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Robert F. Blomquist

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BOOK REVIEW

BOTTOMLESS PIT: TOXIC TRIALS, THE AMERICAN LEGAL PROFESSION, AND POPULAR PERCEPTIONS OF THE LAW

A CIVIL ACTION. By *Jonathan Harr*. New York: Random House. 1995.
500 pp. \$25.00.

Robert F. Blomquist†

INTRODUCTION

"The truth?". . . . "The truth is at the bottom of a bottomless pit."¹

They passed Samos and Delos on the left and Lebynthos on the right, when [Icarus], exulting in his career, began to leave the guidance of his companion and soar upward as if to reach heaven. The nearness of the blazing sun softened the wax which held the feathers together, and they came off. He fluttered with his arms, but no feathers remained to hold the air. While his mouth uttered cries . . . it was submerged in the blue waters of the sea²

In *A Civil Action*,³ Jonathan Harr paints a captivating and unnerving novelistic picture⁴ of the human pathos surrounding one of

† Professor of Law, Valparaiso University School of Law; B.S. 1973, University of Pennsylvania (Wharton School); J.D. 1977, Cornell Law School.

¹ JONATHAN HARR, *A CIVIL ACTION* 340 (1995). The quotation is from one of the key lawyers in the Woburn case, Jerome Facher, of the venerable Boston law firm of Hale and Dorr. Facher was counsel for one of the defendants, Beatrice Foods, a Fortune 500 company.

² THOMAS BULFINCH, *BULFINCH'S MYTHOLOGY* 141 (Richard P. Martin ed., Harper Collins 1991).

³ HARR, *supra* note 1.

⁴ According to the New York Times: "Mr. Harr blends [conflicting character and institutional conflicts] novelistically, reconstructing conversations and inner thoughts, skillfully portraying the way the lawyers, especially the plaintiffs' lawyers, became so consumed by the case that it almost destroyed them." Richard Bernstein, *Of Tragedy and Truth, Caught in a Legal Tangle*, N.Y. TIMES, Sept. 13, 1995, at C17.

The book's dust jacket portrays Harr's account in novelistic terms with a blurb from legal-thriller writer John Grisham ("Whether in truth or fiction, I have never read a more compelling chronicle of litigation.") and a statement that the "book . . . reads like a novel, a chronicle of a modern-day odyssey."

the nation's most celebrated "toxic tort"⁵ cases: *Anderson v. Grace*.⁶ Harr depicts the protagonist of the book, Jan Schlichtmann⁷—lead plaintiffs' counsel for eight families in Woburn, Massachusetts who sued two companies, Beatrice Foods and W.R. Grace for poisoning the local water supply with industrial chemicals and, thereby, causing the deaths and diseases of several family members—as a "lanky, impetuous, maniacally persistent personal injury lawyer"⁸ who candidly admits to being "blinded by greed."⁹

Harr recounts Schlichtmann's seemingly endless battles (real and imagined) with the company lawyers, some of whom possess Dickensian names like William Cheeseman (Grace's chief attorney) and Jerome Facher (Beatrice's chief attorney)¹⁰ and take on in the tale ferocious, heartless, malignant, and nihilistic traits, tinged with inno-

⁵ Toxic tort law is of relatively recent vintage in American law. Its origins can be traced to the burgeoning growth in the industrial production of synthetic chemical substances following World War II and society's reaction to this growth. Indeed, toxic tort actions typically involve plaintiffs who claim "actual or potential physical injuries, emotional distress, property damages, and economic losses, which were caused by substances in the air, ground, and water." Robert F. Blomquist, *An Introduction to American Toxic Tort Law: Three Overarching Metaphors and Three Sources of Law*, 26 VAL. U. L. REV. 795, 795-96 (1992) (citations omitted) (quoting TOXIC TORTS AND PRODUCT LIABILITY 11 (Michael A. Brown ed., 1989)). For a history of American toxic tort law, see generally Robert F. Blomquist, *American Toxic Tort Law: An Historical Background, 1979-87*, 10 PACE ENVTL. L. REV. 85 (1992); Robert F. Blomquist, *Emerging Themes and Dilemmas in American Toxic Tort Law, 1988-91: A Legal-Historical and Philosophical Exegesis*, 18 S. ILL. U. L.J. 1 (1993) [hereinafter *Emerging Themes*].

⁶ *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219 (D. Mass. 1986), *modified & remanded*, 862 F.2d 910 (1st Cir. 1988), *cert. denied*, 498 U.S. 891 (1990).

⁷ Jan Schlichtmann and I were classmates at Cornell Law School from 1974 through 1977. I briefly corresponded with Jan in the late 1980s and early 1990s about the Woburn litigation, mainly because I had requested briefs from the litigation to use in teaching a seminar on Toxic and Environmental Torts. My distant memory of Jan is that he was driven, meticulous, and unrelenting in his preparation and classroom performance. Many of the descriptions in Harr's book, therefore, ring true and resonate on a personal level with my memory of Jan Schlichtmann.

⁸ Bernstein, *supra* note 4.

⁹ HARR, *supra* note 1, at 417.

¹⁰ It's hard to describe what I mean by "Dickensian" names. Suffice it to say that one knows it when one sees it. See, e.g., some of the characters in the following Dickens novels: CHARLES DICKENS, *DAVID COPPERFIELD* (Nina Burgis ed., Oxford University Press 1988) (including Clara Peggotty, Barkis, Mrs. Gummidge and Uriah Heep); *GREAT EXPECTATIONS* (Margaret Cardwell ed., Clarendon Press 1993) (featuring Phillip Pirrip, Mr. Jaggers, Dolge Orlick and Uncle Pumblechook); *THE LIFE AND ADVENTURES OF NICHOLAS NICKLEBY* (C.E. Brock ed., Dodd, Mead 1931) (including Nicholas Nickleby, Charles Cheeryble, Wackford Squeers and Newman Noggs); and *THE PICKWICK PAPERS* (James Kinsley ed., Clarendon Press 1986) (featuring Samuel Pickwick, Rachel Wardle, Mr. Skimpia and Mr. Fogg). Perhaps the hallmark of a Dickensian name is an onomatopoeic resonance.

cent eccentricities.¹¹ In Harr's inferno,¹² a federal district court judge arbitrarily and capriciously exercises his judicial powers by overtly favoring one of the defense lawyers, overlooking evidence, and failing to adequately address serious discovery abuse.¹³ The jury, charged with fathoming arcane scientific principles, sorting through a mountain of evidence, and comprehending their role in implementing a trifurcated trial order which segments the case into a water contamination phase, a medical causation phase, and a damages phase, does its best but, ultimately, guesses at the outcome.¹⁴ The plaintiffs, like victims of a medieval plague, suffer the unexplained loss of their children and loved ones, learn to scorn lawyers and the legal system and, in the end, seem to just fade away like ghosts in a Shakespearian tragedy.¹⁵ In Harr's production,¹⁶ a staggering number and variety of expert scientific witnesses are pampered and paid exorbitant fees;¹⁷ lay witnesses and government witnesses are often reluctant to testify and, of those witnesses who do testify, some lie under oath.¹⁸ Over the nine-year saga of the Woburn litigation co-workers, relatives, friends, and lovers endure or abandon their relationships with the principal litigators and supporting lawyers;¹⁹ a Harvard law professor, Charles Nesson, helps Schlichtmann theorize and strategize while serving as

11 See HARR, *supra* note 1, at 85-86 (Facher's use of worn litigation bags—one with a Porky Pig decal from a cereal box on the outside); *id.* at 87 (Facher's statement to a young female Harvard Law School student, in a trial advocacy class that he taught, to go back to her senior partner in a case hypothetical and tell him that she was giving up law practice to make a living selling cheeseburgers); *id.* at 88 (Facher's marital problems prior to his divorce); *id.* at 89 (Facher's use of "hideouts" throughout the law offices of Hale & Dorr); *id.* at 95 (Cheeseman's dislike for jury trial work); *id.* at 96 (Cheeseman's view of all personal injury cases as involving a "cynical charade"); *id.* at 97 (Cheeseman's collection of hats and his "rigorous, logical cast of mind").

12 See DANTE ALIGHIERI, *THE INFERNO FROM LA DIVINA COMMEDIA* (Warwick Chipman ed., Oxford University Press 1961). Like Dante's *Inferno*, the legal struggle depicted by Harr is suffused with life and death overtones. See, e.g., HARR, *supra* note 1, at 447 (Schlichtmann's analogy of the possibility of losing the Woburn case to dying); *id.* at 468 (Schlichtmann's view of the case as "a struggle to the death"); *id.* (the Woburn litigation as a never-ending "black hole"); *id.* at 479 (explicit reference to Dante).

13 See *infra* notes 86-127 and accompanying text.

14 See HARR, *supra* note 1, at 293-401.

15 See *id.* at 14-50 (describing the suffering experienced by Anne Anderson and her husband over the pain incurred by their son, Jimmy, in living with, and then dying from, leukemia); *id.* at 451-54 (reporting client disillusionment with Schlichtmann).

16 Harr's account should be quite easy to transform into a Hollywood screenplay. His characters are larger than life, he brilliantly depicts a struggle between good and evil and the storyline advances at a vigorous pace.

17 See *infra* notes 47-59 and accompanying text.

18 See, e.g., HARR, *supra* note 1, at 304-11 (describing the testimony of a former owner of Riley tannery).

19 See, e.g., *id.* at 396-401 (describing a failed "love affair" between Schlichtmann and a woman attorney who had accompanied him to New York to be on the *Good Morning America* show).

the plaintiffs' appellate counsel;²⁰ and a high-level business executive of W.R. Grace plays an effective Machiavellian game of psychological chess in getting Schlichtmann to accept a relatively modest settlement offer²¹ which, given Schlichtmann's lavish expenses and debts, provides an insufficient fee for Schlichtmann to avoid bankruptcy and an emotional breakdown.

A Civil Action has attracted considerable popular attention and appears to be the prelude to "a major motion picture."²² The book, on one level a case study of modern toxic tort litigation, reflects many of the issues and dilemmas of contemporary toxic torts jurisprudence. Part I of this Essay, therefore, extracts and presents three basic themes of Harr's book: (a) the problem of indeterminate plaintiffs,²³ (b) the problem of indeterminate defendants,²⁴ and (c) the problem of judicially managing and disposing of complex toxic tort litigation.²⁵

Harr's account, however, is more than a case study of modern toxic tort litigation.²⁶ As noted by one critic, it is also

a portrait of the American legal system and several of its practitioners, a kind of cautionary tale about the way in which what ought to be a straightforward issue of justice and recompense can be transformed by greed and the very rules of engagement into a ruinous and exorbitant miasma.²⁷

Accordingly, Part II of this Essay explores various questions of attorney professional responsibility embedded in Harr's narrative.²⁸

Part III of this Essay focuses on selected "law and literature"²⁹ implications of Harr's book, viewed as part of the genre of what has come to be known as "faction" or "true fiction."³⁰ This section argues that *A Civil Action*, written by a non-lawyer-journalist, can be viewed as an encapsulation of what Richard A. Posner calls "law in popular liter-

²⁰ See, e.g., *id.* at 235-63 (describing "billion-dollar Charlie" Nesson and his suggestion that the recoverable damages in the Woburn litigation could be substantial).

