

"The Verdict" Is In: The Civic Implications of Civil Trials

Richard H. Weisberg

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Richard H. Weisberg, *"The Verdict" Is In: The Civic Implications of Civil Trials*, 50 DePaul L. Rev. 525 (2000)
Available at: <https://via.library.depaul.edu/law-review/vol50/iss2/6>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact wsulliv6@depaul.edu, c.mcclure@depaul.edu.

“THE VERDICT” IS IN: THE CIVIC IMPLICATIONS OF CIVIL TRIALS

Richard H. Weisberg

This article is intended as a commentary on Austin Sarat’s *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*,¹ Stephen Daniels’ and Joanne Martin’s “*The Impact That it has had is Between People’s Ears:” Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*,² and Jeffrey Abramson’s *The Jury and Popular Culture*.³ These three papers convey, variously, a sense of the civic implications of civil trials. All of them assess the fascinating trend towards civil litigation—its labored processes, its aggressive plaintiffs’ lawyers, its juries burdened with translating pain and suffering into dollars and cents. These scholars help us to situate troubling, highly recent, shifts in the public’s valuation of personal injury law. I want to add to their contributions by reminding their readers how only twenty years ago private lawsuits overwhelmed criminal trials in the popular imagination of Americans, how Hollywood helped heroicize the plaintiff’s bar, and how (perhaps) Americans’ sense of the rightness of personal injury remediation still prevails over the shifts in attitude these three articles announce.

Until fairly late into the Twentieth Century, private actions for money judgments rarely saw the light of day in either the newspapers or the wider culture because they were buried under the dramatic topsoil of criminal law. As these writers demonstrate, the last quarter-century changed this situation. Headlines scream forth multi-million dollar judgments for spilled coffee and defective toasters. Changes in the law, which in fact originated in judgments by progressive men and women such as Benjamin N. Cardozo and Rose Bird, permit a perception of products (and of accidents more generally) that place them in the same fearsome genus once occupied only by wild animals (or ultra-hazardous endeavors such as sand blasting). While viewing the realities around us as threatening, including and especially the artifacts

1. See Austin Sarat, *Exploring the Hidden Domains of Civil Justice: Naming, Blaming, and Claiming* in *Popular Culture*, 50 DEPAUL L. REV. 425 (2001).

2. See Stephen Daniels & Joanne Martin, “*The Impact That It Has Had Is Between People’s Ears:” Tort Reform, Mass Culture, and Plaintiffs’ Lawyers*, 50 DEPAUL L. REV. 453 (2001).

3. See Jeffrey Abramson, *The Jury and Popular Culture*, 50 DEPAUL L. REV. 497 (2001).

we ourselves have wrought, we increasingly look to the law in order to remedy injuries that earlier generations might have seen as the inevitable costs of living and taking risks in the world. Such a paradigm shift has captured the imagination of non-lawyers whose stories about tort cases fill newspapers, novels, and movie screens.

The new element in this scenario is not the civil sound itself, but rather the decibel level. Around the time Judge Cardozo was calling a product "a thing of danger" in the seminal case of *MacPherson v. Buick*,⁴ William Faulkner was hilariously depicting the litigious behavior of Yoknapatawpha County, whose citizens sued each other at the drop of a hat, the loss of a horse, or the conveyance of real property.⁵ If headline writers in prior centuries rarely blazoned forth civil lawsuits, Charles Dickens had already metaphorized into a wills case his dessicated Victorian contemporaries.⁶ Shakespeare anticipated the Victorian novelists' fascination with private litigation by setting his most famous trial scene in the context of a contracts dispute.⁷

Civil litigation takes center stage when the stakes for civic values are quite high. If the criminal law moves us by threatening the single individual with the full force of a public need for retribution, civil lawsuits from time to time challenge us to re-think a much wider range of social issues. For Cardozo, the issue was the increasing passivity of people in the face of a depersonalized industrial revolution; for Faulkner, the re-direction of primal and hostile energies into the deceptive verbal ordering of a lawsuit; for Dickens, the dull and exhausted proceduralism of an empire on the cusp of dissolution; and for Shakespeare, the racist animus propping up a superficial religious gentility.

