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CACOPHONY, CONVERSATION, AND COMMON SENSE

William Haltom*

STEPHEN DANIELS & JOANNE MARTIN, *TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE* (UNIVERSITY PRESS OF KANSAS 2015). PP. 257. HARDCOVER \$37.50.

Stephen Daniels and Joanne Martin adduce in *Tort Reform, Plaintiffs' Lawyers, and Access to Justice*¹ the general claim that tort reforms in Texas have so shifted potential plaintiffs' access to lawyers that the adversarial system in civil matters has been compromised severely, perhaps even beyond consequences intended by tort reformers or policymakers. Daniels and Martin show how economic and business consequences of laws and policies in Texas, combined with twenty-first century shifts in the practice of civil law, are driving plaintiffs' attorneys from certain kinds of practice, redirecting their "portfolios" of cases and exertions, or both. As a result, both the access to civil justice that contingency fees promote and much of the gatekeeping trial lawyers have long performed are diminishing. Whether as a deliberate strategy or as an unintended consequence, tort reform in Texas [and *mutatis mutandis* elsewhere in the United States] has made, and threatens to make, civil justice less accessible than before and redress of civil wrongs less likely for have-lesses and have-nots than before. Any student of the sociology of law in general or of U.S. civil litigation in particular must shudder at the prospects the authors ground in their fine study.

Daniels and Martin buttress their general claim by means of concrete data and straightforward history. In marked contrast to the "common sense" generated by insurance companies and tort reformers over the last decades by means of anecdotes and myths, Daniels and Martin interviewed 156 plaintiffs' attorneys intensively and surveyed plaintiffs' attorneys in 2000 and 2006.² In addition, the authors drew on surveys of the Texas Bar by others and archival information regarding the evolution of Texas plaintiffs' attorneys. The authors' tracing of data based on multiple, varying

* Professor, Politics and Government, University of Puget Sound. Disclosure: Professor Haltom recommended that the University Press of Kansas publish this book.

1. STEPHEN DANIELS & JOANNE MARTIN, *TORT REFORM, PLAINTIFFS' LAWYERS, AND ACCESS TO JUSTICE* (2015).

2. *Id.* at 233.

sources of information differs greatly from the anecdotal casuistry that has long characterized partisan, ideological, and other politicized arguments about civil justice and tort reform.³ That casuistry has, for more than three decades, put the phony in cacophony and the nonsense in “commonsense tort reform.” The authors’ deft attention to the actual practice of plaintiffs’ attorneys contradicts the caricatures and cartoons favored and foisted by the American Tort Reform Association, local astroturf groups funded by Big Tobacco and other interests, and other sources of misinformation and disinformation.

The authors lead readers from an overview of American-style tort reform in chapter one and a case study of specific tort reforms by Texas’s legislatures and courts in chapter two, to a history of Texas trial lawyers in chapter three. These chapters situate the authors’ focus on Texas within broader issues that cross states’ boundaries. The authors then examine the professional identities and interrelations of referring lawyers and civil litigators in chapter four and the plaintiffs’ bar in chapter five. These chapters reveal the individual and collective levels of civil practice in Texas. Specifically, effects and ramifications of tort reforms on individual referrals and individual and collective reputations of trial lawyers in chapter six and ramifications of caps on damages and other changes in civil justice systems for malpractice cases in chapter seven show how the practice of civil litigation has shifted to advantage even more the haves. This intensifying focus on everyday implications of alleged reforms that advocates proclaim to be common sense alerts readers to civil justice realities that billboards and electioneering obscure.⁴

Thus, this book teems with implications for national policy-making and politicking at its beginning and at its end, but furnishes information and insights available nowhere else in between. In chapters four through seven, the authors tease from subnational data insights that inform analysis far beyond breezy characterizations of an alleged “litigation explosion” across the United States or a conjured “judicial hell-hole” in a state targeted for tort reform to reveal civil justice and trial lawyering on the ground.⁵ In a concluding chapter, the authors then drive home their crucial message for students of law in society and for the few citizens paying enough attention: “Unless there’s a way to make money practicing law, rights don’t make any difference.”⁶

Given these implications, this book promises to enhance at least three conversations. Perhaps the most important, and certainly the most far-reaching conversation to which the authors contribute, concerns contingency-fee litigation. The authors enrich understanding of a feature of the U. S. civil justice system—chronic yet occasionally acute—that shapes elite and popular conceptions, imaginations, and thus discourse. The contingency fee may be and therefore is easily and facilely caricatured

3. *Id.*

4. *Id.* at 67-68.

5. *Id.*

6. *Id.* at 239.

in and through public relations, both scapegoated and glorified as symbolic politicking and image-laden governance in late-night television commercials and Hollywood features.⁷ That links *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* to such studies as Marc Galanter's corpus,⁸ Lynn Mather's analyses of tobacco litigation in popular media,⁹ Tom Baker's,¹⁰ Chuck Epp's,¹¹ Michael McCann's, and my studies,¹² to specify but a few (and to omit extensive, respected, published work by Daniels and Martin themselves].). While in this regard the book might appear more appropriate for specialized, graduate-level instruction than for undergraduate instruction, "Law and Society" courses for undergraduates in social sciences would definitely find this work useful in any format that contrasted apparent with actual civil justice. The authors' highlighting of the gatekeeping and law-shaping roles of plaintiffs' attorneys will give readers access to some of the systemic consequences of capping damages and otherwise "reforming" contingency fees.