²¹ See, e.g., *id.* at 423-28 (describing the psychological interaction between Schlichtmann and the W.R. Grace executive, Al Eustis, who negotiated the final details of a settlement in the Woburn litigation. Part of this mental chess game included lunch at the Harvard Club in Manhattan).

²² Bernstein, *supra* note 4 (citing dust jacket of book). A CIVIL ACTION has also been named a finalist for the National Book Award.

²³ See *infra* notes 39-60 and accompanying text.

²⁴ See *infra* notes 61-84 and accompanying text.

²⁵ See *infra* notes 85-127 and accompanying text.

²⁶ Several other themes pervade the book. These additional themes—not explored in this Essay—include, but are not limited to, the mental and emotional stress of being a lawyer; the personality disorders suffered by lawyers; the "user unfriendliness" of the legal system to laypersons; and the shallowness of lawyers' lives.

²⁷ Bernstein, *supra* note 4, C17.

²⁸ See *infra* notes 128-76 and accompanying text.

²⁹ See generally, RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).

³⁰ See *infra* notes 177-94 and accompanying text.

ature";³¹ that viewed as a work of popular literature, the book is significant on three levels: as a contemporary criticism of emerging cultural problems of the American legal system, as a glimpse of how lay people regard the law, and as a satirical and political work with parallels to Tom Wolfe's *The Bonfire of the Vanities*.³²

I

A CASE STUDY OF MODERN MASS TOXIC TORT LITIGATION

Peter H. Schuck's *Agent Orange on Trial: Mass Toxic Disasters in the Courts*³³ had an immediate and dramatic impact on toxic tort jurisprudence, helping to draw together the growing literature on mass toxic torts,³⁴ while offering theoretical and pragmatic insights into the unique nature of this new type of tort litigation.³⁵ In this regard, Schuck pointed out the special difficulties engendered by the "mass" character of most toxic tort litigation,³⁶ the unique nature of injuries at stake,³⁷ and the powerful constraints and "gravitational forces" of

³¹ RICHARD A. POSNER, *OVERCOMING LAW* 481 (1995).

³² THOMAS WOLFE, *THE BONFIRE OF THE VANITIES* (1987).

³³ PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

³⁴ Writing in 1986, Schuck cited key law review articles published in the early 1980s, while discussing the diethylstilbestrol (DES) and asbestos litigations as earlier examples of the toxic tort genre. *Id.* at 6. He perceptively noted that "[t]he Agent Orange case is not the first mass toxic tort litigation . . . but it is probably the most revealing and perplexing example of that legal genre." *Id.* (endnote omitted).

³⁵ See generally *id.* at 255-76 (discussing what Schuck calls "versions of legal reality").

³⁶ *Id.* at 6-8.

In the traditional tort case, A intentionally or negligently injures B. A and B are usually, but not always, individuals. The classic examples are assault and battery or a "fender bender" traffic accident. Sometimes, A's conduct injures more than one victim, as when his negligent driving causes a multivehicle collision. Even in those cases, however, the number of claimants is seldom large enough significantly to alter either the nature or the manageability of the litigation.

The mass tort differs from the conventional tort both in degree and in kind. In the mass tort, the number of victims is large; there may be millions of claimants, as in the Agent Orange case. Its scale inevitably creates qualitative, not just quantitative, changes in the character of the case and in the ways in which it must be litigated and judged.

Id. at 6.

³⁷ *Id.* at 8-9.

In the traditional tort case, the nature of the injury is typically rather straightforward: an actual assault, physical collision, trespass on land, defamatory statement, act of professional malpractice, or other relatively determinate, well-defined, traumatic interaction between the injurer and victim. Of course, difficult issues often arise even in conventional tort cases concerning who did what to whom, when, and with what effect. But these difficulties can usually be addressed more or less routinely. . . .

In the toxic tort dispute, the nature of the injury is very different and the processes of establishing, defining, and measuring that injury are far more complex. A chemical agent (or, less commonly, ionizing radiation) is suspected of having harmed one or more individuals. Often the pathways

the "older model of tort litigation" with its "traditional moral claims and legal forms."³⁸

Schuck's insights, then, provide a solid intellectual foundation for exploring the substantive, procedural, and institutional mass toxic tort theories of *A Civil Action*.

A. The Problem of Indeterminate Plaintiffs

One of Jan Schlichtmann's principal problems in litigating the Woburn case was identifying all of the "victims," and potential tort plaintiffs, of the hazardous waste groundwater contamination out of Woburn's total population of 36,000.³⁹ Schlichtmann knew that various children in east Woburn had contracted leukemia, had either

of causation are difficult to detect, the time periods extend over decades, and the effects are not readily isolated or scientifically understood.

Id.

³⁸ *Id.* at 10.

[A] tort case traditionally entailed a very distinctive model of adjudication, one that possessed a unique moral and legal structure and a characteristic array of advantages and disadvantages. Increasingly, . . . this model has been joined by another, quite different one, of which the mass toxic tort case is perhaps the clearest example. This newer model calls into serious question many of the premises that underlie the first.

It would be a great mistake, however, to assume that the newer model has fully obliterated the "tort" aspect of the mass toxic tort case, leaving no trace of its traditional moral claims and legal forms. Quite the contrary is true. [Indeed] . . . the older model of tort litigation survives, continuing to exert powerful gravitational forces on the mass toxic tort case, confusing and constraining the ways in which the dispute may be defined, litigated, and resolved.

Id. at 9-10 (citation omitted).

³⁹ HARR, *supra* note 1, at 12. Harr describes the economic and industrial history of Woburn in lucid and compelling prose. He notes:

Woburn's first commercial enterprise had been a tannery, built by the Wyman brothers in 1648. . . . By the Civil War, Woburn had twenty tanneries, matching Philadelphia in the production of leather. The city acquired the nickname Tan City. The most prosperous bank in town was the Tanner's Bank, and now the high school football team called itself The Tanners.

The leather trade supported other industries. In 1853 Robert Eaton founded a chemical factory in northern Woburn, along the banks of the Aberjona River, and supplied the tanneries with the chemicals—blue vitriol, Glauber's salt, sulfuric acid—necessary to produce leather. At the turn of the century, Eaton's factory was one of the largest chemical plants in the country. . . . [But] by the late 1960s [the tanning industry] had been eclipsed by competition from abroad. A decade later, only the J.J. Riley tannery in east Woburn, near the Aberjona River, still produced leather. . . .

To attract new businesses the city cleared and developed many acres of land in northeastern Woburn for industrial parks. Scandal arose when several city officials were discovered to have an undisclosed financial interest in the land, but development proceeded nonetheless. Up on Commerce Way, near Interstate 95, several small manufacturing and trucking firms moved in. Robert Eaton's old chemical factory on the banks of the Aberjona River was taken over by Monsanto. W.R. Grace, another chemical giant, built a small plant on land that had once been an orchard. Woburn

died or were dying from leukemia, and had consumed drinking water from former town drinking Wells G and H (shown in 1979 to be polluted with high levels of the industrial solvents trichloroethylene, or TCE, and tetrachloroethylene, or "perc").⁴⁰ However he did not

didn't lack for industry, but somehow there was never enough money to fix all the cracked sidewalks or the potholes in the street.

Id. at 12-13.

⁴⁰ The Reverend Bruce Young, minister of the Woburn Trinity Episcopal Church and a major supporting character in Harr's book, had conducted an informal and amateurish survey in the autumn of 1979 regarding the number of leukemia cases which had occurred in Woburn since city Well G had opened in 1964 and city Well H had begun pumping in 1967. Many Woburn residents suspected that these wells contributed to the incidence of leukemia in the town from 1964 through 1979 because of unusually high levels of industrial solvents found, by happenstance, in the wells in the spring of 1979. As described by Harr:

The Woburn police were summoned in the spring of 1979 to investigate the appearance of 184 barrels of industrial waste on a plot of vacant land in northeast Woburn. The person responsible for dumping the barrels in Woburn, the so-called midnight dumper, was never caught, and the barrels were taken away before their contents could cause any harm. The whole event would have been inconsequential had it not been for the vigilance of the state environmental inspector who handled the case. He thought it prudent to test samples of water from Wells G and H, which lay just a half mile to the south.

The results of those tests reached the desk of Gerald McCall, acting director for the northeast region of the state environmental department, on Tuesday afternoon, May 22. McCall took one look at the analysis and quickly telephoned the Woburn city engineer. He told the engineer to shut down Wells G and H immediately. Both of the wells were "heavily contaminated" with trichloroethylene, commonly known as TCE, an industrial solvent used to dissolve grease and oil. The lab found 267 parts per billion of TCE in Well G and 183 in Well H. The wells also contained lesser amounts of four other contaminants, among them tetrachloroethylene, known as perc, another industrial solvent. The Environmental Protection Agency listed both solvents as "probable" carcinogens.

Id. at 36. Among Reverend Young's parishioners was the Anderson family, consisting of Charles, Anne and their son Jimmy. The Andersons moved to Woburn in 1965, settling in the eastern part of town in the Pine Street neighborhood. *Id.* at 17-18. In January 1972, Jimmy Anderson was diagnosed as having leukemia. Comparing notes with her neighbors, Anne Anderson found it odd that there were two other children diagnosed with leukemia in her neighborhood. Suspicious of the city water that "never tasted right," *id.* at 21, Anne Anderson repeatedly talked with Reverend Young about her feelings while he drove Anne and Jimmy to Massachusetts General Hospital, where Jimmy received treatment for his leukemia. Skeptical of Anne's obsessional theory, at first, Reverend Young was spurred into action in 1979, after the discovery of industrial solvents in city Wells G and H, to find out more about leukemias in Woburn. Young wrote a letter to the editor of the local paper asking parents who'd had a child diagnosed with leukemia [from 1964-1979] to come to a meeting at Trinity Episcopal. Maybe they wouldn't discover anything they didn't already know, the minister told Anne. Maybe no one would show up at the meeting. But it was worth a try, he said, and Anne agreed.

Id. at 39. Thirty people showed up at Trinity Episcopal in October of 1979. Reverend Young used the meeting to pass out a health questionnaire that a nurse at Massachusetts General had helped him prepare.

Reverend Young waited for the questionnaires to be sent back. Several weeks after the meeting he and Anne met in his office at the church. They

know what had *caused* the leukemias to occur.⁴¹ Perhaps the genetic background of the children had initiated the leukemias. Maybe health habits (such as the quality of diet, exercise and medical care) had triggered the disease in some of the children. It was also conceivable that some or all of the Woburn leukemia cases had been caused by other environmental exposures such as toxins in the air or suspected carcinogens in common household products, unrelated to the elevated levels of chemicals found in the east Woburn groundwater.⁴²

Similarly, because of the latent and chronic quality of many toxic injuries, Schlichtmann could not be sure that everyone actually

had information on twelve cases. That still did not seem to Young like a particularly large number over a fifteen-year period, but he did not mention his thought to Anne. He had purchased a street map of the city. Anne read aloud the address of each case, and the minister marked it on the map. Of the twelve cases, eight were located in east Woburn, and six of those were clustered in the Pine Street neighborhood, where perhaps two hundred families lived. Young thought the distribution looked highly unusual, especially when plotted on the map.