The late Twentieth Century provided one of those cultural moments when shifting social perceptions demanded the foregrounding of civil litigation. During this period, from 1980-2000, we witnessed one great criminal trial. Significantly, though, OJ Simpson needed to embody in one person and in two murders the basic elements that had enlivened the criminal law earlier in the century and made it almost the exclusive subject of law-related films and popular narratives: race, sex, and the corruption of authority endeavoring to protect itself from the threat of popular outsiders. Apart from this anachronism, it was a host of multi-million dollar civil judgments that crystallized where we

4. 111 N.E. 1050 (N.Y. 1916).

5. See Richard H. Weisberg, *The Quest for Silence: Faulkner's Lawyer in a Comparative Setting*, 4 MISS. C. L. REV. 193 (1984), reprinted in *JURISPRUDENCE: READINGS, PROBLEMS AND NARRATIVES* (Robert L. Hayman & Nancy Levit eds., 1995).

6. CHARLES DICKENS, *BLEAK HOUSE* (Norman Page ed., Penguin Books 1971) (1853).

7. WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE* (Jay L. Halio ed., Oxford Univ. Press 1990) (1600).

were in American law, that filled the movie theaters and covered the television screens. The failed idealism of criminal lawyer Atticus Finch was replaced by the civil crusading, or the "populism," to use Jeffrey Abramson's Jacksonian allusion, of Erin Brokovich and Jay Schlichtmann.

Now the precise modality of expression of popular culture in film and television enjoys a very short half-life. Perhaps deservedly, these meager emanations barely cast a shadow on other cultural artifacts, and it is unlikely we will be discussing *A Civil Action* or *Erin Brokovich* for ten years, much less for the eighty years we have been discussing Faulkner and Cardozo, the 150 we have been reading Dickens, or the 400 we have been seated before Shakespeare. The proof of this fact is the failure of any of these three papers to mark the great civil law films of our time (both of which happen to star Paul Newman): *Absence of Malice* and *The Verdict*.

Both of these films from the early 1980s signaled the civil turn in our civic imaginations. It was as though the Warren Court's bequest to popular culture was *New York Times v. Sullivan*⁸ even more than *Brown v. Board of Education*.⁹ Lawyers no longer fought the excesses of unjust public rage. Gregory Peck's heroic Atticus had yielded to the down-at-the-heels negligence lawyer out of Boston played by Newman. Grand criminal prosecutions of racial or political minorities such as we expected in the 1950s or 1960s gave way to the compendious explanations of libel law in *Absence of Malice*. Film-makers stopped pillorying the police arm of the state, turning their reformist impulses instead to big private institutions such as the Church (whose high-toned Boston hospital and doctors err horrendously in *The Verdict*) or the Press (which, through Sally Fields as a misguided reporter, publishes "true" but irresponsible dispatches that result in a needless death in *Absence of Malice* and almost bring down the innocent Newman).¹⁰ Story-tellers liked the law of torts, and so did we.

As all of these writers indicate, torts is still the rage. Although personal injury litigation has become even more central to our understanding of American civics in the early Twenty-First Century, neither of Paul Newman's law films appears to be exactly on point. No longer paradigmatic is the "outsider" plaintiff's lawyer whose own downtrod-

8. See *New York Times Co. v. Sullivan*, 376 U.S. 967 (1964).

9. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

10. *New York Times* film critics have often criticized *Absence of Malice*. The newspaper's blurb-writers assess the film as follows: "Slanted newspaper story ruins man. Well done but curious ethical tilt." Curious? Only if you think the elite media and its favorite Supreme Court decision are impermeable to criticism.

den status leads him to challenge the institutionally powerful and gain “the verdict” for all beleaguered humanity. So much trivia has entered the media’s discussion of public issues that the concerns of *Absence of Malice* appear quaint. Rather, we have a “mass media” marketing political ideas and images more than it markets news.¹¹ Among the dominant imagery of this post-Newman era, we find the plaintiff’s lawyer cast in Hamiltonian terms¹² as a greedy corrupter of the American community. Mitchell Stevens, the personally troubled big city lawyer who brings his confused jurisprudence and his needful pocketbook to a resisting upstate community, has replaced the wind-mill-jousting champion of the downtrodden; *The Sweet Hereafter*, with its “naming, blaming, and claiming,”¹³ has bumped the Newman law films off the screen. Or at least so it seems.

