-71.
[180]*Id.* at 271.

plexity of modern lawsuits outstripped the competence of jurors as fact finders.[181] The jury arose "in the infancy of society, at a time when only simple questions of fact were submitted to the courts."[182] Adapting the jury "to the needs of a highly civilized nation, where the relations between men have multiplied exceedingly," is "no easy task."[183]

However, "arguments based on the incompetence of jurors in civil suits carry little weight with me," Tocqueville continued.[184] Partly he thought the concern with "the enlightenment and capacities" of jurors was misplaced, as if the jury were merely a "judicial" institution to be judged narrowly by its use to litigants.[185] More crucially, Tocqueville saw the assessment of juror qualifications as too static, unmindful of the moral uplift and civic education that comes from investing citizens with responsibility for justice.[186] This is the part of the Tocquevillian narrative that has wholly dropped out of contemporary conversation about the civil jury.[187] Ultimately, the jury for Tocqueville was rightly as much a political as a legal institution.[188] The jury was as characteristic of democracy as universal suffrage.[189] Juries took an abstract ideal such as "popular sovereignty" and "really puts control of society into the hands of the people."[190]

Applied to the criminal jury, Tocqueville's emphasis on the jury as a political institution is familiar.[191] Even today, we continue to value the criminal jury as a forum for popular input into the law.[192] However, descriptions of the civil jury as a "political body" are far more jarring to the contemporary ear.[193] Nevertheless, Tocqueville believed the civil jury was more important than the criminal jury as a way of empowering and educating citizens for self-government.[194] The civil jury of the 1830s was "one of the most effective means of popular education at society's disposal."[195] The jury was "a free school which is always open," a place where ordinary citizens rub elbows with the "best-educated" and gain "practical lessons in the law."[196]

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[181] *Id.*
[182] *Id.*
[183] DE TOQUEVILLE, *supra* note 177, at 271.
[184] *Id.* at 275.
[185] *Id.* at 272-73.
[186] *Id.* at 273-75.
[187] *Id.*
[188] *Id.* at 272-74.
[189] DE TOQUEVILLE, *supra* note 177, at 273.
[190] *Id.* at 272-73, 275.
[191] *Id.* at 274-75.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] DE TOQUEVILLE, *supra* note 177, at 275.
[196] *Id.*

Service on civil juries was the principal reason a broad segment of the American public came into "political good sense."[197]

Criminal trials involve the people only "in a particular context," but civil litigation "impinges on all interests" and "infiltrates into the business of life."[198] Few people can imagine themselves a defendant in a criminal trial.[199] However, "anybody may have a lawsuit."[200] Therefore, "[e]ach man, when judging his neighbor, thinks that he may be judged himself."[201] In this way, civil juries "teach men equity in practice."[202]

Far from fomenting class divisions and rich versus poor adversary relations, civil juries moderate popular passions by establishing the judge as legal tutor for jurors.[203] Law is the only aristocratic force left in America, Tocqueville thought, and via the jury, it extends its empire over the common person.[204] "[T]he legal spirit penetrate[s] right down into the lowest ranks of society."[205]

Tocqueville's republican narrative of the civil jury as a crucible of democratic learning is fairly unspoken in America. Hamiltonians scoff at the idea that ordinary people can be brought up to speed by some ritualistic recital of legal instructions. Wilsonians agree that law is a matter for professional elites, not amateurs. Only populists remain enticed by the ideal of participatory democracy. Ultimately, populists lack patience to practice the ideal; they would rather stay home and are aroused to wrest control back from elites only when betrayed. Therefore, the populist tells great stories about muscular juries delivering an occasional blow for the people. However, they do not tell Tocqueville's kind of story, the republican story about the daily, undramatic work of juries, and the slow ways jury duty inculcates habits of persuasion and deliberation, the civic virtues of collective argument upon which self-government depends. For all the popularity of the courtroom drama, there remains no drama since *Twelve Angry Men* that centrally portrays the dynamics of jury deliberation.

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[197] *Id.*
[198] *Id.* at 274.
[199] *Id.*
[200] *Id.*
[201] DE TOQUEVILLE, *supra* note 177, at 274.
[202] *Id.*
[203] *Id.* at 275-76.
[204] *Id.*
[205] *Id.* at 276.

CIVILITY IN THE LEGAL PROFESSION†

Richard R. Sugden*

Throughout his career, Chief Justice Allan McEachern has ensured that British Columbia counsel acted with an appropriate degree of civility towards both each other and the court. Initially he did so by example. His legal career was a paradigm of the vigorous advocate who nonetheless conducted himself in a fashion which was at all times fair and decent. Latterly, as a judge of both the British Columbia Supreme Court and the Court of Appeal, he again led by example. He was unfailingly courteous to all counsel who appeared before him. Perhaps however his most significant contribution to ensuring that civility became entrenched in counsel appearing before B.C. courts was his institution of the Inns of Court program in 1984.