Id. at 40. Schlichtmann ended up representing eight families; these families experienced childhood leukemia cases and adult diseases going back to 1964.

⁴¹ Contrary to the intuitive suppositions of Reverend Bruce Young, Anne Anderson, and others, expert epidemiological analysis discounts the significance of geographic "clusters" in predicting the cause of leukemia. Dr. Clark Heath of the United States Centers for Disease Control (CDC), described by Harr as "the world's foremost expert in leukemia clusters," *id.* at 41, was not impressed by the Woburn leukemia cluster.

[Heath] knew more, and was certain of less. "Results have suggested little if any tendency for cases to come in clusters beyond what chance would predict," he wrote in 1982 in the textbook *Cancer Epidemiology and Prevention*. Others in the field agreed with this position. Some epidemiologists at CDC, for example, explained apparent leukemia clusters by analogy to the "Texas Sharpshooter" effect: a man shoots at the side of a barn and then proceeds to draw targets around the holes. He makes every shot into a bull's-eye. If an epidemiologist were to draw a circle around, say, the greater Boston area, he would find an incidence of leukemia comparable with the rest of the United States. Draw a circle around Woburn and he'd find a worrisome elevation. Draw a circle around the Pine Street neighborhood and he'd find an alarming cluster. Was it a real cluster? Or was he just drawing bull's-eyes where he found bullet holes?

Id. at 43.

⁴² See, e.g., HARR, *supra* note 1, at 238-39. When Schlichtmann attended depositions of his clients, the defense lawyers would question "the families closely about their use of more than five hundred brand-name household products—cleaning agents and detergents, rug shampoos, cosmetics, nail-polish removers, insect repellents, paints, lawn fertilizers, cold remedies, cough syrups, herbal teas, coffee, even peanut butter." *Id.*

To Schlichtmann, the strategy behind this exhaustive list was obvious. These five hundred items all allegedly contained a known or suspected carcinogen. Peanut butter, for example, ranked high on the list, right up with cigarettes. The reason: all peanut butter contains trace amounts of aflatoxin B1, a natural but potent liver carcinogen produced by a common peanut mold. Cheeseman and Facher would try to suggest to a jury that inasmuch as the cause of childhood leukemia was largely a mystery to medical science, dozens of substances used by the families might just as likely have caused the Woburn illnesses as the contaminated water.

Id. at 239.

harméd by the contaminated well water knew that they had, in fact, been harmed. The *Harvard Health Study*, an exhaustive statistical study of over 7,000 Woburn residents in 1984 by professors at the Harvard School of Public Health, illustrated this problem. The *Harvard Health Study* authors concluded that the data they compiled " 'strongly suggests the water from [Woburn] Wells G and H is linked to a variety of adverse health effects.'"⁴³ These adverse health effects included "an increased rate of fetal and newborn deaths [over the time period 1960 through 1982] among pregnant women whose homes had gotten the largest quantities of the water."⁴⁴ Among Woburn children who had consumed water from Wells G & H, the Harvard scientists

found increased rates of allergies, skin afflictions such as eczema, and respiratory disorders—chronic bronchitis, asthma, and pneumonia. They also found a "significant excess" of congenital defects to the eye and ear, of kidney and urinary tract disorders, and of "environmental" birth defects, a grouping that included cleft palate, spina bifida, Down's Syndrome, and other chromosomal aberrations.⁴⁵

But the *Harvard Health Study* used statistical discourse and did not show that the contaminated well water had actually *caused* the hodgepodge of adverse health effects suffered by the residents of east Woburn.⁴⁶

Harr's account describes Schlichtmann's lavish and, at times, Herculean efforts to overcome the problem of indeterminate plaintiffs: extraordinary difficulties of proving by a preponderance of the evidence that his clients had *in fact* suffered various diseases, sicknesses, and abnormalities due to the consumption of the contaminated well water. Schlichtmann consulted an immunologist from California named Dr. Alan Levin who "had a theory about the Woburn case. He believed that constant low-level exposure to TCE

⁴³ *Id.* at 133. The Harvard Health Study was later published in scientific literature. See S. Lagakos et al., *An Analysis of Contaminated Well Water and Health Effects in Woburn, Massachusetts*, 81 J. OF THE AMER. STATISTICAL ASSOC. 583 (1986).

⁴⁴ HARR, *supra* note 1, at 133.

⁴⁵ *Id.*

⁴⁶ The Harvard Health Study provoked strong criticism from many professional quarters. As summarized by Harr:

"This report is characterized by . . . an ignorance of epidemiological issues," wrote one reviewer at the federal Centers for Disease Control. The American Industrial Health Council, an industry research group, denounced the study as biased, and even one of [the authors'] colleagues at Harvard stated, "It was an incredible mistake to use as interviewers people who have a self-interest in the outcome. To my mind that just destroys the credibility of it right there."

Id. at 134.

had damaged the immune systems of all the members of the Woburn families."⁴⁷ According to Dr. Levin:

"These chemicals always do something," he told Schlichtmann. "Most of the time they don't do enough damage for us to notice. You might lose a few cells, but you won't notice it because we've got a lot of extra cells." A healthy, vigilant immune system will attack and kill aberrant cells. But if the immune system has been damaged, as Levin speculated, a malignant cell stands a far greater chance of surviving and proliferating.⁴⁸

Levin, in turn, referred Schlichtmann to a pathologist who, responding to Levin's requests, performed a series of lymphocyte counts and T cell assays⁴⁹ on the plaintiffs at an initial cost to Schlichtmann's firm of ten thousand dollars,⁵⁰ with a follow-up control study costing fifty thousand dollars.⁵¹ Schlichtmann, "insist[ing] on absolute thoroughness,"⁵² employed a full-time assistant to "find the report of every visit [by each of the thirty-three Woburn family members involved in the litigation] to a doctor, of every scraped knee, sore throat, and common cold."⁵³ Schlichtmann expanded his inquiry into the medical issues in the case by retaining the services of Chicago physician, Dr. Shirley Conibear, a specialist in occupational and environmental medicine; he had his firm pay \$88,729 to the specialist for a series of physical examinations of all twenty-eight living family members.⁵⁴ Dr. Conibear, after discovering that a majority of the Woburn adults

⁴⁷ *Id.* at 136-37.

⁴⁸ *Id.* at 137.

⁴⁹ *Id.*

The lymphocyte count—a simple count of white blood cells—was easy enough. Any lab could do that. The T cell assays were somewhat more difficult. All T cells look alike, but they perform different functions, and distinguishing one from another was a tricky business. The helper T cell, for instance, identifies foreign organisms—viruses, bacteria, cancerous cells—and summons killer T cells, which are equipped with cytotoxic enzymes. Another type of T cell, the suppressor, stops the attack of the killer T cells when the invading organism has been conquered.

Id.

⁵⁰ *Id.* at 138.

⁵¹ *Id.* at 139.

⁵² *Id.* at 198.

⁵³ *Id.* "For those children with leukemia, the records consisted of thousands of pages—lab tests, chemotherapy protocols, the notes of nurses, doctors, social workers, and psychiatrists. And for the adults, some records dated back to the 1930s." *Id.* at 198-99.

⁵⁴ It appeared that Schlichtmann's consultation with Dr. Conibear might be worthwhile. As eloquently described by Harr:

Dr. Shirley Conibear had published many articles about the health problems of industrial workers exposed to toxic chemicals. . . .

For a handsome fee, Conibear had agreed to come to Boston and perform thorough physical examinations of all twenty-eight living family members. Schlichtmann had his staff prepare for Conibear's arrival by leasing a suite of rooms in a doctor's office building near the Boston University Medical Center and furnishing it with rented equipment. He also arranged ac-

showed signs of irregular heartbeats, recommended that Schlichtmann find a trained heart specialist to conduct further tests. For an additional cost of \$55,762, Schlichtmann hired "a first-rate cardiologist," Dr. Saul Cohen, to conduct "thorough cardiac workups, examinations of the sort the nation's president would receive" to determine whether TCE exposure could have caused pathological effects on the adult plaintiffs.⁵⁵

"Almost every medical expert Schlichtmann talked to knew another expert that Schlichtmann might want to talk to."⁵⁶ In this way,

commodations for a week at the Ritz-Carlton for Conibear and her staff, which included two other physicians and a lab technician.

Conibear's first round of reports, more than nine hundred pages long, cost Schlichtmann \$88,729. He felt they were worth every penny. He read that in 1964, the year Well G came on line, Richard Toomey [one of his clients] had suffered an episode of gastric and abdominal pain so severe that he'd gone to see a doctor. By 1971, when the wells were operating full time, Toomey's stomach problems had become chronic. He had also complained repeatedly of sore throats, headaches, nausea, severe sweats, and various rashes. Toomey's daughter, Mary Eileen, born in 1965, had suffered repeated rashes on her face and legs, sinus problems, vomiting, chills, and abdominal pains.

.....

One after another, the case histories of the plaintiffs looked astonishingly alike. Conibear told Schlichtmann that the pattern of chronic solvent poisoning was unmistakable. She had . . . found more than a hundred articles on the toxic effects of TCE. Most of those articles dealt with workers who'd been exposed to the solvent, and they cited the same constellation of symptoms—dizziness, nausea, vomiting, fatigue, skin rashes. Among the Woburn families, any one person might have the misfortune to suffer repeated rashes, chronic abdominal pains and nausea, and sinus and upper-respiratory-tract infections. But for a group of families, related to each other only by geography and the water they used, to suffer so many common ailments and to have a leukemic child in the family—to Schlichtmann, that could not be coincidence.

Id. at 200-02.

⁵⁵ *Id.* at 202-03. As explained by Harr:

It took Cohen six weeks to complete his examinations of all the [fourteen] Woburn adults and the three oldest teenage children. He began with routine physicals followed by blood tests, resting electrocardiograms, treadmill cardiograms, and twenty-four-hour-long ambulatory heart recordings by Holter monitor. When he finished, he delivered to Schlichtmann's office a summary of his findings, along with a three-foot stack of reports that contained hundreds of pages . . .

Schlichtmann read that not just some but all of the seventeen individuals tested by Cohen experienced irregular heartbeats. The results, Cohen told Schlichtmann, had surprised him—"quite striking" were his exact words. Schlichtmann asked Cohen to review Conibear's physical exams and the index of past medical complaints that she had assembled. "That, in addition to my own findings, really stunned me," Cohen would testify later at his deposition. "I was very impressed with the consistency of these findings and the similarity of complaints in this particular cohort of patients."

Id.

⁵⁶ *Id.* at 206.

