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Foreword

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FOREWORD: ACCESS TO JUSTICE: THE ECONOMICS OF CIVIL JUSTICE

*John T. Nockleby**

A wide range of topics could fruitfully be studied in a symposium entitled the "Economics of Civil Justice." For example, how lawyers are obtained and compensated, how businesses pay for civil liability, how losses that are created are distributed or re-distributed, and the political dynamics of judges and judging, are all subjects that reflect economic choices within the civil justice system.

In this Symposium, the second in a series exploring "Access to Justice,"[1] three of these themes are addressed. First, several essays explore access to justice by examining how people obtain lawyers to represent them in civil proceedings. A second topic focuses on a very different problem: the recurring charge that the civil law approach to tort law is undermining the insurance liability regime—in this instance by pricing medical providers out of the liability insurance market.[2] Finally, the last article links contested judicial decisions to the divergent values represented in the major political parties.

In contrast to criminal law, where the state is formally required to provide indigent defendants legal representation,[3] no such right to counsel exists in civil law.[4] As a result, the capacity of individuals to

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1. *See* Symposium, *Access to Justice: Can Business Coexist with the Civil Justice System?*, 38 LOY. L.A. L. REV. 3 1009 (2005).

2. This issue is also explored in Volume 38 of the Loyola of Los Angeles Law Review. *See* Nancy S. Marder, *The Medical Malpractice Debate: The Jury as Scapegoat*, 38 LOY. L.A. L. REV. 3 1267 (2005).

3. *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

4. *See, e.g.*, Lassiter v. Dep't of Social Servs. of Durham County, 452 U.S.

find lawyers to represent them in civil matters is stratified in at least three ways.

First, some individuals and many businesses are sufficiently wealthy to be able to afford a lawyer to represent them regardless of the merits of their claim or defense. Those who must pay to bring legitimate claims—or to defend against claims—may not like to pay, but at least they have resources. A second tier of civil litigants, comprised of many small businesses and middle class citizens, have difficulty finding lawyers at a reasonable cost.

Third, some individuals are able to attract entrepreneurial plaintiffs' lawyers to accept representation on a contingency basis. This, however, is a limited group of individuals whose claims reflect merit—and whose losses are large enough to attract a private lawyer to represent them on a contingency basis.[5]

In contrast, most Americans have difficulty finding lawyers to represent them in civil matters that do not provide sufficient incentive for a private lawyer to accept their case. For some of these individuals, the class action device has emerged as a mechanism of resolving sometimes complex claims of product defects or environmental injuries.

Does this system of providing unequal, stratified access to civil justice in fact promote justice? Do poor people, or people who do not present cases that provide for the possibility of large damage awards, have adequate access to civil justice? Do small businesses have adequate access to appropriate representation?

In his article for this volume, Professor Stephen C. Yeazell poses serious questions about contemporary access to courts.[6] He contrasts the public nature of criminal law, in which government controls the entire enterprise from policing to prosecution, with the privatized nature of civil litigation.

But criminal law was not always the monopoly of the state. Indeed, 150 years ago, Yeazell tells us, the responsibility for carrying

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18, 26–27 (1981) (finding a categorical due process right to counsel for an indigent person facing a deprivation of physical liberty, but not for an indigent person facing termination of parental rights).

5. *See generally* HERBERT KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004) (describing contingency fee practice).

6. Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 LOY. L.A. L. REV. 691 (2006).

out criminal prosecutions was largely privatized. Individuals and not state agents made and carried out key decisions, such as whether to prosecute certain crimes. At that time, indigent parties had significant access to courts. He suggests that we might learn something useful for civil justice from the decision to socialize criminal law and prosecution.

To pursue civil justice, litigants need lawyers. The costs of pretrial investigation, discovery, and expert testimony are all privatized. As a result, in the absence of financing mechanisms, "one could reasonably say that no effective access to civil justice exist[s] for most of the population."[7] True, some plaintiffs are able to induce representation from lawyers willing to accept a contingency fee, but many do not have damage claims (for example, in divorce proceedings), and thus have no hope of paying lawyers from an anticipated future award. At least in those instances—such as in family law and criminal justice—in which the state has created a monopoly, Yeazell concludes that the state has an obligation "to create avenues of access to justice for its weakest citizens."[8]

In her contribution to this issue, Professor Anne Bloom studies a procedural mechanism—the class action—as a means of aggregating civil claims.[9] Bloom focuses on the alleged "crisis" in consumer class actions—the claim that "class action litigation enriches lawyers without providing any real benefit to society."[10]

Professor Bloom analyzes how the Agent Orange litigation contributed to this perceived "crisis." Prior to Agent Orange, the class action device had proved central in civil rights cases, where claims of structural inequalities in a given institution could be comprehensively addressed. Would aggregating personal injury claims achieve a similar success?