The Inns of Court program in British Columbia followed upon similar initiatives in the U.S. It was, and remains, a mentoring program, intended to promote a heightened sense of professionalism in junior lawyers through informal discourse with more senior members of the bar. Since its inception it has flourished.

The U.S. program was begun in the early 1980s at the urging of former Chief Justice Warren Burger. The initiative was inspired largely by the general perception of increasing incivility in the practice of law.[1] Civility is one of the four cornerstones of the U.S. Inns of Court, the other cornerstones being professionalism, ethics, and competence.[2]

Civility is a value which Justice McEachern has always held dear. In his view, civility is the sine qua non of legal professionalism.[3]

Surprisingly, there is a dearth of Canadian authority regarding civility or its importance in the practice of the legal profession, notwithstanding that the obligation of courtesy is mandated by our Rules of Professional Conduct.[4]

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[1]Rhesa H. Barksdale, *The Role of Civility in Appellate Advocacy*, 50 SO. CAR. L. REV. 573, 576 n.15 (1999).

[2]*Id.* at 577.

[3]This is how Justice McEachern defined civility in a paper on professionalism he wrote for a CLE seminar in 1984.

[4]For example, Chapter IX of the *C.B.A. Code of Professional Conduct* stipulates that when acting as an advocate, the lawyer must treat the tribunal with courtesy and respect. Commentary 14 to the rule states that the lawyer should be courteous and civil to the court and opposing counsel; a consistent pattern of rude, provocative or disruptive conduct might well merit disciplinary action. Chapter XV requires the lawyer to assist in maintaining the integrity of the profession. To this end, commentary 3 stipulates that a lawyer should refrain from writing letters that are abusive, offensive or otherwise inconsistent with the proper tone of a professional communication. Finally, Chapter XVI stipulates that the lawyer's conduct toward other lawyers should be characterized by "courtesy and good faith."

On the other hand, the U.S. authority is voluminous. There are countless surveys, articles reporting the results of those surveys, articles opining on the need for civility, articles decrying the lack of civility, and articles explaining the implications of incivility and how it bodes ill for the legal profession. In addition, within the past decade, the bar associations in a number of U.S. jurisdictions have adopted creeds of civility. One American judge has referred to civility as "the new religion" of the legal profession.[5] The discrepancy would suggest that incivility has not figured as a significant problem in the Canadian legal experience. Perhaps this is because historically we have been influenced in large part by the traditions of the English bar. In a recent article, an American attorney described his experience assisting a barrister in the U.K. and noted the dramatic difference in the atmosphere of civility between American and English proceedings:

> Imagine trials free of objections, with no interruptions for "sidebar" conferences. The spotlight focuses on the witnesses, not the attorneys, and a spirit of accommodation rather than contentiousness reigns. Such trials are not figments of the imagination. They occur every day in England.
>
> In the spring of 1994, I had the opportunity to work with a British barrister [in the U.K.]. . . . During our first trial, I sensed that although the law and the rules of evidence were similar, the atmosphere was significantly different. It was far less combative than American trials. The guiding principle was reasonable accommodation with opposing counsel. Objections were an endangered species. Heated debate was nonexistent. . . .
>
> As I participated more in these trials . . . I realized that the civil atmosphere was more than the sum of the procedural variations [between the two jurisdictions]. *Civility existed because the barristers were intent on maintaining it. They did not justify combative behavior as being necessary to protect their clients' interests. They did not attempt to introduce questionable evidence because they could fashion a "good faith" argument for admission. Barristers saw themselves as filling two roles: the first as advocates for their clients; and the second as officers of the court who have a responsibility to keep the trial process free from the taint of adversarial game playing.*[6]

The above described atmosphere of civility caused a revelation among the author and his American colleagues. They realized that trying a case need not be a painful experience and that litigation could in fact be enjoyable

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[5]Address by Gary M. Farmer, *Nova Law Review* Annual Banquet (Mar. 20, 1999), published as *Civility and Professionalism in Legal Advocacy*, 23 NOVA L. REV. 809 (1999).

[6]Dennis Turner & Solomon Fulero, *Can Civility Return to the Courtroom? Will American Jurors Like It?,* 58 OHIO ST. L.J. 131, 131-32 (1997) (emphasis added) (statement by Dennis Turner).

"when one is confident opposing counsel will not resort to stratagems designed more to distort the quest for truth than to aid it."[7]

Nonetheless, there is a disquieting perception that civility within the Canadian legal profession is on the decline. Recently, for example, the Advocates' Society of Ontario held a forum on civility in the legal profession; this forum was prompted by numerous concerns raised by both lawyers and judges that professional civility had waned. Where once we cut our teeth on the traditions and civilities of the English bar, the impression was that more and more, we are looking to the U.S. to shape our notions as to the acceptable bounds of professional conduct. The "Rambo" lawyer, it seems, has cast a long shadow.