Moreover, this book contributes to conversations about consequences of changes in civil justice policies and ramifications of efforts to "reform" tort litigation to suit the interests of well-positioned lobbyists and politicians and so will intrigue students of policy, policy-making, and especially the impact and outcomes of changes in policies. As a result, the authors correspond with scholarly studies of "adversarial legalism"¹³ (from Bob Kagan,¹⁴ Martha Derthick,¹⁵ Tom Burke,¹⁶ and Carl Bogus¹⁷) as well as popular screeds concerning tort reform from Walter Olson¹⁸ to Ralph Nader *et al.*¹⁹ This range of "correspondence" would, in my view, make the book valuable for graduate classes and undergraduate classes alike. Daniels and Martin

7. I have in mind ERIN BROCKOVICH (Universal Pictures 2000) and THE VERDICT (Twentieth Century Fox Film Corporation 1982), but the list of films that involve contingency negotiation and litigation is far longer and includes a recent documentary, "HOT COFFEE: IS JUSTICE BEING SERVED?" (The Group Entertainment 2010). Please see Michael McCann and William Haltom, *Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in "Erin Brockovich" and Other Contemporary Films*, LAW & SOC. INQUIRY (2008).

8. Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (2006).

9. Lynn Mather, *Theorizing about Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, LAW & SOC. INQUIRY (2006).

10. TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2007).

11. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE (2010).

12. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004); Michael McCann, William Haltom, & Shauna Fisher, *Criminalizing Big Tobacco: Legal Mobilization and the Politics of Responsibility for Health Risks in the United States*, 38 LAW & SOCIAL INQUIRY 288 (2013).

13. *See generally*, CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW (2003); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY (2002); MARTHA A. DERTHICK, UP IN SMOKE: FROM LEGISLATION TO LITIGATION IN TOBACCO POLITICS (2001); ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

14. KAGAN, *supra* note 13.

15. DERTHICK, *supra* note 13.

16. BURKE, *supra* note 13.

17. BOGUS, *supra* note 13.

18. WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992); WALTER K. OLSON, THE RULE OF LAWYERS: HOW THE NEW LITIGATION ELITE THREATENS AMERICA'S RULE OF LAW (2002).

19. RALPH NADER, WESLEY J. SMITH, & MICHAEL MENDELSON, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (1998).

model grounded, concrete, realistic, and painstaking inquiry that penetrates rhetoric and imagery to say what differences policies have made or are making. The book would profit as well policy wonks (especially in state capitals) and pundits (both in leading local papers and in the national press) who could get beyond ideological shibboleths and partisan sloganeering. If the chattering classes, including chattering professors and legal academics, neither note nor understand the costs and risks of reducing contingency-fee practice and undermining gatekeepers of civil recompense, then tort politics is distorted and no publics are educated. Even attentive citizens sophisticated enough to persevere through precise, measured prose could enhance their understanding of civil justice and litigation through this work.

In addition, the book contributes to significant, substantial discourse in socio-legal studies regarding trial lawyers as agents who must stay in business and regulate the transformation of disputes into settlements and cases in the system of civil justice in the United States. I expect law school professors and students, social scientists, public intellectuals, and other academics to be interested in and informed by Daniels and Martin's specific findings and general characterizations. In particular, this book nicely complements and even advances the studies of Herbert Kritzer²⁰ in depicting the professional experiences and commercial vicissitudes that shape civil justice and civil practices "on the ground" every day.

Both the sociological and the political-scientific aspects of the book make Daniels and Martin's studies of tort policies of vastly greater value to lawyers, legal academics, and judges as well as bar than any other study I know. Indeed, to the best of my knowledge, the only scholarship that competes with this book would be articles by Daniels and Martin that have graced law reviews and other scholarly journals or professional outlets over the last decades.

Having noted the contributions this book will make to various conversations, I concede that every student of civil justice and workaday litigation must wonder whether scholarship can overcome, even in the short run, well-financed cacophony and skillfully fabricated common sense. The authors cite recent work from popularizers, such as Walter Olson, to scholarly specialists, such as Herbert Kritzer, and many scholarly polemicists in between (for example, Lester Brickman²¹). The authors also connect twenty-first century civil-justice politicking to enduring dilemmas and questions from longstanding conflicts. The authors dexterously interweave chronic, large-scale features and foibles of U.S. systems of civil litigation into contemporary, statewide facts and faults of Texas-style civil justice, which may incline pessimists and realists alike to wonder what may or will be done. In politics national and subnational in which masters of imagery, spin, symbols, and marketing routinely sweep away meticulous, accurate, precise, and fair (in the case of Daniels and Martin, even generous) students of lawyerly practice and civil-justice realities, scholars should not overesti-

20. HERBERT KRITZER, *THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION* (1990); HERBERT KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATING PROCESS IN ORDINARY LITIGATION* (1991); HERBERT KRITZER, *RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES* (2004).

21. LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* (2011).

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mate their capacity to deflect interests and resources from continuing their dominance. Nonetheless, studies such as *Tort Reform, Plaintiffs' Lawyers, and Access to Justice* speak truths to those who will read and think, and Daniels and Martin rely on readers and thinkers thence to speak some truths to some powers. Whether that "Texas two-step" can thwart or turn back the cacophony or nonsense that is all too common, scholars can seek to know. Daniels and Martin have sought and obtained knowledge. Beyond that, in the conclusion of their book, the authors note that trial lawyers in Texas have adapted as best they can to civil justice capped by arbitrary limits on damages and to victims' access to civil litigation that fosters negotiation "in the shadow of the courthouse." Through cunning and commitment, then, practitioners may yet keep ajar the doors of courthouses in Texas and across the land.