Daniels and Martin, along with Abramson, admit that much kicking and screaming have accompanied the diminishment of the plaintiff’s lawyer in the American civic imagination. Daniels and Martin show empirically that, at least over a three year period in the mid-1990s, every indicator of trial-level success of the plaintiff’s bar in Travis County Texas fell dramatically.¹⁴ Somewhat more impressionistically, they report the continuing concern of the Texas bar that a “mass culture” emphasis on “tort reform,” “the lawsuit crisis,” and its excessive verdicts, has reduced the defense bar’s willingness to settle cases: with juries “softened up” by media propaganda, defense counsel are willing to roll the dice.¹⁵ Plaintiff’s lawyers moan and groan, some of them forced to scrutinize potential clients more carefully (is this necessarily bad?), others to alter their practice or even go out of business. However, Daniels and Martin always carefully revert to a discourse of uncertainty about these data: are they temporary, are they really driven by “mass media attacks,” or are they only “perceived changes,”¹⁶ the unsubstantiated “common sense” response of self-interested and beleaguered lawyers?¹⁷ Could the findings have been driven more by Newt Gingrich than by popular culture and media forces? Did the reticence of Texas Governor George W. Bush to pillory “trial lawyers” during the 2000 campaign¹⁸ indicate that his fellow Texans at the

11. See Daniels & Martin, *supra* note 2, at 560.

12. See Abramson, *supra* note 3, at 515.

13. See Sarat, *supra* note 1, at 426.

14. See Daniels & Martin, *supra* note 2, at 481.

15. *Id.* at 475.

16. *Id.* at 478.

17. *Id.* at 482.

18. As of this writing, President George W. Bush has begun to emphasize his aversion to trial lawyers.

Travis County bar probably over-reacted in the late 1990s if they in fact went out of the torts business? Perhaps most likely of all as a counter-thesis, did Daniels and Martin realize that trial lawyers have a kind of Faulknerian savvy, that, like the mass media itself, these lawyers' complaints to them may have been "a triumph of marketing over reality,"¹⁹ and that these interviewees' casting of blame on mass marketing campaigns is as real or as non-sensical as the tort reform commercials and reports they so bemoan?

Jeffrey Abramson's article is more measured. He correctly declines the offer to see Americans (in Texas or elsewhere) as the "passive audience" posited by some thinkers cited in the Daniels and Martin survey.²⁰ Americans, instead, actively contribute to the creation of popular imagery about law and lawyers. The tail does not wag the dog: "[P]opular portrayals of civil jury trials do capture great debates about injury and claiming in America, about blame and responsibility."²¹

"Mass media" campaigns, such as tort reform, have their place in these great debates.²² However, for Abramson, Americans had always already internalized the "Hamiltonian view" that civil juries are the wrong body to determine vital issues of economic and social policy. This informed intuition of many Americans serves as a check and balance on other American impulses that favor the civil jury. Although "often impervious to empirical evidence that civil juries are not as antibusiness and antidoctor as the plot line demands,"²³ the Hamiltonian impulse is deep-seated in our culture and equally as indifferent to occasional "mass marketing" reformist campaigns.²⁴ The latter capitalize upon, they do not produce, an already situated Hamiltonian skepticism.

Abramson is careful to remind us that, even as *The Sweet Hereafter* temporarily prevails in its Hamiltonian way over other versions of the story, the Jacksonian and the Wilsonian narratives still fight for narrative dominance. Abramson, again, does not mention Paul Newman or his two civil law films; however, Brokovich and Schlichtmann (the bottom-up Jacksonians against environmental polluters) and Jeffrey Wygant (the instigator of top-down Wilsonian forces against Big Tobacco) resist the baleful Hamiltonians and rehearse the Tocquevillian

19. See Daniels & Martin, *supra* note 2, at 461.

20. See Abramson, *supra* note 3, at 506.

21. *Id.* at 498.

22. *Id.*

23. *Id.* at 499 (citing Marc Galanter).

24. *Id.*

view that "the jury was as characteristic of democracy as universal suffrage."²⁵

Americans, on this account, are far less permeable to occasional mass media influences than would be the "passive audience" conjured by either Daniels and Martin,²⁶ or the savvy group of self-interested interviewees who so effectively pleaded to them the trial-lawyer-as-victim argument. I prefer Abramson's more historically-grounded vision, but I believe that in neglecting *The Verdict* he also missed part of the picture. *A Civil Action* may be "required reading for many law school students and undergraduates,"²⁷ but Jan Schlichtmann is not one with the Jacksonian ideals found in Paul Newman's downtrodden character. Between these two Boston-area tort lawyers, time will prove that Schlichtmann will soon be forgotten and Newman will live to fight another day.