Schlichtmann ended up retaining a *dozen* different medical experts—including a neurologist, a biochemist, and a toxicologist.⁵⁷

Ironically, because the trial court judge decided to manage the case by segmenting the litigation into three distinct phases,⁵⁸ Schlichtmann never had an opportunity to present the costly, yet compelling, medical evidence he had accumulated in his far-reaching consultations,⁵⁹ although his extensive preparation did help him to partially overcome the indeterminate plaintiffs problem in settling with W.R. Grace for \$8 million, after the water contamination phase, but before the medical causation phase of the trifurcated litigation.⁶⁰

⁵⁷ *Id.* at 203-08. Schlichtmann's willingness to spend such large sums of his firm's money on the case, however, caused considerable consternation for one of his partners, Kevin Conway. Conway—whom Schlichtmann had met while both worked as associates in the Boston law firm of Reed & Mulligan—joined Schlichtmann and another young lawyer from Reed & Mulligan in forming a new firm called Schlichtmann, Conway & Crowley.

Schlichtmann decided to bring [his twelve medical experts] together for a conference, a round-table discussion. He rented the Grand Ballroom at the Ritz-Carlton and paid the plane fare for the experts from California, Chicago, and Washington, D.C. He paid for their hotel rooms at the Ritz, their meals and, of course, their time. Most of them billed around two hundred dollars an hour. The conference began with dinner and drinks on a Friday evening and continued throughout Saturday. It went so well that Schlichtmann arranged for a second one, out in Chicago.

Not long after that meeting, Conway discovered that Saul Cohen, the cardiologist, had charged a hundred dollars an hour for the night he'd spent sleeping at the Chicago Hilton. This was only half of Cohen's regular hourly rate, his sleeping rate, as it were. It infuriated Conway, but Schlichtmann said calmly, "No, he's worth it."

The steadily mounting bills alarmed Conway, but they didn't surprise him. He had known that Schlichtmann would spend every cent the firm had on Woburn, and then borrow more. Three years ago, Conway had predicted that the case would become a "black hole." Now, eight months into discovery, that prediction seemed on the verge of coming true.

Id. at 208-09.

⁵⁸ See *infra* notes 99-103 and accompanying text.

⁵⁹ HARR, *supra* note 1, at 208-09. Getting into Schlichtmann's head, Harr writes:

He had come a long way. The case, he told himself, did not depend on the leukemia claim alone. He now had compelling evidence of chronic solvent poisoning. And even if the scientific evidence that TCE caused leukemia was weak, there could be no doubt now that exposure to the contaminated water had exacerbated the leukemias. The disease would not have run the same course. He could argue that more of the children would have survived if Grace and Beatrice had not contaminated the wells.

Id. at 208.

In an intriguing note on sources at the end of his book, Harr reveals, among other things, that "[t]he thoughts and feelings of the characters as described in the narrative are based on what they told me they thought and felt, or what they described as their thoughts and feelings in transcribed court proceedings." *Id.* at 494.

⁶⁰ *Id.* at 445-48 (discussing negotiations). See generally SCHUCK, *supra* note 33, at 9, 11, 184-89 & 261-62 (discussing the problems of indeterminate plaintiffs and toxic tort litigation, in general, and of Agent Orange litigation, in particular).

B. The Problem of Indeterminate Defendants

In addition to the problem of indeterminate plaintiffs, another of Jan Schlichtmann's principal problems in litigating the Woburn case was the indeterminate defendants problem. According to Peter Schuck, this difficulty arises because "the identity of the particular injurers may be unknown, and even if known, it may be impossible, either in principle or in practice, to accurately allocate responsibility for the harm among them."⁶¹ As Schlichtmann asked himself at the beginning of his involvement in the case: "Whose chemicals had polluted the wells? Who had dumped these chemicals, and when had they gotten into the water supply? Had they in fact caused leukemia?"⁶²

Schlichtmann's first lead in finding out who might be responsible for contaminating Wells G & H with industrial solvents came in 1982 from a preliminary investigative report prepared by the U.S. Environmental Protection Agency (EPA). Schlichtmann learned about the existence of the EPA report through another attorney, Anthony Roisman, who was the Executive Director of a Washington D.C. public-interest law firm named Trial Lawyers for Public Justice.⁶³ "Roisman was in his early forties, a Harvard Law School graduate who had been head of the U.S. Justice Department's Hazardous Waste Enforcement Section during the Carter Administration."⁶⁴ Roisman had made use of the Freedom of Information Act⁶⁵ to obtain documents from the EPA about Woburn's groundwater contamination. According to the EPA's preliminary report, obtained by Roisman and shared with Schlichtmann, the agency had identified an area of high TCE concentrations surrounding Wells G and H.⁶⁶ Calling for further study, the report did not identify which of the several industries in the area was

⁶¹ SCHUCK, *supra* note 33, at 9.

⁶² HARR, *supra* note 1, at 68. In other words, assuming that elevated levels of TCE and perc *could actually cause* leukemia and other adverse health effects actually suffered by the plaintiffs, and further assuming that Schlichtmann's clients were *actually exposed* to these chemicals through consumption or use of water from Wells G & H, the following factual issues remained: *who* was responsible for contaminating the wells, and in *what amount*, and *what amount* was each plaintiff exposed to over a period of several years?

⁶³ Schlichtmann had learned about Roisman through Reverend Bruce Young, *see supra* note 40, who had been put in contact with Roisman through a staff member in Senator Edward Kennedy's office. The staffer knew of Reverend Young through his testimony with other Woburn residents before the U.S. Senate's Committee on Public Works and the Environment in hearings that ultimately led to the enactment of the Superfund law. HARR, *supra* note 1, at 76-78.

⁶⁴ HARR, *supra* note 1, at 77.

⁶⁵ 5 U.S.C. § 552 (1995).

⁶⁶ HARR, *supra* note 1, at 78.

responsible for the contamination.⁶⁷ However, the EPA did put Woburn on its "Superfund" list.⁶⁸

After their initial meeting in early 1982, Schlichtmann and Roisman decided to join forces, with Roisman as lead counsel and Schlichtmann as local counsel. Their agreement further provided that Roisman's firm, Trial Lawyers for Public Justice, would bear half the costs of preparing the Woburn case, with Schlichtmann's firm picking up the other half. Moreover, Schlichtmann and Roisman agreed that the latter's firm would receive "two thirds of any fee that might result from a settlement or a verdict" and Schlichtmann's firm would receive the other third.⁶⁹ Target defendants first appeared after Schlichtmann and Roisman decided to hire a Princeton University professor who was "an expert in groundwater contamination and hazardous wastes"⁷⁰ to interpret the EPA's preliminary report. Based on the professor's analysis, two Fortune 500 companies with manufacturing facilities in the immediate vicinity of Wells G and H were identified as probable sources of the TCE that had contaminated the east Woburn drinking water. These two companies were W.R. Grace, a multinational chemical company, and Beatrice Foods, manufacturer of an assortment of consumer products.⁷¹

When they filed their complaint in May of 1982—eight days before the expiration of the statute of limitations—Schlichtmann and Roisman at least had a theory of the injuries suffered by their clients and how the defendant companies had contaminated Wells G and H. The complaint claimed that subsidiaries of Beatrice and Grace had poisoned the plaintiffs' drinking water with various toxic chemicals,

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 77. Schlichtmann's one-third share of any settlement or verdict in the case had to be divided equally between his firm and Mulligan (the lawyer from Schlichtmann's former firm who had obtained the case in the first instance). *Id.*

⁷⁰ *Id.* at 78.

⁷¹ *Id.* at 78-79.

The EPA report was highly technical, filled with maps of bedrock and groundwater contours, well logs, and scientific jargon. . . . The professor told Roisman and Schlichtmann that the underground plume of TCE coming from the northeast appeared to originate at a manufacturing plant owned by W.R. Grace The other source of contamination, to the west of Wells G and H, came from the fifteen acres of wooded land that was owned by the John J. Riley Tannery. And the tannery, it turned out, was itself owned by the giant Chicago conglomerate Beatrice Foods, producer of dozens of consumer goods, from Samsonite luggage to Playtex bras, Peter Pan peanut butter and Tropicana orange juice.

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 and Roisman. . . . 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.

including TCE. According to the complaint, TCE was “a potent central nervous system depressant that can cause severe neurological symptoms such as dizziness, loss of appetite, and loss of motor coordination. It can produce liver damage and cause cell mutations and cancer.”⁷² The complaint, which sought compensatory as well as punitive damages “for the willful and grossly negligent” acts of the two companies, went on to assert that the defendants’ actions in poisoning the plaintiffs’ water “had resulted in a cluster of leukemia, the deaths of five children, and injuries to all of the [thirty-three] family members who were party to the lawsuit, including ‘an increased risk of leukemia and other cancers, liver disease, central nervous system disorders, and other unknown illnesses and disease.’”⁷³

However, when Jan Schlichtmann, who ultimately took over the lead counsel role in the case,⁷⁴ focused his efforts on *proving* the plaintiffs’ allegations of groundwater contamination by Beatrice and Grace, he encountered a variety of difficulties. Initially, in pre-trial skirmishing, Grace’s lawyer, William Cheeseman, brought to the attention of the court a newspaper article quoting a research assistant for the plaintiffs who apparently had admitted that there was “no firm proof of a connection between the families, the chemicals found in their wells, and the two companies.”⁷⁵ Secondly, the EPA’s failure to identify either Grace or Beatrice as likely sources of the contamination of Wells G and H in its preliminary studies prepared before the lawsuit began weighed against the plaintiffs.⁷⁶ Thirdly, in another pre-trial move, Grace’s lawyer was given permission to implead another company, Unifirst, that had a dry cleaning facility in east Woburn and used large quantities of perc, an industrial chemical and suspected carcinogen found in high concentrations in Wells G and H.⁷⁷ At first blush, it seemed possible that the presence of another polluter in the case would further cloud the question of factual causation against Beatrice and Grace.⁷⁸ Fourthly, pre-trial discovery of assorted employees

⁷² *Id.* at 81.

⁷³ *Id.*

⁷⁴ *See id.* at 142-43 (describing the change in the co-counsel agreement).

⁷⁵ *Id.* at 100. The vehicle for this statement, Grace’s motion for sanctions against Schlichtmann under FED. R. Civ. P. 11, was not successful. Grace’s Rule 11 motion for sanctions was dismissed in spite of the uncertainties and tentative information Schlichtmann had used as a basis for the complaint against Grace. *Id.* at 85-119.

⁷⁶ *Id.*

⁷⁷ *Id.* at 144.

