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THE JURY AND POPULAR CULTURE

Jeffrey Abramson*

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.

* Louis Stulberg Professor of Law and Politics, Brandeis University. Ph.D., Harvard University 1977; J.D., Harvard Law School 1978. Author of *JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* (2d ed. 2000).

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).

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 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 WR 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

3. GRISHAM, *supra* note 2, at 379 (1996).

4. The names of the 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., 1999/2000 Winter, 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.*

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 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 50 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

7. ERIN BROCKOVICH (Universal Studios 2000) (dramatizing a fictional story based on actual events).

8. *Id.*

9. GRISHAM, *supra* note 2.

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).

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 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

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).

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).

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, 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

21. HARR, *supra* note 5.

22. MATHER, *supra* note 17, at 928-29; GRISHAM, *supra* note 2.

23. TWELVE ANGRY MEN (MGM/UA 1957).

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 non-fiction 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, 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

24. ERIN BROCKOVICH (Universal Studios 2000); HARR, *supra* note 5.

25. ERIN BROCKOVICH (Universal Studios 2000).

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. ERIN BROCKOVICH (Universal Studios 2000).

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 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

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *ERIN BROCKOVICH* (Universal Studios 2000).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

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 associate 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

43. ERIN BROCKOVICH (Universal Studios 2000).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. ERIN BROCKOVICH (Universal Studios 2000).

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 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

50. *Id.*

51. *Id.*

52. *Id.*

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, at 246-27 (1996) (summarizing research which indicates that jurors do hold corporations to a higher standard of responsibility than non-corporate defendants).

55. ERIN BROCKOVICH (Universal Studios 2000).

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 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

56. *Id.*

57. HARR, *supra* note 5.

58. ANTHONY LEWIS, GIDEON'S TRUMPET (1964).

59. HARR, *supra* note 5.

60. *Id.*

61. *Id.*

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.

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 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

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.

71. *Id.* at 453.

72. *Id.* at 56-66.

73. *Id.* at 56-66.

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 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.

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.

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*.

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 hospital.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 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" over the years of TCE, 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, 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

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.*

91. *Id.* at 155-78.

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 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 "Sep-

92. *Id.* at 185.

93. *Id.* at 187-98.

94. HARR, *supra* note 5, *passim*.

95. *Id.* at 164-68.

96. *Id.* at 287, 390.

97. *Id.* at 286-87.

98. *Id.* at 291-403.

99. *Id.* at 286-403.

100. HARR, *supra* note 5, at 381-92.

101. *Id.* at 391.

102. *Id.* at 391-93.

tember, 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 juries 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 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

103. *Id.* at 392.

104. *Id.* at 394.

105. *Id.* at 456.

106. HARR, *supra* note 5, at 368-69.

107. *Id.* at 258-88.

108. *Id.*

109. *Id.* 87-488.

110. *Id.* at 456.

111. *Id.* at 369.

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 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

112. HARR, *supra* note 5, at 377-401.

113. *Id.* at 281.

114. *Id.* at 282.

115. *Id.* at 284.

116. *Id.* at 282.

117. *Id.* at 284, 382.

118. HARR, *supra* note 5, at 382.

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 anti-trust cases, probabilities and risk assessment in products liability trials, and standards of care among neo-natologists.

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 lavish party that night, or about the jury that

119. *Id.* at 442-53.

120. *Id.* at 452.

121. *Id.*

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, or 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

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 ASSOCS., *A SURVEY OF THE ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM* 4-5 (1993)).

129. *Id.*

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, 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' 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

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.

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 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

139. *THE SWEET HEREAFTER*, *supra* note 12.

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.

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 litigiousness 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 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 in-

152. *Id.*

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.

creased 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 cigarettes.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 his-

158. MATHER, *supra* note 17, at 905-06.

159. *Id.* at 905.

160. *Id.* at 906.

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.*

tory, 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

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

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.

170. *THE INSIDER*, *supra* note 20.

171. *Id.*

172. *Id.*

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 (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"

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.

176. *Food and Drug Admin. v. Brown & Williamson*, 529 U.S. 120 (2000).

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 complexity 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

177. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270-76 (Anchor Books 1969).

178. *See id.*

179. *Id.* at 270-71.

180. *Id.* at 271.

181. *Id.*

182. *Id.*

183. DE TOCQUEVILLE, *supra* note 177, at 271.

184. *Id.* at 275.

185. *Id.* at 272-73.

186. *Id.* at 273-75.

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 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

187. *Id.*

188. *Id.* at 272-74.

189. DE TOCQUEVILLE, *supra* note 177, at 273.

190. *Id.* at 272-73, 275.

191. *Id.* at 274-75.

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* DE TOCQUEVILLE, *supra* note 177, at 275.

196. *Id.*

197. *Id.*

198. *Id.* at 274.

199. *Id.*

200. *Id.*

201. DE TOCQUEVILLE, *supra* note 177, at 274.

202. *Id.*

203. *Id.* at 275-76.

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.

204. *Id.*

205. *Id.* at 276.