Like Abramson, I believe in certain deep-structural patterns of American thought that overwhelm even the most aggressive ephemeral or "mass cultural" impositions. With respect to lawyers and juries in the civil litigation arena, I also concur in the view that Americans look to the courtroom either to right certain wrongs overlooked by legislators (the Jacksonian model) or to prod the political branches to take action (the Wilsonian model). However, I would go further. Americans see trial lawyers as heroes. As such, they must be idealists, outsiders, rebels, and loners. In this context, Hollywood and popular fiction conjoin with more "serious" components of culture to produce the image epitomized by the Newman character in *The Verdict*. Insulted and injured, cast aside by the Boston Brahmins, virtually disbarred, and on the margins of society without any sources of personal sustenance, this debased personal injury lawyer is poised for the type of exaltation only Americans associate with law.²⁸ Eschewing greed and a \$210,000 check offered to him by the cynical Church, this lawyer throws himself into the prosecution of a seemingly hopeless case on behalf of his comatose client. On life support, the client has been reduced to a vegetative state by the alleged negligence of some of Boston's top doctors employed by the Church-run hospital. Shorn of a decent office, opposed by the devil himself (pricey defense lawyer James Mason and his minions of obsequious Harvard Law grads), seduced by a woman who is betraying him at every moment, the lawyer-

25. *Id.* at 522.

26. See Daniels & Martin, *supra* note 2, at 459.

27. See Abramson, *supra* note 3, at 405-06.

28. See RICHARD H. WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* (1994).

as-hero finally prevails. He rights society's wrongs by besting its most powerful non-governmental institutions in a civil lawsuit.

Jan Schlichtmann offers us the converse, and it leaves us cold. He enters at the top of his game. As cynical as the forces Newman battles, Schlichtmann begins as one of those plaintiffs' lawyers that the reformists love to hate. Engaged by injured people, he lives only for the cash victory, the contingency fee that comes on the heels of his clients' misfortunes. Only an epiphinal moment saves his soul and ranges him in mortal combat against the polluters. However, lacking Newman's gritty background of suffering and degradation, Schlichtmann and his strange conversion to idealism lack authenticity. He ends the story where his Bostonian colleague began: alone and broke.

The riches-to-rags suit fits poorly the American fashion of Jacksonian heroism. It will not do. Bereft (momentarily) of the memory of Newman's law films, we open a space for Mitchell Stevens in *The Sweet Hereafter*. The corrupter of a community, this ambulance chaser fairly compels the motto of the Hamiltonian reformers: throw the contingency fee and its beneficiary out of the temple! However, Stevens and his ilk (Pacino in *The Devil's Advocate*, a far cry from the Newman-esque Pacino of *And Justice For All*) will hardly form a blip on the screen of American popular culture and its ongoing love affair with plaintiffs' lawyers.

Austin Sarat provides us with a fine account of the film version of a story that reads quite differently in the original, a novel by Russell Banks. Without doubt, the filmmaker has been caught up in the same mid-1990s anti-lawyer atmosphere proven in part by the statistics of Daniels and Martin. Mitchell Stevens, developing a personal psychodrama connected to his rebellious and sick daughter, tries to transpose upon a new community his own sense of anger and injustice. The film artfully depicts (through flashbacks) the younger Stevens saving his baby daughter's life when she has been bitten by spiders during his marriage's last harmonious moments. How could such an excellent father be responsible for his now adult daughter's drug addiction, her promiscuity, and her AIDS?

So, too, the community that has suffered through the bus accident resulting in the loss of half its children must look beyond obvious explanations to more remote "responsible" parties. It is not mere fate, Stevens insists, nor even the possibility that the bus driver erred. No, these explanations would be too close to home. Stevens' search for a "deep pocket" defendant in the county or in the manufacturer of the bus can be benignly interpreted as a transferal of his own deepest

need to deflect responsibility for his daughter from himself to more abstract causes. He tells Billy Amsel, who most rigorously rejects his "philosophy," that it is "society" that has robbed parents of their children. In fact, as the story tells us time after time, it is the parents themselves: it is Stevens being too much "the lawyer" (his daughter's sarcastic indictment), it is Billy himself and his adulterous lover Risa Walker, it is the specific adult and not a baleful, more remote reality. If Mitchell can pin the accident on distant deeper pockets, might implicitly also excuse himself, Billy, Risa, and even the incestuous father of Nichole Burnell, the accident victim who has been left a paraplegic but who will refuse to play the "blame game" when she knows the truly responsible cause.