Bloom argues that class actions were used after the Agent Orange cases to funnel mass tort cases into private claims systems. Consequently, class actions are now viewed as a means to resolve large numbers of claims cheaply and quickly, but at a significant cost to individualized access to courts. Judges now see the class action

7. *Id.* at 703.
8. *Id.* at 716.
9. Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719 (2006).
10. *Id.* at 720.

device as a means of achieving judicial economy, while defendants seek global peace through settlements that bar claimants from pursuing individual suits. Professor Bloom suggests that this shift away from ensuring increased access to justice for under-compensated victims has fueled the current "crisis" in class actions. However, in order to reclaim the historic role of class actions as a vehicle for justice, Professor Bloom contends that access needs to be emphasized over judicial economy.

Jonathan D. Glater, a New York Times reporter, explores the issue of access to justice within a broader context: the challenge of obtaining access to power levers other than courts that can enable individuals to redress wrongs.[11] Glater argues that media exposure is more important than ever for those who lack the means to vindicate their legal rights, but is simultaneously becoming more difficult to obtain.

Glater juxtaposes the media's fixation on litigation involving high-profile litigants and sensational cases with the plight of individuals of moderate means attempting to enforce their legal rights. Glater suggests that conventional media are facing economic and competitive pressures that make it more likely that they will continue to seek viewers or readers (and, one might add, advertisers) by covering famous names rather than by deploying resources to investigate stories with broad social impact. The problem is that a discrimination case or the problems of the urban impoverished might be depressing to readers, or worse, seen as "routine." Although a shift in media priorities may be warranted, Glater suggests that merely the fact that a problem is important or affects many people is not enough by itself to capture the media's attention.

In their essay, Tal Finney and Joel Yanovich address an obstacle to civil justice faced by anyone with a claim worth less than many thousands of dollars: it is not generally economical to hire lawyers to fight such a dispute in court.[12] Finney and Yanovich cite studies showing that, in 1995, most contingency fee lawyers would not accept a case whose value was less than $60,000. As one part of the solution, the authors suggest that states should increase the juris-

11. Jonathan D. Glater, A Broad View of Access, 39 LOY. L.A. L. REV. 759 (2006).

12. Tal Finney & Joel Yanovich, *Expanding Social Justice Through the "People's Court"*, 39 LOY. L.A. L. REV. 769 (2006).

dictional limits of small claims courts to $20,000, provide simpler information about filing and proving claims, encourage mediation, and offer an appellate process.

Building on a different theme of the economics of civil justice, two symposium authors address some of the myths and realities of claims made about the civil justice system. In recent years, many critics of the civil justice system have contended that liability insurance rates are increasing dramatically, and that the high insurance rates directly result from increased civil litigation and high damage awards. In response, some defenders of the civil justice system contend that liability insurance rates are tied more to the success of insurers in the financial markets than to their claims experiences. Which, if either, of these views is correct?

Have tort claims and tort damage awards in fact been increasing in recent years? Have insurers suffered losses in the financial markets, causing them to raise liability insurance rates to please shareholders? In an insurance market in which insurers are free to raise rates, what are the forces that keep liability insurance rates under control?

In this issue, Douglas A. Kysar, Thomas O. McGarity, and Karen Sokol examine the veracity of and links between a healthcare crisis, a malpractice insurance crisis, and a lawsuit crisis.[13] In the authors' view, the United States is unquestionably suffering from both a healthcare crisis and a malpractice insurance crisis. Advocates of malpractice liability "reforms" have attempted to place the blame for increased malpractice premiums onto the civil justice system, and at the same time, place the blame for the alarming lack of access to affordable, quality healthcare in the United States onto malpractice victims and their attorneys.

Through examination of the arguments of the opponents of the civil justice system, however, the authors find that there is no medical malpractice *lawsuit* crisis: only a well coordinated public relations creation aimed at imposing radical restrictions on common law *liability*.[14] The best available empirical evidence suggests that

13. Douglas A. Kysar et al., *Medical Malpractice Myths and Realities: Why an Insurance Crisis is Not a Lawsuit Crisis*, 39 LOY. L.A. L. REV. 785 (2006).

14. Indeed, as Kysar, McGarity and Sokol note, a series of recent scholarly studies support their argument that the rise in malpractice insurance rates is unrelated to claims losses. *Id.* For example, Tom Baker's excellent book on

the civil justice system is not inundated with baseless claims, that insurance companies' losses in malpractice lawsuits are not driving premium hikes, that doctors are not disappearing, and that there is no surge in "defensive medicine" contributing to increased healthcare costs. In this light, the authors urge legislators to count carefully the social costs before yielding to pressures from the healthcare industry to remove the modest remaining restraints that the civil justice system places on that industry's power to affect the lives of those in need of medical services.