Recently, a fellow lawyer who has been practicing for seventeen years remarked on the increasingly abusive tenor she has observed in letters drafted to opposing counsel by junior members of her firm. When she has pointed out the unnecessarily combative nature of the letter, the reaction has invariably been one of blank incomprehension. It is as if, she lamented, people today are entering the practice of law with the notion that civility is incompatible with good lawyering and that a good lawyer must be more than adversarial; he or she must be as combative and belligerent as possible. If this perception is sound, then Chief Justice McEachern's recognition of the need back in 1984 for a program such as the Inns of Court was indeed prophetic.

THE MEANING OF CIVILITY

"Civility" has attracted a number of interpretations. *Black's Law Dictionary* notes that the word "civil" derives from the Latin adjective "civilis," a term pertaining to a member of the civitas, or the free political community. In the Oxford dictionary, "civil" is also defined as the state of being polite, obliging and not rude.

One legal scholar has defined incivility as any unprofessional conduct which falls short of an express violation of the Rules of Conduct; it includes poor manners, lack of social grace, and any conduct that might impede opposing counsel from accomplishing his or her professional obligations.[8] The latter reference is likely to strike a chord with many litigators; consider how many pre-trial motions seem to be taken not with a view to the merits of the action, but more with a view to obfuscation or delay.

Others have explained the concept more by way of example. Perhaps this is the wiser course because in defining the term, we necessarily limit it.

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[7]*Id.*

[8]Kara A. Nagorney, *A Noble Profession? A Discussion of Civility Among Lawyers*, 12 GEORGETOWN J. LEGAL ETHICS 815, 816 (1999).

One English barrister referred to civility as conduct exemplary of a "gentleman." While this phrasing might seem anachronistic, it was clearly meant to refer to conduct that reflects the golden rule: civility requires simply that a lawyer should accord opposing counsel the same dignity and respect he or she would expect and hope for in return.[9]

Other scholars have considered incivility as conduct which would undermine professional collegiality and the notion that in the adversarial arena, lawyers should "strive mightily but eat and drink as friends."[10] In Lord Hailsham's view, for example, tactics tending to demean or degrade one's opponent are the hallmark of incivility and should be scrupulously avoided:

> [Inadvertent errors by one's opponent] should be remedied with the greatest delicacy and above all one should never seek to humiliate an honourable opponent. This I believe to be part of one's moral duty both to the opponent himself and to the tradition of general decency in which controversy should be conducted whether in litigation or across the floor of the House of Commons.[11]

Other scholars have referred to the "Rambo" lawyer as the quintessential example of incivility. There are six traits that have been identified as characteristic of the Rambo lawyer. These are:

1. A mind set that litigation is war and that describes trial practice in military terms;
2. A conviction that it is invariably in your (and your client's) interest to make life miserable for your opponent;
3. A disdain for common courtesy, assuming it ill-befits a good lawyer and a true warrior;
4. A facility for manipulating facts and engaging in revisionist history;
5. A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding; and
6. An urge to put the trial lawyer on center stage, rather than the client or his case.[12]

To my mind, the one definition of civility that seems to encompass all of these notions is a deceptively simple one: it is the ability to disagree without being disagreeable.[13]

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[9]DAVID NAPLEY, ETHICS AND GENERAL CONDUCT OF COUNSEL AS TECHNIQUES OF PERSUASION 266.
[10]WILLIAM SHAKESPEARE, THE TAMING OF THE SHREW, act I, scene 2.
[11]A SPARROW'S FLIGHT: THE MEMOIRS OF LORD HAILSHAM OF ST. MARLEYBONE 362 (1990).
[12]Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889, 891-92 (1999).
[13]Barksdale, *supra* note 1, at 577.

If civility eludes precise definition, incivility is another matter. Incivility does not need defining; it is something we all recognize at a visceral level when we see it.

THE ROLE OF CIVILITY WITHIN THE PROFESSION

Members of the legal profession are engaged in a common enterprise: to foster the better working of the legal order through the rational resolution of disputes.[14] Our higher purpose, as it were, is to promote the functioning of a just society. Incivility within the legal profession is incompatible with this purpose:

> Civility within the legal system not only holds the profession together, but also contributes to the continuation of a just society. [Our legal system] is markedly adversarial and without something to act as a glue within, its adversarial nature might overrun its underlying goal of preserving liberty and justice. Conduct that may be characterized as uncivil, abrasive, hostile or obstructive necessarily impedes the goal of resolving conflicts rationally, peacefully, and efficiently, in turn delaying or even denying justice. Lawyers have altered the art of argument as a form of discourse into battle, made trial a siege and litigation a war. This mind set eliminates peaceable dealing and often forces dilatory, inconsiderate tactics that detract from just resolution.[15]

Justice Warren Burger referred to civility as the "lubricant" that prevents lawsuits from turning into combat.[16] In his view, civility operates essentially as the gatekeeper of a just society and a watchdog against the invasion of anarchy:

> [W]ithout civility, no private discussion, no public debate, no legislative process, no political campaign, no trial of any case, can serve its purpose or achieve its objective. When men shout and shriek or call names, we witness the end of rational thought processes, if not the beginning of blows in combat. . . .
>
> *With passing time, I am developing a deep conviction as to the necessity for civility if we are to keep the jungle from closing in on us and taking over all that the human hand and brain has created in thousands of years by way of rational discourse and in deliberative processes, including the trial of cases in courts. . . . [C]ivility . . . is the barrier between a courtroom and a bar room brawl.*[17]

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[14]Louis H. Pollack, *Professional Attitude*, 84 A.B.A. J., August 1998, at 66, 67.
[15]Nagorney, *supra* note 8, at 816-17.
[16]WARREN E. BURGER, DELIVERY OF JUSTICE 176 (1990).
[17]*Id.* at 178 (emphasis added).

Civility is also important to the autonomy of the legal profession. As one author argues, the law profession is its own civil society, operating within a larger society. Within this smaller society, civility operates to counterbalance individualist drive with self-restraint and public spirit. The lawyer's capacity for civility mirrors the profession's capacity for dialogue, interaction and co-operation. Incivility within our ranks throws into question the profession's ability to govern its own affairs. As Michael Eizenga wrote in a paper presented at the recent forum for civility held by the Ontario Advocates' Society:

> [T]he tension between self-preserving and community serving goals is deeply imbedded in our self-governing institution. Given the inexorably adversarial nature of the legal system, lawyers are directed to a radical kind of individualism in a contest to trump individual rights with other individual rights. At its worst, this context drives us away from one another and closes minds. Furthermore, this conduct of controversy is most certainly reflected in patterns of discourteous, thoughtless and rude behaviour towards one another. These all too common incidents of uncivil behaviour represent moments when the balance between individual and community has been disrupted. *In my view, if there are expressions of hostility, rudeness or arrogance between lawyers in the courtrooms, in the boardrooms, or in correspondence, then I can no longer see the actors as citizens of our professional civil society. For this is behaviour which has forsaken the essential professional call to participate with each other in balancing the tension between individual excellence and public service. In short, the measure of success for our self-governance is the degree to which the tension between individualism and community mindedness is moderated or balanced.*[18]

In the author's view, civility is embedded in the rule of law and therefore forms the very bedrock of the legal profession. This is not just academic mumbo jumbo; similar notions drove one American court to chastise an abusive litigator in the following terms:

> [V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyers will live with the rules that govern the system. *Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him*

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[18]Michael Eizenga, *Citizenship in the Legal Profession: Civility as an Instrumental Value in Self Governance*, at 2-3. This was one of the papers presented at the recent forum on civility held by the Ontario Advocates' Society.

entry into the justice system to represent his client, and in so doing, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper function of that system.[19]

DECLINE IN CIVILITY: THE U.S. EXPERIENCE

In the 1990s, surveys were undertaken in a number of the federal circuits to determine whether incivility was a problem within the profession. In the Seventh Circuit, of the approximately 1400 judges and attorneys surveyed, forty two percent of the lawyers and forty five percent of the judges thought that incivility was a significant problem. In a 1996 survey of the District of Columbia Circuit, sixty-nine percent of the lawyers responded that incivility was rampant.[20]

The discovery or "deposition" process was identified as a particularly fertile breeding ground for incivility. One commentator has suggested that this is because the process takes place away from the watchful eye of the judiciary; lawyers employing abusive and uncivil tactics in discovery usually know that such tactics would not be tolerated in a court of law.[21]

The main purpose of discovery is to enable a litigant to obtain facts and information from the opposing side; in this way, trial by ambush is avoided. The process assists counsel in assessing the merits of a claim and is an invaluable settlement aid.[22] Increasingly, however, lawyers are using the process as a means to delay the trial of a case. In addition to maximizing billings, the goal seems to be to drive the costs of litigation up to such a prohibitive level that the opposing party has no choice but to capitulate.[23]

The misuse of the discovery process is marked by incivility in many guises: obstructive practices, the making of numerous and pointless objections, ill-mannered remarks during the deposition, instructions by the attorney for the witness not to answer, the use of speaking objections and midtestimony conferences between a lawyer and his or her witness.[24]

One of the more egregious instances of lawyer incivility occurred in *Paramount Communications v. QVC Network*.[25] In that case, a member of

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[19]Washington State Physicians Ins. Exch. v. Fisons Corp., 858 P. 2d 1054 (Wash. 1993) (emphasis added).
[20]These figures are taken from Nagorney, *supra* note 8, at 815.
[21]Alyson Nelson, *Deposition Conduct: Texas' New Discovery Rules End Up Taking Another Jab at the Rambos of Litigation*, 30 TEX. TECH L. REV. 1471, 1474 (1999).
[22]*Id.* at 1471.
[23]Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH L. REV. 955, 977 (1992).
[24]Nelson, *supra* note 21, at 1474.
[25]637 A.2d 34 (Del. 1993).