⁷⁸ As things worked out, however, Cheeseman’s motion to implead Unifirst was a temporary godsend for Schlichtmann. As explained by Harr:

In the months that followed, Unifirst’s lawyers filed countersuits against both Grace and Beatrice. Cheeseman still wanted to keep Unifirst in the case, but Grace’s in-house corporate counsel finally overruled him. Unifirst was causing too much trouble and it did not look as if the company would

of Beatrice and Grace proved to be inconclusive.⁷⁹ While Schlichtmann had uncovered considerable physical evidence and eyewitness accounts of Grace's dumping of sizeable quantities of TCE and other industrial materials on the ground outside its east Woburn plant,⁸⁰ discovery produced only weak evidence of Beatrice's employees' dumping of harmful wastes.⁸¹ Moreover, Schlichtmann's proof that the chemicals dumped by the defendants over the years had actually reached Wells G and H was scant. Finally, Schlichtmann's two experts at the first stage of trial, the "waterworks phase," stumbled: his geologist withered under cross-examination,⁸² while his groundwater flow expert from Princeton made fundamental mistakes that affected his credibility before the jury.⁸³

Schlichtmann ended up winning "half a loaf" for his clients after the "waterworks" phase of the trial. While the jury found Schlichtmann's evidence and argument against Beatrice insufficient to conclude that any toxic chemicals had leached through the soil and contaminated plaintiffs' drinking water, the jury did find Grace responsible for contaminating Wells G and H with TCE.⁸⁴

C. The Judicial Management Problem

The trial court judge who presided over the Woburn litigation after the case was removed from state court to federal court⁸⁵ was United States District Court Judge Walter Jay Skinner. At the time of

ever cooperate in a joint defense. Against his will, Cheeseman was forced to dismiss all claims against the company.

Id. at 146. Moreover, Schlichtmann negotiated a one million and fifty thousand dollar settlement with Unifirst that was used to finance the continuing litigation against Grace and Beatrice. *Id.*

⁷⁹ *Id.* at 155-83.

⁸⁰ *Id.* at 143-83.

⁸¹ *Id.* at 183-93.

⁸² *Id.* at 297-304.

⁸³ *Id.* at 325-40. Ironically,

As it later turned out, [the Princeton groundwater flow expert] Pinder was generally right. In its final report, released two years after the trial, the EPA concluded that the Beatrice property "contains the most extensive area of contaminated soil" and "represents the area of highest groundwater contamination at the Wells G & H site." The report may have vindicated Pinder, but it came out too late to do Schlichtmann any good.

Id. at 339.

⁸⁴ *Id.* at 392-94. Thus, Schlichtmann was able to eventually negotiate with Grace for a settlement of the case in the amount of eight million dollars, in lieu of Grace having to endure the next phase of the trial—the medical causation phase. *Id.* at 405-48. Schlichtmann also appealed the Beatrice verdict and, due to newly-discovered evidence regarding the hazardous waste dumping practices at Beatrice's Riley Tannery that was withheld during discovery, attempted, albeit unsuccessfully, to obtain a new trial against Beatrice on the grounds of abuse of discovery by defense counsel. *See id.* at 459-89. *See infra* notes 110-27 and accompanying text.

⁸⁵ *Id.* at 99.

the court clerk's assignment of the case to him, Judge Skinner, a graduate of Harvard Law School, was "fifty-six years old, his hair turning white, his blue eyes pale and watery behind horn-rimmed glasses."⁸⁶

While Judge Skinner had a reputation as an able and experienced jurist, even he had trouble managing and disposing of the Woburn case. This is not surprising. "Toxic tort cases 'can be more complex than the ordinary tort case' and 'massive in terms of environmental or individual impact and dollar exposure.'"⁸⁷ Accordingly, "[these] cases sometimes require the application of creative case management techniques."⁸⁸

Theoretically, in addition to the inherent judicial power to use discretion in handling a court case, there is a panoply of special case management techniques available to American trial judges in toxic tort cases like the Woburn litigation. Specific case management measures include: discovery conferences and orders;⁸⁹ pre-trial confer-

⁸⁶ Harr's description of Judge Skinner is vivid and memorable:

At [the] time [of his assignment to the Woburn case] Judge Walter J. Skinner had a backlog of more than five hundred cases. Each month, the [clerk-initiated] lottery piled twenty to thirty new cases on top of that backlog. The vast majority of these cases would settle before trial, but they usually settled only after Judge Skinner had met with the lawyers in a pre-trial conference and threatened an early trial date.

Id. at 105-06.

⁸⁷ Blomquist, *Emerging Themes*, *supra* note 5, at 13 (quoting Kyle A. Kane, *Managing the Toxic Tort Defense*, in TOXIC TORTS PRACTICE GUIDE § 30.01, at 30-32 (James T. O'Reilly ed., 2d ed. 1992))

⁸⁸ *Id.*

⁸⁹ See FED. R. CIV. P. 26(f) and equivalent state rules.

ences and orders;⁹⁰ appointment of special masters;⁹¹ consolidation;⁹² multidistrict litigation under federal statutory authorization;⁹³ segmented trial of various issues or claims;⁹⁴ class actions;⁹⁵ and special jury interrogatories.⁹⁶ Recent federal and state judicial opinions illustrate the effectiveness of these techniques.⁹⁷

On one level of analysis, Harr's portrayal of Judge Skinner depicts a busy federal judge who, by dint of his commanding and forceful presence, moved the Woburn litigation along in an effective and efficient manner, while patiently responding to the "hardball" tactics of the trial lawyers in the case.⁹⁸

⁹⁰ See FED. R. CIV. P. 16 and equivalent state rules. Rule 16(a) provides that "the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference." As pointed out by the Advisory Committee:

The amended rule makes scheduling and case management an express goal of pretrial procedure. This is done in Rule 16(a) by shifting the emphasis away from a conference focused solely on the trial and toward a process of judicial management that embraces the entire pretrial phase, especially motions and discovery.

FED. R. CIV. P. 16 advisory committee's note. See also FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION SECOND § 21.21 (1985) (recounting a series of extensive pre-trial conferences recommended to be held in complex cases).

⁹¹ See FED. R. CIV. P. 53 and equivalent state rules. As a general proposition, a reference to a master "shall be the exception and not the rule." *Id.* at 53(b). Moreover, in jury cases, a reference "shall be made only when the issues are complicated." *Id.* In non-jury actions, "save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it." *Id.* See also *In re* "Agent Orange" Prod. Liab. Litig., 94 F.R.D. 173 (E.D.N.Y. 1982) (wherein the trial judge ruled that appointment of a special master to resolve disputes and discovery disagreements was warranted in a highly complex toxic tort case because of: (i) the magnitude of the case; (ii) the sheer complexity of the anticipated discovery problems; (iii) the volume of documents to be reviewed—many of which were subject to claims of privilege; (iv) the number of witnesses to be deposed; and (v) the need for a speedy processing of all discovery issues to meet the trial date); HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351, 381-83 & 390-94 (1960) (discussing, among other issues, the use of special masters).

⁹² See FED. R. CIV. P. 42(a) and equivalent state rules.

⁹³ See 28 U.S.C. § 1407 (1995). The legislative history of this section reveals that: The objective of the legislation is to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the "just and efficient conduct" of such actions. The committee believes that the possibility for conflict and duplication in discovery and other pretrial procedures in related cases can be avoided or minimized by such centralized management.

H.R. REP. NO. 1130, 90th Cong., 2d Sess. 2-3 (1968), reprinted in 1968 U.S.C.C.A.N. 1898, 1899-1900.

⁹⁴ See generally FED. R. CIV. P. 42(b) and equivalent state rules. Judicial economy and prevention of jury confusion are the primary purposes for allowing trials of various issues or claims.

⁹⁵ See FED. R. CIV. P. 23 and equivalent state laws.

⁹⁶ See generally FED. R. CIV. P. 49(a) and equivalent state laws.

⁹⁷ Blomquist, *Emerging Themes*, *supra* note 5, at 15-25.

⁹⁸ See, e.g., HARR, *supra* note 1, at 107-19 (describing Judge Skinner's handling of Grace's Rule 11 motion by William Cheeseman against Jan Schlichtmann; brooking prolix legal memorandum filed by the attorneys; finding room in his "busy trial calendar" to

On another level of analysis, however, at least two of Judge Skinner's case management judgment calls are extremely troubling. Taken chronologically, the first questionable management call of significance began with Judge Skinner's last-minute decision, on the eve of trial and after the jury had been empaneled,⁹⁹ to trifurcate the liability and damages issues in the case into a responsibility phase, a causation phase, and a damages phase. While this decision should have been made months earlier at the final pre-trial conference, the judge was right to be concerned about the potential for jury confusion and the practical difficulties of addressing all claims by all litigants in one trial. As Harr informs us, Judge Skinner remarked: " 'I've been trying to picture what this trial is going to look like,' the judge told the lawyers. 'You've got thirty-three plaintiffs, and to submit all thirty-three of these causation and damage issues in one trial may be unbelievably cumbersome. It's very complicated.' "¹⁰⁰

The judge decided to divide the trial into three separate phases. The first stage of the trial, the " 'waterworks' phase of the case" focused on whether Beatrice and Grace could be linked to the contamination of Wells G & H.¹⁰¹ According to the judge, " '[u]nless you get the product being dumped on the property and getting into the water, there's no case. There's no point in going any further.'" The second stage of the trial focused on the causation question: "had the chemicals in fact made the surviving family members sick and killed the children?"¹⁰² The judge went on to say " '[i]f the jury decides that favorably . . . then you have to ask, How much is that worth? How much compensation do you give somebody for the loss of a child?' "¹⁰³

Thus the link between Grace, Beatrice and the water, and the link between the water and the injuries were presented separately.¹⁰⁴

However, Judge Skinner's approach to the practical cumbersomeness of the case unfairly prejudiced the plaintiffs' case for three reasons. First, Judge Skinner's management order overtly favored Mr. Facher, the Beatrice attorney in the case. Apparently, the judge was "trying to make amends for denying [Facher's earlier] plea for a six-month delay."¹⁰⁵ But, Judge Skinner routinely favored Facher throughout the long course of the litigation, apparently due to law

accommodate the various motions of the attorneys; judiciously handling questionable legal practices by counsel; attempting to expedite amicable voluntary resolution of the various issues); *id.* at 267-90 (ruling on Beatrice's motion to postpone the trial; empaneling the jury); *id.* at 293-376 (conducting the waterworks phase of the trial).

⁹⁹ *Id.* at 285.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 286-87.

¹⁰² *Id.* at 287.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 287-88.

¹⁰⁵ *Id.* at 287.

school ties and prior acquaintance.¹⁰⁶ Second, while Judge Skinner's order made sense, it was also dangerous, as Professor Charles Nesson unsuccessfully argued in his role as plaintiffs' co-counsel: "[T]he jurors would come into the courtroom expecting to hear a human drama about the poisoning of the Woburn families. Instead, they'd first have to sit through a case about geology and groundwater movement."¹⁰⁷ Third, from the standpoint of both epistemology and cognitive psychology, Judge Skinner's artificial breaking up of the Woburn story into three distinct phases confounded the jury's ability to understand the case.¹⁰⁸ The tortious wrong implicated in the case was the negligent poisoning of a particular human drinking water source with toxic chemicals that, eventually, caused plaintiffs to suffer death and disease. Such a factual scenario needs to be heard synoptically, not in a piecemeal fashion.