Dawn House, a highly-regarded journalist for The Salt Lake Tribune, takes a different approach to the claims of tort reform.[15] In her essay, House chronicles the story of Zina Lewis, a thirty-nine year-old Utah advanced practice nurse who had to undergo a series of surgeries to replace her faulty pacemaker. The surgeries damaged Lewis' heart, and she unsuccessfully sought device failure information from the pacemaker manufacturer, the FDA, and Congress.

House weaves Lewis' story together with recent mass recall campaigns by medical device makers such as Guidant and Medtronic, as well as with recent legislative developments in curbing lawsuits. House details how the lack of FDA oversight and an inadequate incident reporting system have enabled device manufacturers to withhold failure information from physicians, patients, and the general public.

At the same time, House points out, the Republican-controlled Congress has passed new laws that curtail the rights of patients and consumers to litigate and hold medical device manufacturers accountable. Using Lewis' story as case in point, House argues that lawmakers, in their rush toward tort reform, have failed to consider whether corporate trade secrets should also be curbed so that medical device failure data can be released and whether regulatory agencies are doing enough to protect the public's health in this arena. House's essay illustrates the interplay between the tort system and administrative regulatory structures. When administrative regulation fails, the civil justice system provides the only realistic opportunity

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this subject makes this argument with great clarity. TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005).

15. Dawn House, *Tort Reform—What About the Little Guy?*, 39 LOY. L.A. L. REV. 819 (2006).

for an individual to be heard.

The final article in the Symposium focuses on the role of judges in the contest over rules and values adopted by the civil justice system. In recent years, prominent politicians have leveled broadsides against judges for making decisions they abhorred. The recent controversy over what should happen to Terri Schiavo, whose body though declared brain dead was maintained in a Florida hospital for many years, provides a powerful example.[16] These conflicts raise the perennial question: how are (and should) judges be "accountable" to the political process?

In recent years two major developments have characterized increasing tensions between the second and third branches of government. First, judges have been under increasing attack for being—as some argue—"unaccountable" to elected officials. These attacks raise the question: to what degree should the third branch of government be accountable for decisions to the legislative or executive branches?

Second, in many states judicial elections have become increasingly polarized along conventional political fault lines, with some judicial candidates going so far as to state their views on specific controversies, and other candidates claiming to favor "business-friendly" courts. Are these two developments desirable? Is it inevitable (or good) that statewide judicial elections will soon be characterized by electioneering, sloganeering, and pandering?

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16. *See, e.g.*, Michael Specter, *The President and the Scientists*, THE NEW YORKER MAGAZINE, March 13, 2006, available at http://www.newyorker.com/online/content/articles/060313on_onlineonly01. According to the Washington Post, Tom Delay, at the time the Republican majority leader, railed against state and federal judges. The Post stated that DeLay

> wants to examine what he called the "failure" of state and federal courts to protect Schiavo, who died 13 days after the court-ordered withdrawal of her feeding tube. DeLay issued a statement asserting that "the time will come for the men responsible for this to answer for their behavior." He later said in front of television cameras that he wants to "look at an arrogant, out-of-control, unaccountable judiciary that thumbed their nose at Congress and the president."

Mike Allen, *DeLay Wants Panel to Review Role of Courts*, THE WASHINGTON POST, Apr. 2, 2005, at A9, *available at* http://www.washingtonpost.com/wp-dyn/articles/A19793-2005Apr1.html.

Professor Anthony Champagne's study recognizes that criticism of the federal judges is a long-standing tradition.[17] He contends, however, that more recent attacks on the federal judiciary coming from the right reflect not only divergent cultural and religious values, but also the ideological differences in American politics between the Republican and Democratic parties. As the Warren Court de-segregated American society and established a progressive vision of social and political rights, the composition of the two major political parties moved toward increasingly divergent views on those social issues (such as state-supported school prayer, abortion and gay rights) decided by courts.

As Champagne notes, the "religious conservative agenda is clear: criticize court decisions or remake the judiciary so as to be able to overturn [liberal] decisions completely."[18] The implication Champagne draws is that the judiciary is becoming increasingly politicized, not in the conventional sense that much constitutional theory reflects the ideological bent of judges, but rather in the sense of partisan politics.

The essays and articles in this Symposium take several tacks in addressing the many conflicts over the economics of civil justice. Many of these conflicts are intractable. And whatever solutions one might imagine are likely to prove transient. But, in the best traditions of academic scholarship, the authors represented in this Symposium have given us new insights into the problems.

17. Anthony Champagne, *The Politics of Criticizing Judges*, 39 LOY. L.A. L. REV. 839 (2006).

18. *Id.* at 842.