the Texas bar undertook an expedited deposition of a Delaware witness. The following passage exemplifies the abusive stance adopted by the lawyer:

> A. [Mr. Liedtke, witness for the Texas counsel] I vaguely recall [Mr. Oresman's letter]. . . . I think I did read it, probably.
> Q. [By the Delaware counsel] Okay. Do you have any idea why Mr. Oresman was calling that material to your attention?
> Texas counsel: Don't answer that. How would he know what was going on in Mr. Oresman's mind? Don't answer it. Go on to your next question.
> Delaware counsel: No, Joe,—
> Texas counsel: He's not going to answer that. Certify it. I'm going to shut it down if you don't go to your next question.
> Delaware counsel: No, Joe, —
> Texas counsel: Don't "Joe" me, asshole. You can ask some questions, but get off of that. I'm tired of you. You could gag a maggot off a meat wagon. Now, we've helped you every way we can.
> Delaware counsel: Let's just take it easy.
> Texas counsel: No, we're not going to take it easy. Get done with this. . . .
> Delaware counsel: We will go on to the next question. We're not trying to excite anyone.
> Texas counsel: Come on. Quit talking. Ask the question. Nobody wants to socialize with you.
> Delaware counsel: I'm not trying to socialize. We'll go on to another question. . . .
> Texas counsel: Well, go on and shut up.

After instructing his witness not to talk to Delaware counsel except to respond to questions, he then said: "You fee makers think you can come here and sit in somebody's office, get your meter running, [and] get your full day's fee by asking stupid questions."

The Texas lawyer's conduct did not go unnoticed by the Supreme Court of Delaware. In a blistering addendum to its judgment, the court condemned his conduct as having no place in the practice of law:

> Staunch advocacy on behalf of a client is proper and fully consistent with the finest effectuation of skill and professionalism. Indeed, it is a mark of professionalism, not weakness, for a lawyer zealously and firmly to protect and pursue a client's legitimate interests by a professional, courteous, and civil attitude toward all persons involved in the litigation process. A lawyer who engages in the type of behavior exemplified by [Texas counsel] on the record of the Liedtke deposition is not properly representing his client, and the client's cause is not advanced by a lawyer who engages in unprofessional conduct of this nature. . . .

> [T]he Court finds this unprofessional behavior to be outrageous and unacceptable. If a Delaware lawyer had engaged in the kind of misconduct committed . . . on this record, that lawyer would have been subject to censure or more serious sanctions. While the specter of disciplinary proceedings should not be used by the parties as a litigation tactic, conduct such as that involved here goes to the heart of the trial court proceedings themselves. As such, it cries out for relief. . . .[26]

Although there was no mechanism for the Delaware court to address misconduct by out-of-state lawyers, the court held that it would be appropriate to take into account Texas counsel's behaviour should he, in the future, apply to appear in any proceedings in Delaware.

Counsel's response to the Delaware court was chillingly defiant. He vilified the judge who wrote the judgment as someone who thought he was Emily Post and called the other judges "bureaucrats in robes."[27] It bears noting that the lawyer in question has enjoyed enormous financial success as a lawyer.[28] His blatant denigration of the judiciary and the sensibilities of the very profession which allowed him such success highlights the fundamental problems with lawyers who are uncivil. They may actually profit from conduct which is outrageous.

REASONS FOR DECLINE IN CIVILITY

Numerous factors have been identified as responsible for the decline of civility within the profession.

1. Decline in Professionalism

One of the more disturbing reasons that is commonly cited is the increasing commercialization of the practice of law. The perception is that law is becoming more a business and less a professional calling. This shift in perspective legitimizes the view that winning is to be gained at all costs. This view is often rationalized on the basis of the lawyer's obligation to represent his client zealously. This obligation is seen by some to trump all other professional obligations and to justify abusive tactics. As was stated by U.S. District Justice Marvin Aspen, the chair of the Seventh Circuit's Committee on Civility:

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[26]*Id*. at 54-55.

[27]These remarks are referenced in the article by Nelson, *supra* note 21, at 1477.

[28]*See* Lydia P. Arnold, *Ad Hominem Attacks: Possible Solutions for a Growing Problem*, 8 GEO. J. LEGAL ETHICS 1075, 1091 (1995). The author describes the offending lawyer's success as being in the billions of dollars. The author argues that this kind of success coupled with the vitriolic means by which it has been achieved sends mixed messages and cannot help but foster the impression that such tactics are essential to good lawyering.

> [Some trial lawyers] would argue that the duty to represent a client zealously is paramount to the administration of justice, even when it conflicts with any obligations of professionalism. That, in essence, forms the core of the debate over the decline of civility in the profession. The Rambo lawyers invariably wrap their tactics in the cloak of zealous advocacy. To do less, they maintain, is to fail to put the interests of their client first.[29]

To the extent this view is driven by the financial bottomline, it strikes at the very heart of law as a profession.