The second significant questionable case management judgment call by Judge Skinner is two-pronged: (1) his mishandling of Schlichtmann's post-trial motion for a new trial based upon discovery abuse by counsel for Beatrice¹⁰⁹ and (2) the judges further actions (on remand from the United States Court of Appeals) regarding the so-called "misconduct hearings" leading to his decision not to grant Schlichtmann's request for a new trial against Beatrice.¹¹⁰

It all began during a routine search of the regional EPA's records by one of Schlichtmann's assistants in 1987—over a year following the end of the "waterworks" phase of trial. In this search, Schlichtmann discovered a groundwater analysis report prepared by an environmental engineering firm in 1983 (three years before the start of trial) for a subsidiary of Beatrice: the John T. Riley Tanning Company. Schlichtmann was "astounded" because "[h]e had never seen this report before, and yet he had asked repeatedly, in interrogatories, in depositions, and by subpoena—on eleven separate occasions, he counted—for all such documents."¹¹¹ The newly-found report was highly probative, Schlichtmann thought, of the issue of groundwater contamination of Wells G and H by toxic substances emanating from

¹⁰⁶ See, e.g., *id.* at 464 (ruling Facher was not to blame in failing to turn over key documents in discovery).

¹⁰⁷ *Id.* at 287.

Nesson tried to change the judge's mind. "This is the defendants' plan," he began, but the judge quickly interrupted him.

"No, it's *my* plan," the judge insisted.

"It's your plan," conceded Nesson. "But when you start the trial with essentially a bloodless issue, where you don't have the families, that's very advantageous to the defendants."

Id.

¹⁰⁸ See *id.* at 372.

¹⁰⁹ See *infra* notes 114-15 and accompanying text.

¹¹⁰ See *infra* notes 123-27 and accompanying text.

¹¹¹ HARR, *supra* note 1, at 460.

Beatrice's land: "The report stated that groundwater from under the [Beatrice] tannery flowed to the east, toward the city wells, through very porous soil, exactly as Schlichtmann's expert . . . had predicted. Tannery waste, described in the report as 'a black sludge resembling peat,' had been dumped down the hillside leading to [Wells G & H]."112

In light of the Beatrice groundwater report, Schlichtmann made a motion for a new trial. During oral argument, Judge Skinner curly doubted that the report would have been helpful to the plaintiffs at the time of the "waterworks" phase of trial. Moreover, during the argument on the motion, the judge let pass, without sanction, a threat of physical violence made by Facher against Schlichtmann;¹¹³ the judge also denied Schlichtmann's request to ask Beatrice's attorneys "if they knew of any other documents relevant to the lawsuit that they had failed to produce."¹¹⁴ Taking nine weeks to issue his order, Judge Skinner—in an analysis that is as incredible as it is shallow—"found that the [Beatrice groundwater] report was, on balance, 'more favorable' to Beatrice than not, 'or at the most of neutral value.' Its presence in the case would not, therefore, have materially affected the outcome of the trial."¹¹⁵ "The judge did agree, however, that Schlichtmann had properly asked for the report." And that opposing counsel "should have given it to him."¹¹⁶ However, this "default" was due to "lapse of judgment" and not a "deliberate conspiracy."¹¹⁷ In fact, the judge concluded that Schlichtmann himself was partially re-

112 *Id.*

If he'd had this report, thought Schlichtmann, the trial would have been a different event altogether. The report bolstered the testimony of all his own experts. And who knows what other discoveries the report might have led him to? Certainly Facher must have known about this report. Why had Facher hidden it? And what else had he hidden? Was it possible that there was more?

Id.

113 At the hearing on Schlichtmann's motion,

Facher, quivering with rage and indignation, stood directly behind Schlichtmann. He lifted his hand as if he were about to strike Schlichtmann on the head.

From the corner of his eye, Nesson saw this movement and leaped up to confront Facher. Judge Skinner jumped up, too, and then so did Schlichtmann. "I will meet him in the hall if he wants to," sputtered Facher, looking up at Schlichtmann, who towered over him. "Or Charlie, too."

"Everybody sit down!" roared the judge. "I'm not going to have this bickering between counsel!"

Id. at 462.

114 *Id.* 462-63.

115 *Id.* at 464.

116 *Id.*

117 *Id.*

sponsible for the failure to produce the report, because he insisted on "rushing" to trial.¹¹⁸

Schlichtmann appealed Judge Skinner's ruling on the groundwater report to the United States Court of Appeals for the First Circuit, merging appeal of the judge's ruling on the verdict at the "waterworks" phase of trial with the judge's post-trial decision denying plaintiffs' motion for a new trial because of discovery abuse. Schlichtmann believed that the trial court decisions "went to the very heart of the judicial system."¹¹⁹ While the appellate court affirmed Judge Skinner's findings on the jury verdict below, the appellate panel found, contrary to Judge Skinner's ruling, that "the record contains clear and convincing evidence" of discovery misconduct by Beatrice's counsel.¹²⁰ The First Circuit found, therefore, that Judge Skinner had "abused his discretion in this instance, 'an error that was compounded when he proceeded to make findings of fact [about the discovery dispute] on the very matters which inquiry could reasonably have been expected to illuminate."¹²¹ Accordingly, Judge Skinner was ordered to conduct further " 'aggressive' inquiry" into the discovery allegations and to report back to the appellate court, which retained jurisdiction in the matter.¹²²

Judge Skinner, however, did not expeditiously and properly manage and dispose of the misconduct remand order. Although the judge initially asserted that he was going to "exercise quite stringent control over the shape of the [misconduct] hearing," he summarily rejected considering any affidavits from eyewitnesses and insisted that all witness statements be made in open court, subject to cross examination.¹²³ Over the course of two months, some two years after the end of the "waterworks" phase of the case, Judge Skinner "heard the testimony of twenty-six witnesses and received into evidence 236 exhibits totalling almost three thousand pages. The misconduct hearings lasted longer than most major trials."¹²⁴ Incredibly, however, after another four months had passed and Judge Skinner issued his opinion, in which he absolved Facher of any misconduct, the judge found it necessary to convene yet another round of misconduct hearings wherein Beatrice would bear the burden of proving that the misconduct of one of its affiliated lawyers had not "materially impaired"

118 *Id.*

119 *Id.* at 465.

120 *Id.* at 466.

121 *Id.*

122 *Id.* at 466-67.

123 *Id.* at 467-68.

124 *Id.* at 477.

Schlichtmann's development of the case.¹²⁵ In this further round of post-trial misconduct hearings, Facher tried to call Schlichtmann to the stand to ask him, under oath, whether Schlichtmann had been prevented from developing the case against Beatrice because he did not have access to Beatrice's newly-discovered groundwater report. Schlichtmann refused. Then the judge demanded to see Schlichtmann's investigative file to see whether or not he had comparable groundwater information about the Beatrice tannery property. In an unfair turning of the tables, Judge Skinner's final report to the Court of Appeals on the discovery misconduct zeroed in on Schlichtmann, who had no notice that his conduct was under review for possible judicial sanction at this point in the litigation.¹²⁶ Harr vividly portrays the impact of Judge Skinner's ruling in the following language, worthy of extensive quotation:

[Schlichtmann] awoke from a nightmare into a nightmare. At the office that morning, the judge's clerk called to say that Skinner had just issued his final report to the Court of Appeals. Schlichtmann walked up Milk Street to the courthouse, accompanied by Crowley. "I know I'll be enraged when I see it," he told Crowley. "That arthritic old bastard is going to do something to me."

Up on the seventh floor, at the office of the civil clerk, Judge Skinner's clerk handed Schlichtmann a copy of the decision. Schlichtmann flipped quickly through the pages, scanning the judge's words. Schlichtmann's investigative files ("a thorough and well-documented inquiry", wrote the judge) contained "no support whatsoever for the claim of disposal of the complaint chemicals at the tannery site, or by the tannery on the 15 acres." Judge Skinner concluded that at the start of the case, throughout the entire trial, during the appeal and the misconduct hearings, and up to the present moment, Schlichtmann "knew there was no available competent evidence tending to establish the disposal of the complaint chemicals by the defendant itself, either at the tannery site or on [its] 15 acres."

Accordingly, the judge found that Schlichtmann had violated Rule 11 by pursuing a frivolous claim that had no support in fact. This constituted clear misconduct.

But Schlichtmann's misconduct, continued the judge, was balanced by the misconduct of [Beatrice-affiliated attorney, Mary Ryan] in concealing the [groundwater] report. Thus, concluded Skinner, "in the convoluted context of this case, it is my recommendation that neither party should profit through sanctions from the

¹²⁵ *Id.* at 483-84.

¹²⁶ *Id.*

delinquency of the other, and that should be the sanction for both of them."¹²⁷

It is clear that Judge Skinner's decision to trifurcate the case on the eve of trial, and his handling of the Rule 11 sanctions, as well as his thinly described favoritism towards Jerome Facher had a tremendous impact on the outcome of the case.

II

QUESTIONS OF PROFESSIONAL RESPONSIBILITY

Questions abound concerning the ethics and mores of the numerous attorneys portrayed in *A Civil Action*. Indeed, one of the most powerful themes in the book is the widespread professional *irresponsibility* of the lawyers involved in the Woburn litigation.¹²⁸ For purposes of this Essay, I focus on the three leading lawyers for the key litigants: Jan Schlichtmann, the chief lawyer for the plaintiffs; Jerome Facher, lead counsel for the defendant Beatrice; and William Cheeseman, the principal lawyer for the defendant Grace.¹²⁹

A. Jan Schlichtmann

Jan Schlichtmann certainly meant well. Harr's account portrays him, on balance, as a sympathetic character with many worthwhile

¹²⁷ *Id.* at 486-87. The Court of Appeals adopted Judge Skinner's recommendation with open arms. As described by Harr:

It was not their job, stated the court, to second-guess a trial judge who was intimately familiar with the "checkered history and inner workings of this convoluted case." Judge Skinner deserved commendation for having "tackled so thankless a task with incisiveness and vigor." The court upheld all of Judge Skinner's findings as "sound, well-substantiated, and free from observable legal error," and endorsed the recommendation for sanctions. "This long safari of a case," concluded the court, "may at last be brought to a close."

Id. at 487-88. *Query.* Is the First Circuit's decision *really* based on wanting to get rid of a nettlesome case and to, simultaneously, discourage large, complex cases which have the potential for tying up judicial resources for years at a time?

¹²⁸ *Cf.* the platitude articulated by Justice Felix Frankfurter in *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 247 (1957) (concurring) ("From a profession charged with such responsibilities there must be exacted those qualities of truth-speaking, of a high sense of honor, of granite discretion, of the strictest observance of fiduciary responsibility, that have, throughout the centuries, been compendiously described as 'moral character'").