In a fine article on Banks' novel, Margaret J. Fried and Lawrence A. Frolick emphasize what the film version sadly alters, the equal time given by the novel to three other voices in addition to that of Mitchell Stevens.²⁹ For the filmmaker, however, the almost-exclusive focus on the lawyer opportunistically rouses the audience's ire at exactly the (brief) American period in which opposition to "trial lawyers" had peaked. The cost to Banks' more universal indictment of a whole generation was more than outweighed by the emotional benefit to the filmgoer of finding one villain among the many.

The film is quite different from, and simply not as good as, the novel.³⁰ Too melodramatic, perhaps not all that well acted, the film may play best these days in law school classrooms where the impetus driving tort reform needs to be understood by budding litigators. Emphasizing the film's lone genial invention, Nichole's constant inter-textual reference to "The Pied Piper," the law school teacher can evoke the fatuousness both of leader and follower in some populist movements, including some on both sides of the tort reform debate.

29. Margaret J. Fried and Lawrence A. Frolick, *The Limits of Law: Litigation, Lawyers, and the Search for Justice in Russell Bank's The Sweet Hereafter*, 7 *CARDOZO STUD. L. & LIT.* 1 (1995).

30. I believe Sarat is wrong to find the film conveying the novel's plot "intact." See Sarat, *supra* note 1, at 2. On an obvious level, the omission of Banks' concluding demolition derby scene fundamentally alters the calculus of community that is so vital to the novel. In addition, there is the perspectival focus I have mentioned above. Sarat also exaggerates in marking the film as "an important . . . moment in the cultural life of law in that it does not focus on a trial . . . but instead examines . . . the emergence and transformation of disputes." *Id.* at 2. "The processes through which problems are defined, blame is assigned, claims are made . . .," far from "unexplored" in earlier stories that do not necessarily represent actual trials, are commonplace in serious fiction from Dostoevski (*Crime and Punishment*) to John Barth (*The Floating Opera*) and in films based on literature such as Kafka's *The Trial*—which, despite its title contains no trial scene, or *Intruder in the Dust* (based on Faulkner's masterpiece) or *Absence of Malice*, which has been highlighted above. *Id.* at 3.

In the American mainstream, admiration continues to flow to the lone lawyer fighting the occasional institutional malevolence of corporations, churches, law enforcement agencies, and hospitals. Try as they might, tort reformers have utterly failed to change this reality, which has been instilled into the popular culture by American storytellers and particularly filmmakers. Therefore, the whining of the Texas plaintiff's bar reported by Daniels and Martin, and Sarat's emphasis on the film version of *The Sweet Hereafter* seem misguided. Wide scale distrust of those who propel civil litigation is a cyclical but counter-American phenomenon, particularly as compared to the taxonomy of ensconced American attitudes uncovered by Abramson. The American popular mind will always revert to the excitement and the appeal to fairness of the Jacksonian lawyer, supported by the Tocquevillian jury.³¹

As a result, *The Verdict* will outlive not only *The Sweet Hereafter*, but also *A Civil Action*. American audiences want both the victory of civil justice and the rewards due those who shepherd it to improbable victory. Our civic sense demands from Hollywood what it usually gives us: the defeat of the bad and the ascendancy of the good. We want a lawyer who has climbed from back bay Boston bars to millions in fees, not a lawyer from the same locale whose hard work brings him only baked beans, no beluga.

As long as our popular culture matches our civic tradition, civil trials will be a venue for the individual's victory over the institution, and plaintiffs' lawyers will be justly exalted. The plaintiffs' bar must not fear. Hollywood has afforded crusading lawyers as much protection from "tort reformers" as they will need in the foreseeable future. Mitchell Stevens and George W. Bush notwithstanding, Paul Newman prevails.

31. Perhaps Abramson is correct in asserting that Tocquevillians might still be waiting, as to the jury, for an appropriate successor to *Twelve Angry Men*. With that story fully imbedded in the popular imagination, however, I believe that *The Verdict* once again comes to the rescue. Although we never see them in the jury room, the twelve men and women from Boston must have worked hard together to arrive at a unanimous verdict at the film's end. "May we award more in damages," the foreperson asks the judge, "more than the plaintiff has demanded?"