Roscoe Pound, the former dean of Harvard Law School, discussed the notion of professionalism as follows:

> The term refers to a group of men pursuing a learned art as a common calling in the spirit of public service—no less a public service because it may incidentally be a means of livelihood. *Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose*. Thus, if an engineer discovers a new process or invents a new mechanical device he may obtain a patent and retain for himself a profitable monopoly. If, on the other hand, a physician discovers a new specific for a disease or a surgeon invents a new surgical procedure they each publish their discovery or invention to the profession and thus to the world. If a lawyer has learned something useful to the profession and so to the administration of justice through research or experience, he publishes it in a legal periodical or expounds it in a paper before a bar association or in a lecture to law students. It is not his property. He may publish it in a copyrighted book and so have rights to the literary form. . . . But the process or method or developed principle he has worked out belongs to the world.[30]

So the lawyer who crafts an argument in lonely isolation, who wins the client's case and in the process changes the law significantly (think of *Donoghue v. Stevenson*) achieves personal gain; but the results of the lawyer's efforts transcend that gain. Ultimately, they redound to the benefit of the greater body of society.

As has been touched upon above, the attributes of professionalism have important implications for the autonomy of the legal profession. Historically, the view has been that only professionals are capable of setting and enforcing appropriate standards for members of their group; that non-professionals

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[29]Marvin E. Aspen, *Let Us Be Officers of the Court*, 83 A.B.A. J., July 1997, at 94, 95.
[30]ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5-6 (1953) (emphasis added).

are not able to identify improper conduct; and that therefore, while government is able to regulate other occupations, its only option with respect to professions is to delegate to professionals the power to administer their own affairs.[31] Our professionalism, in other words, is the justification of our right to self-govern. Conduct which derogates from our professional character necessarily places this right at risk. As one Canadian judge has observed, the increasing obsession with the financial bottom line has caused a perception in the public that the legal profession has adopted the practices, not of a profession, but a trade. This cannot help but bode ill: If lawyers treat law exclusively as a business, the public may well ask why they should be accorded the independence of a profession.[32]

2. Expansion of the Bar

Another factor commonly cited as contributing to the decline in civility is the explosive growth in the number of practicing lawyers.[33] The expansion of the bar has led to greater competition and increased pressure; it has also tended to depersonalize practice. Many lawyers believe they will never run into the same opposing counsel twice.[34] The notion that "what goes around, comes around" as an incentive for civility becomes all but lost.[35]

3. Media Distortion and the Wants of the Client

Some point to the take-no-prisoner, Rambo-like lawyer popularized in recent movies and television series. As one author has noted, many people entering law school and practice today suffer from the *L.A. Law* syndrome, believing that the legal profession is one of affluent, powerful and glamorous hucksters.[36] They have no understanding of the lawyer's equivalent to the code of chivalry—the notion that one is free to deliver hard blows but not to strike foul ones—and consider civility as something of a quaint anachronism.[37]

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[31]Manitoba Law Reform Commission, Regulating Professions and Occupations 4 (1994).
[32]Rosalie Abella, 10 CBA Bar Talk, no. 2, at 17-18 (1998).
[33]Cook, *supra* note 23, at 961. Justice Cook notes that between 1960 and 1992, the number of U.S. lawyers tripled; the net increase amounted to approximately 28,000 attorneys a year. Justice Cook also observes that the rate of growth in the attorney population has surpassed the rate of growth of the general population and that U.S. lawyers now represent over two thirds of the world's lawyers.
[34]Arnold, *supra* note 28, at 1087-88.
[35]*But see* John P. Dolan, *Courtesy Is Its Own Reward*, 83 A.B.A. J., Jan. 1997, at 104. The author argues that bullying tactics inevitably bring some kind of payback down the road. The author recounts an incident where he witnessed a fellow lawyer bullying and berating an airport counter attendant and invoking the fact that he was a lawyer to add some measure of force. When the author asked the attendant how he was able to handle such abuse so calmly, the attendant responded ever so politely: "He's going to Pittsburgh; his bags are going to Paris."
[36]Arnold, *supra* note 28, at 1089.
[37]*Id*., quoting from Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81 (1991).

The consequences of this kind of media portrayal are twofold.

First, it operates as an "inference of permissibility" for abusive advocacy.[38]

Second, it distorts the perception of what good advocacy in fact is and affects both what people seek in a lawyer and what lawyers strive to become.[39] Increasingly, clients are demanding unnecessarily aggressive and offensive tactics, and increasingly, lawyers are willing to oblige for fear that civility will be taken as a sign of weakness. The phenomenon is described by one author as follows:

> Increasingly lawyers feel under pressure by their clients to engage in hardball tactics and aggressive . . . behavior. Some attorneys believe that being civil is either a sign of weakness or will be perceived as such and therefore adopt an obnoxious attitude. This is often encouraged by clients who believe the only effective attorneys are the "bastards." Clients feel much more able to push their attorneys into less civil behavior with implied or overt threats of taking their business elsewhere than they have been in the past.[40]