¹²⁹ This Essay does not contend that any lawyer discussed necessarily breached ethical standards or would be held to have violated specific attorney professional responsibility standards before a state disciplinary board. Rather, the Essay merely comments on some of the logical implications that *could* be asserted from the language in Harr's text. Definitive judgments are not made herein. Moreover, I openly acknowledge that additional contrary accounts of the attorneys' conduct in the Woburn litigation might very well lead to a different conclusion. I do not undertake to look for that additional evidence, however, since the purpose of this Essay is to review the book, *A Civil Action*.

traits, including: astuteness,¹³⁰ generosity,¹³¹ thoughtfulness,¹³² candor,¹³³ public-spiritedness,¹³⁴ industry,¹³⁵ thoroughness,¹³⁶ courage,¹³⁷ tenacity,¹³⁸ and articulateness.¹³⁹ However, in the book, Schlichtmann's positive traits are somewhat diminished by his moodiness,¹⁴⁰ spendthrift and ostentatious financial behavior,¹⁴¹ self-centeredness,¹⁴² unwillingness to listen carefully to others,¹⁴³ quick temper,¹⁴⁴ and greed.¹⁴⁵

Greed, it seems, was the root cause of most of Schlichtmann's professional responsibility problems in the Woburn litigation.¹⁴⁶ Despite a breathtaking run of significant personal injury victories and settlements while in his thirties,¹⁴⁷ Schlichtmann never seemed to be satisfied. He was always pressing for *more*. While money, in the abstract, was not that important to him, he visibly relished the material things that money could buy. After a few years of trying personal injury cases in the fast lane, Schlichtmann came to expect to live with kingly flair.¹⁴⁸

130 HARR, *supra* note 1, at 55.

131 *Id.*

132 *Id.*

133 *Id.* at 58.

134 *Id.* at 59.

135 *Id.* at 61, 65.

136 *Id.* at 61, 127-28.

137 *Id.* at 62-63.

138 *Id.* at 66.

139 *Id.* at 113.

140 *Id.* at 73.

141 *Id.* at 73, 123-25.

142 *Id.* at 55, 81-82.

143 *Id.* at 74-75.

144 *Id.* at 108.

145 *Id.* at 417.

146 *Id.* Cf. the homily from an early American Bar Association ethics opinion: "Ours is a learned profession, not a mere money-getting trade." FRED R. SHAPIRO, THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 132 (1993) (citation omitted).

147 See HARR, *supra* note 1, at 54, 123-24 (describing the settlement of Copley Plaza Hotel fire case for \$2.25 million); see also *id.* at 60-63 (relating a plaintiff's jury verdict totalling \$250,000 for the drowning death of a three-year-old playing in a neighborhood gravel pit); *id.* at 72 (recounting the settlement of a medical malpractice case for \$675,000 involving brain damage suffered by a three-year-old girl); *id.* (discussing the settlement of a medical malpractice case for \$1.15 million involving injuries suffered by a newborn infant from overheating of a hospital incubator); *id.* at 72-73 (reporting a plaintiff's jury verdict of \$492,000 involving a medical malpractice suit against a hospital and physicians for negligently leaving a surgical clamp inside the abdomen of an elderly man for nine years); *id.* at 63-66 (preparing the foundation of settlement for a case close to the policy limits of a million dollars against the pilot of a small private aircraft who crashed the plane while intoxicated and caused the death of three passengers).

148 Curiously, Schlichtmann did not appear to have a miser's predilection to hoard and accumulate stores of money. Harr compared Schlichtmann and his partner Conway:

They differed in their approach to money, too. Conway lived frugally, saving to buy a house and start a family. Schlichtmann spent every penny he earned. Conway noticed that Schlichtmann usually seemed depressed

To complicate matters, Schlichtmann's greed mixed with a gambler's mindset. The Schlichtmann we come to know in *A Civil Action* was a lawyer who repeatedly sought the big payoff. Time and again he risked vast sums of money in various plaintiff-personal injury cases he handled and brandished a cockiness and audacity which bordered on recklessness and irresponsibility.¹⁴⁹ Schlichtmann's greedy gambler's disposition led to the dilemma portrayed at the end of Harr's book. In preparing the case, Schlichtmann had authorized the expenditure of some two and a half million dollars for expert witness fees, exhibit preparation, consulting fees, hotel and food bills, travels, etc. This left him needing a settlement far in excess of a reasonable offer while at the same time unable to afford to go on with further, time-consuming litigation.¹⁵⁰ Schlichtmann's purported sin, then, was a fundamental

when he had money in the bank. He seemed driven by a need to get rid of money as quickly as possible, and when he had spent it all, he would burrow into another case and his spirits would rise.

Id. at 73.

Harr's account describes Schlichtmann's love of the material world in great detail. *See id.* at 123-24 (describing Schlichtmann's use of the "Grand Ballroom at the Ritz-Carlton and a private dining room for lunch and dinner breaks" to conduct settlement discussions in a case). "At the end of the first day the parties retired to the dining room and continued their discussion over lobster bisque, tomatoes Provencale, grilled rack of lamb, and a grand cru Bordeaux, all paid for by Schlichtmann." *Id.* at 123. When he opened his own law firm,

Schlichtmann ordered a large conference room table, made of bird's-eye maple and stainless steel [at a cost of \$12,000], from the man who had designed a similar table for the Blue Room of the White House. Surrounding the table were eight chairs of soft, buttery leather, each like a sofa unto itself. Oak filing cabinets were specially built for the office, along with a library to hold Schlichtmann's substantial collection. He had the decorator install a kitchenette and bathrooms equipped with telephones and a spacious tiled shower. The firm leased the most advanced office computer system available. In keeping with the opulence of the new office, [Schlichtmann's secretary] arranged for fresh flowers to be delivered daily.

Id. at 124-25. Moreover, when Schlichtmann's new office opened, his

firm celebrated its opening with a huge party. A crane pulled up outside, stopping traffic . . . for several hours, in order to hoist a grand piano through the second-floor windows. The first floor of the building was occupied by a venerable old Irish pub named Patten's Bar & Grill. Schlichtmann rented the pub for the evening and hired the best caterer in town to prepare the food. Waiters in black tie served champagne. One jazz combo played downstairs at the bar while another played upstairs in the office.

Id. at 125; *see also id.* at 351 (describing Schlichtmann's hand-tailored suits and Bally shoes); *id.* at 4-5 (describing Schlichtmann's Porsche 928); *id.* at 448 (describing Schlichtmann's need for Dmitri suits, a condominium and regular trips to Hawaii).

¹⁴⁹ *See id.* at 127 (describing Schlichtmann's refusal of a million dollar insurance company settlement offer in a medical malpractice case).

¹⁵⁰ *See id.* at 429 (reporting Schlichtmann's admission that his firm had spent two and a half million dollars in preparing the case). *See also id.* at 379-492 (describing the deteriorating financial status of Schlichtmann and Schlichtmann's firm due to his actions in preparing the Woburn litigation). *See also id.* at 422 ("Schlichtmann looked at his partners. 'The money cannot be taken, not six point six million [dollars as a possible settlement

one. His behavior appears to have forced him to place his own financial interests ahead of his responsibilities to his clients to seek a fair and adequate verdict or settlement.¹⁵¹ Based on Harr's account, it is arguable that in this regard Schlichtmann's own financial interests transgressed at least three of the *Rules of Professional Conduct*. First, and somewhat paradoxically, Schlichtmann could be said, even in the setting of a highly complex and indeterminate toxic tort case,¹⁵² to have violated Rule 1.1 ("Competence") by engaging in lavish and wasteful case preparation that was not "reasonably necessary for the representation" of the Woburn plaintiffs.¹⁵³ Second, given the strongly negative reaction by some of the plaintiffs¹⁵⁴ to the ultimate eight million dollar settlement with Grace (with each family receiving

offer from Grace],' he said in a level voice. 'I cannot take fees and expenses out of that and go to the families empty-handed and say, "Thanks for the privilege of representing you."')".

¹⁵¹ See MODEL RULES OF PROFESSIONAL CONDUCT pmbl. at 6 (1995) [hereinafter RULES] ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.").

¹⁵² See *supra* notes 39-84 and accompanying text.

¹⁵³ RULES, *supra* note 151, Rule 1.1. The full text of the Rule provides that: "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Id.*

A strong countervailing justification for Schlichtmann's lavish case preparation, however, is the fact that the defendants outspent the plaintiffs. Harr noted:

Schlichtmann had indeed been lavish with the expenses. That had always been his way. He'd never spared any cost in preparing a case, and in Woburn there had always been another well that could be drilled, another medical test that could be performed. Yet he had not come close to matching the seven million dollars in legal fees and costs that Grace had paid for its defense, not to mention the additional millions paid by Beatrice.

HARR, *supra* note 1, at 454.

¹⁵⁴ Despite the fact that Schlichtmann only insisted on legal fees based on 28 percent of the settlement—rather than the agreed amount of forty percent in his contingency contract—Anne Anderson "expressed anger at the size of Schlichtmann's fee," *id.* at 453, and she joined another family, the Zona family, in disputing "some of the \$2.6 million that Schlichtmann had claimed in expenses." *Id.* at 454. Indeed, according to Harr:

When they raised this issue, Schlichtmann suggested they hire an accountant to go through the thousands of invoices. They took him up on the invitation. The accountant questioned copying fees, interest charges, overtime expenses, and sundry other matters. Anne and the Zonas hired a lawyer to represent them. Ronald Zona called Donna Robbins [another plaintiff in the case] one night to enlist her support. He told Donna that Schlichtmann had stolen half a million dollars from them.

Id. But Schlichtmann acted honorably in the final analysis with respect to the contention that his firm had overbilled the plaintiffs for expenses:

Schlichtmann told the families that he would not dispute the accountant's findings. He agreed to remit whatever sum the accountant deemed appropriate. The accountant submitted a list that came to eighty thousand dollars. Schlichtmann was prepared to divide this sum equally among the [plaintiff] families, but none except Anne and the Zonas would accept any of the money.

\$375,000 in cash at the time of the approval of the settlement agreement and another payment five years later of \$80,000, with Schlichtmann's case expenses amounting to \$2.6 million and his legal fees to \$2.2 million),¹⁵⁵ Schlichtmann may have failed to fully abide by the commands of Rule 1.4 ("Communication"). Schlichtmann arguably neglected to "explain . . . matter[s] to the extent reasonably necessary to permit the client[s] to make informed decisions regarding the representation."¹⁵⁶ Third, Harr's account does not detail the original consultation given by Schlichtmann to his multiple clients when he took over as lead counsel in the case. To the extent that Schlichtmann did not discuss "the implications of the common representation [of the plaintiffs by Schlichtmann] and the advantages and risks involved" with the Woburn family members who became plaintiffs in the litigation, he may have violated Rule 1.7 ("Conflict of Interest; General Rule").¹⁵⁷

Id. Part of Anne Anderson's negative reaction to Schlichtmann at the time of the settlement with Grace may have been affected by her pastor, Reverend Bruce Young. As explained by Harr:

He'd been furious—"bullshit mad," as he later put it—when he heard that morning about the settlement. He felt he'd invested a lot of himself in this matter, and to him taking Grace's money without a full disclosure by the company, or any expressions of atonement, cheapened everything. The way he saw it, the case had started out as a matter of principle. He recalled Anne Anderson saying once that she wasn't after money, that what she wanted was for J. Peter Grace to come to her front door and apologize. As far as Reverend Young was concerned, Schlichtmann had botched the first part of the trial—the easy part—and then he'd sold out when things began to look risky. Even worse, thought Young, was the way Schlichtmann was now using his lawyerly powers of persuasion to convince the families that they'd actually won something.