The fallacy, of course, is that uncivil and abusive tactics are inimical to effective advocacy and service of the client's best interests. Such tactics have the effect of making litigation an end unto itself. They invite retaliation from opposing counsel; litigation is delayed and prolonged; and in the process, the goal of an efficient and rational resolution is all but lost. The end result is far higher costs to the client.[41] As one large firm litigation lawyer responding to the Seventh Circuit's Survey on Civility observed:

> When a lawyer behaves uncivilly, contentiously opposing everything his opponent proposes, both litigants suffer because they must pay even higher attorneys' fees and the disposition of the case is delayed. It is no secret that a lawyer's contentiousness causes more work for the lawyer on both sides and slows down the progress of the litigation. *And I have not seen a shred of evidence that such conduct advances the client's interest one iota*.[42]

If clients realized how much more costly representation by a combative lawyer is, perhaps civility would be recognized for what it is: in Chief Justice McEachern's words, the sine qua non of professionalism. To this,

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[38]Farmer, *supra* note 5, at 811.
[39]Nagorney, *supra* note 8, at 821.
[40]Arnold, *supra* note 28, at 1088.
[41]Cook, *supra* note 23, at 977.
[42]Final Report of the Committee on Civility of the Seventh Federal Judicial Circuit 3 (1992) (emphasis added).

one might add: the sine qua non of effective advocacy and service in the client's best interests.

4. Judicial Conduct

It has been suggested that responsibility for the decline in civility to some extent lies with the judiciary. Namely, there is the problem of judicial tolerance. Whenever the judiciary turns a blind eye to uncivil practice, the suggestion goes, they inadvertently validate it.[43]

5. Incivility as a Societal Problem

In the Seventh Circuit's Final Report on Civility, the Committee acknowledged the complex causes and manifestations of incivility in society at large as contributing factors to civility problems within the legal profession. One of the judges surveyed made the following observation:

> Today our talk is coarse and rude, our entertainment is vulgar and violent, our music is hard and loud, our institutions are weakened, our values are superficial, egoism has replaced altruism and cynicism pervades. Amid these surroundings, none should be surprised that the courtroom is less tranquil. [As] Cardozo [reminded] us, judges are never free from the feelings of the times.[44]

It does not behoove the profession to excuse incivility as a reflection of the times. As the president of the American Bar Association recently stated, lawyers should be leaders. The very nature of our professional calling demands that we oppose any trend that threatens civil discourse.[45]

CONSEQUENCES OF INCIVILITY

The consequences of incivility have been touched upon throughout this essay. They do, however, warrant a brief repeating.

First and foremost, incivility among lawyers debases our profession in the eyes of the public. The legal profession and its members are dedicated to the greater good of a just society. A just society is characterized in large part by its ability to transcend the Oresteian thrall of vengeance and fury and to resolve disputes dispassionately, through rational and civil discourse. If lawyers cannot maintain civility within their own profession, then quite rightly their ability to fulfill the larger objects of their profession comes into question. Practically speaking, this compromises our autonomy and our right to self-governance.

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[43]Nagorney, *supra* note 8, at 820.
[44]Final Report, *supra* note 42, at 3.
[45]N. Lee Cooper, *Courtesy Call*, 83 A.B.A. J., March 1997, at 8.

Second, incivility serves no useful purpose. True, it may appease clients who think that Rambo tactics are attributes of good lawyering. The reality, however, is that abusive and uncivil conduct invariably costs the client a great deal more. Incivility often invites retaliation by opposing counsel and inevitably leads to protraction of the proceedings and delay in resolution. In these circumstances, the lawyer prospers, the client suffers, and, in the process, the reputation and integrity of the profession is called into question.

Third and finally, incivility robs the practice of law of any pleasure. Harken back to the comments of the U.S. attorney regarding the atmosphere of civility in the U.K. legal profession and his consequent revelation that the practice of law could actually be enjoyable.[46] This observation is telling. Recent surveys suggest that an increasing number of lawyers are unhappy in their profession.[47] To the extent incivility has contributed to this malaise, we must rethink how we treat one another. Otherwise we stand to lose worthy members of the profession.

POSSIBLE SOLUTIONS

There are a number of methods by which the tide of incivility might be stemmed.

1. Education

Education, of course, springs quickly to mind. Just as civility and ethics should pervade all areas of legal practice, so too should they pervade all areas of legal education. As Justice Burger stated:

> The legal system that waits to train its ministers how to act and behave professionally until they are chronologically mature is in much the same situation as parents who wait to try to teach their offspring table manners until after they reach voting age. . . . It can't be done at that point.[48]

In Justice Burger's view, law schools have the first and best chance to inculcate the understanding that civility is basic to the proper administration of justice.[49] Other academics concur; if law students are obliged to consider

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[46]Turner & Fulero, *supra* note 6.
[47]In C. Wilson, *Quod Vide: A Matter of Public Trust*, 1998 NATIONAL 20, 25, reference is made to a survey in which more than 50% of the lawyers responded that they would choose another profession if they had the chance. The article also notes that depression among lawyers is higher than among 103 other occupations.
[48]BURGER, *supra* note 16, at 176.
[49]*Id*. at 175.

civility from the outset of their legal education, they are more likely to enter the profession assuming that it is a quality essential to the practice of law.[50]

2. Civility Creeds

A number of U.S. jurisdictions have attempted to address the problem through the promulgation of civility creeds and courtesy codes. What follows is a sampling of the Texas creed:

> II. LAWYER TO CLIENT
>
> . . . .
>
> 4. I will advise my client that civility and courtesy are expected and are not a sign of weakness. . . .
>
> 6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
>
> 7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
>
> 8. I will advise my client that we will not pursue tactics which are intended primarily for delay. . . .
>
> 10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel. . . . A client has no right to instruct me to refuse reasonable requests made by other counsel. . . .
>
> III. LAWYER TO LAWYER
>
> . . . .
>
> 7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond. . . .
>
> 9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. . .
>
> 10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel. . . .
>
> 16. I will refrain from excessive and abusive discovery.

[50]Nagorney, *supra* note 8, at 826.

> 17. I will comply with all reasonable discovery requests. . . . I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. . . . I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.[51]

The difficulty, however, is that civility creeds are aspirational in nature and their enforcement is problematic.[52] As one commentator has noted, without the possibility of enforcement, such creeds or the like may not make much difference.[53] For this reason, some academics have argued that a rule of professional conduct mandating civility would be more effective.[54]

3. Rules of Procedure

In some U.S. jurisdictions, the problem of incivility has also been addressed through revision of the rules of civil procedure. In Texas, for example, argumentative or suggestive objections are grounds for terminating the deposition or assessing costs or other sanctions. The Texas rules also stipulate a six-hour maximum for oral depositions; the rationale is that lawyers will be less inclined to waste time by engaging in unnecessarily abusive conduct or pointless objections.[55]

4. Judicial Activism

Others have argued that more judicial activism is required and that in addition to demanding better attorney conduct, the judiciary should itself act as the exemplar of civility.[56] However, as the Seventh Circuit's Committee on Civility cautioned, we should not place the responsibility on the judiciary in order to escape our own:

> Judicial leadership, like civility itself, cannot be legislated or mandated. If change is to come, *it must stem from the individual effort of each participant in the litigation process as part of a personal obligation assumed equally by lawyers and judges*.[57]

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[51]The Creed in its entirety is reproduced in Justice Cook's article, *supra* note 23, at 1001-04.
[52]Although this has not prevented courts from imposing sanctions for flagrant demonstrations of incivility. One of the more famous cases in this regard is *Dondi Properties Corp. v. Commerce Savings & Loans*, 121 F.R.D. 284 (N.D. Tex. 1988). In that case, the court warned that if counsel did not take heed of the tenets of the civility creed, they would meet with sanctions ranging from a "warm friendly discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions or other measures appropriate to the circumstances." *Id*. at 288.
[53]*See e.g*. Arnold, *supra* note 28, at 1093.
[54]Nelson, *supra* note 21, at 1493.
[55]Nagorney, *supra* note 8, at 823.
[56]Final Report, *supra* note 42, at 4.
[57]*Id*. (emphasis added).

CONCLUSION

It is questionable whether incivility in the Canadian legal profession is as grave a problem as it appears to be in the U.S. Hopefully, it will never become so. Nonetheless, the American experience is a cautionary one. If we do not yet have the need to promulgate codes of civility and the like, this should not cause us to be less vigilant or unforgiving of incivility in all its guises. Perhaps our own intolerance is ultimately the most effective solution. As Justice Warren Burger stated:

> [T]he overwhelming majority of judges and lawyers comply with basic standards of good manners and professional decorum—the civility that is the barrier between a courtroom and a bar room brawl. We know that only a small fragment of reckless, irresponsible lawyers are guilty. Some few of them seem bent on destroying the system and some are simply ill-trained, ill-mannered and undisciplined noise makers. But there again we return to the concept so eloquently stated by Archibald Cox to the rowdy Harvard students—and I paraphrase him again—*we cannot tolerate incivility in a few without encouraging it in many*.[58]

Chief Justice McEachern, through both his career and his specific initiative of the Inns of Court program, recognized the importance of ensuring that lawyers who practice in the courts in British Columbia do so in a proper fashion. The Inns of Court program therefore was fashioned as a series of papers and talks prepared by senior counsel on matters as mundane as the role of counsel in the production of documents to rather more vital subjects, including professionalism and civility. The purpose of the exercise was clear: to ensure that lawyers in this jurisdiction learn the proper way to conduct themselves throughout the litigation process. The program has been a success. It is to the great credit of Chief Justice McEachern, his leadership and his foresight, that the importance of civility in our profession has been kept in the foreground.

[58]BURGER, *supra* note 16, at 178.

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