Id. at 452.

¹⁵⁵ *Id.* at 453.

¹⁵⁶ RULES, *supra* note 151, Rule 1.4(b).

¹⁵⁷ *Id.* Rule 1.7(b)(2). An interesting comment to Rule 1.7 provides as follows:

Lawyer's Interests

The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See Rules 1.1 and 1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

In general, a more charitable interpretation of the story line in *A Civil Action* might lead one to conclude that Schlichtmann really didn't have a personal financial conflict with the interests of the plaintiffs in the Woburn litigation. See HARR, *supra* note 1, at 75, 417. Support for this view of the narrative can be gleaned from portions of the book where Schlichtmann expresses a general desire to help people through the law while also helping himself to fame and fortune.

B. Jerome Facher

While Harr portrays Jerome Facher in a relatively unsympathetic light,¹⁵⁸ the text generally describes Facher as an ethical, but relentless, corporate defense lawyer.¹⁵⁹ One significant issue¹⁶⁰ of professional responsibility regarding Facher is raised, but not answered, in Harr's tale: was Facher, in any moral way, ethically responsible for interfering with Schlichtmann's documentary discovery requests of what became known as the "Yankee Environmental Engineering" groundwater report?¹⁶¹ This issue is separate and distinct from the question, which was extensively litigated, of whether or not Beatrice's attorneys' "discovery misconduct" had "materially impaired" Schlichtmann's preparation of the plaintiffs' case.¹⁶² If Facher, in fact, ordered that the Yankee Environmental Engineering report not be turned over to Schlichtmann, or determined not to disclose the existence of the report without seeking a protective order from the trial court, he would theoretically be subject to disciplinary sanction under Rule 3.4 ("Fairness to Opposing Party and Counsel"). Specifically, Rule 3.4(a) instructs lawyers not to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."¹⁶³ Moreover, Facher may have breached Rule 3.4(d), which prohibits a lawyer in pre-trial proceedings to "fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party."¹⁶⁴

Given the amorphous language of Rule 3.4, with its qualifying language of "unlawfully," "reasonably diligent effort" and "legally proper discovery," it is unlikely that Facher would have been found to have breached professional ethics. Since Schlichtmann's motion for a

¹⁵⁸ See *supra* note 11 and accompanying text.

¹⁵⁹ See, e.g., HARR, *supra* note 1, at 85-86 (reporting that Facher was chairman of the litigation department at the Boston firm of Hale and Dorr as well as an adjunct trial instructor at Harvard Law School); see also *id.* at 90 ("[Facher had] never seen a case that he thought he could not have won."); *id.* at 86-90 (describing Facher's spartan work habits and frugal temperament).

¹⁶⁰ Two other minor issues of professional responsibility regarding Facher are raised in Harr's book. First, the account of Schlichtmann's perception that Facher had talked about the Woburn litigation with the trial court judge in an ex parte communication, see *id.* at 223-24, if true, would be a probable violation of Rule 3.5(b)'s prohibition against ex parte communications between attorneys and judges. Second, Facher's physical outburst, fighting words, and possible tortious intent toward Schlichtmann at a pre-trial hearing, *id.* at 461-62, arguably violated Rule 3.5(c), which prohibits a lawyer from "engag[ing] in conduct intended to disrupt a tribunal." See also *supra* note 113 and accompanying text.

¹⁶¹ See *supra* notes 116-17 and accompanying text.

¹⁶² See HARR, *supra* note 1, at 123-26.

¹⁶³ RULES, *supra* note 151, Rule 3.4(a).

¹⁶⁴ *Id.* Rule 3.4(d).

new trial because of discovery misconduct by Beatrice's lawyers resulted in the Court's finding the Yankee Environmental Engineering report nondispositive, because of the reciprocal misconduct, Facher could be said to have, on balance, lawfully opposed Schlichtmann's legally improper discovery requests.

C. William Cheeseman

As the key lawyer for Grace up to the start of the trial,¹⁶⁵ William Cheeseman was responsible for pre-trial motion practice and pre-trial discovery in the Woburn litigation. Harr's narrative generally describes Cheeseman as an ethical and upstanding attorney who prided himself on his "reputation at his firm for finding clever ways to kill lawsuits in their infancy, with motions of demurrer or summary judgment."¹⁶⁶ But some of Cheeseman's "pre-trial maneuvering" in the Woburn case, as described in Harr's book, presents a troubling ethical issue of professional responsibility: when a lawyer represents an organization as a client, what are the lawyer's responsibilities to press for candor from employees of the organization who may be lying during the course of discovery?

According to Harr's account, William Cheeseman attended the depositions of several Grace employees who were questioned by Schlichtmann about the extent of their knowledge of dumping chemicals on Grace's property in Woburn, Massachusetts.¹⁶⁷ During early Grace depositions, Schlichtmann had questioned the head of safety and maintenance for Grace's Woburn plant and a former painter in Grace's plant; both witnesses contended that they lacked knowledge of any chemical dumping at Grace over the prior years.¹⁶⁸ When a receiving clerk at the Grace plant, named Al Love, submitted to Schlichtmann's depositions, however, Love admitted to seeing various Grace employees dump leftover containers of waste solvents in a pit in the facility's backyard. Moreover, Love acknowledged that he had heard Grace employees joke about these pits.¹⁶⁹ In another startling deposition revelation, Love informed Schlichtmann that he lived in the east Woburn neighborhood, a few houses away from the lead plaintiff, Anne Anderson, and that he had become concerned for the

¹⁶⁵ Once the first phase—the "waterworks" phase—of the trifurcated trial proceeding commenced, Cheeseman's colleague, Michael Keating, at Foley, Hoag & Eliot, took over the litigation. HARR, *supra* note 1, at 296. Cheeseman did not play an active part in the trial or intervening negotiations. For background references to Cheeseman's personality and eccentricities, see *supra* note 11 and accompanying text.

¹⁶⁶ *Id.* at 95.

¹⁶⁷ See *id.* at 155-83.

¹⁶⁸ *Id.* at 155-60.

¹⁶⁹ *Id.* at 160-62.

safety of his family when he heard that Wells G and H were contaminated.¹⁷⁰

Cheeseman, after Love's deposition, reacted to these revelations by counselling Love to come forward so that Grace could "get the Environmental Protection Agency in," so Grace could "clean up everything that might be in the ground."¹⁷¹ Cheeseman, also, notified Schlichtmann when the former Grace painter partially recanted his deposition testimony ("remembering" that he *had* been involved in dumping solvent drums in a backyard pit at Grace's plant).¹⁷² From these instances, one can infer that Cheeseman did not vigorously press for the complete truth and disclosure of Grace's disposal practices in Woburn. Cheeseman could aptly defend himself from such an accusation by answering that he had no responsibility as an advocate under the *Rules of Professional Conduct*. In particular, Cheeseman could point to Rule 1.13 ("Organization as Client") for authority to support a laissez-faire approach by counsel to the Woburn discovery scenario. Indeed, Rule 1.13 directs a lawyer representing an organization like Grace to take measures "designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."¹⁷³ So, Cheeseman might argue, it doesn't matter if some of Grace's employees lied about their knowledge of past solvent dumping activities; Cheeseman's role was to prudently and methodically get to the bottom of the matter without compromising the organizational interests, and potential tort liability, of W.R. Grace.

I acknowledge the persuasiveness of Cheeseman's hypothetical defense based on existing professional rules of conduct. However, along the lines of Professor Monroe H. Freedman's call for a "lawyer's moral obligation of justification,"¹⁷⁴ I question whether a lawyer in Cheeseman's position shouldn't have a more robust ethical duty. As stated by Professor Freedman:

A moral obligation of public justification is particularly appropriate for lawyers. Ours is a profession of public service. Indeed, we hold a government-granted monopoly to serve a fundamental constitutional function—providing the right to counsel—and we hold that unique power for the benefit of the people of the United States. In a democratic society, the people are entitled to know what lawyers do and why we do it. It is proper, therefore, to publicly challenge lawyers to justify their representation of particular clients, and law-

¹⁷⁰ *Id.* at 163-65.

¹⁷¹ *Id.* at 167.

¹⁷² *Id.* at 172.

¹⁷³ RULES, *supra* note 151, Rule 1.13(b).

¹⁷⁴ Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995).

yers, within the bounds of zealous representation, [and the lawyers] are morally bound to respond.¹⁷⁵

According to Professor Freedman's enlightened view, a lawyer *does* play a moral role in the litigation process and *is* accountable to the public at large for the decision to accept or reject a particular client.¹⁷⁶ How does a lawyer like Mr. Cheeseman justify his firm's continued representation of Grace in circumstances where it reasonably appeared that several employees—and, by implication, management—were not telling the whole truth about prior waste disposal practices at the Woburn Grace facility?

III

LAW AND LITERATURE IMPLICATIONS

Use of the word "literature" "carries with it qualitative connotations which imply that the work in question has superior qualities; that it is well above the ordinary run of written works."¹⁷⁷ Moreover, the word "literature" usually denotes works which belong to the major *fictional* genres such as epic poetry, drama, lyric poetry, novel, short story, or ode.¹⁷⁸

In the last twenty-five years or so, theorists have recognized and named a new genre of literature: "faction." Faction is a portmanteau word—a word formed by combining two or more words. It originated around 1970, "denot[ing] fiction which is based on and combined with fact."¹⁷⁹ Notable examples of the genre include Norman Mailer's *The Armies of the Night*, Truman Capote's *In Cold Blood*, and Alex Haley's *Roots*.¹⁸⁰ Use of the term "faction,"

might easily apply, for instance, to historical novels which combine a great deal of period fact with fictional treatment, or to novels which incorporate actual living personalities (e.g. the President of the USA, the British Prime Minister or the General Secretary of the Communist Party in the USSR) in a narrative about recent events which pertain to historical fact. Faction has proved to be quite a controversial matter, particularly in connection with television.¹⁸¹

As a finalist for the National Book Award, *A Civil Action* deserves to be called literature; as a purported true-life account of a major mass toxic tort case and its key participants that reads like a novel, it may

¹⁷⁵ *Id.* at 112.

¹⁷⁶ *Id.* at 116-17.

¹⁷⁷ J.A. CUDDON, A DICTIONARY OF LITERARY TERMS AND LITERARY THEORY 505-06 (1991).

¹⁷⁸ *Id.* at 505.

¹⁷⁹ *Id.* at 324.

¹⁸⁰ NORMAN MAILER, *THE ARMIES OF THE NIGHT* (1965); TRUMAN CAPOTE, *IN COLD BLOOD* (1965); ALEX HALEY, *ROOTS* (1976).

¹⁸¹ CUDDON, *supra* note 177, at 324.

usefully be referred to as fiction. In my view, it is analogous to a novel. Indeed, when the movie of *A Civil Action* is ultimately released,¹⁸² the celluloid film version will probably qualify as fiction even more than the book does, since it is likely that Hollywood will feel free to take certain liberties with the "facts" represented as truth in Harr's book.

While *A Civil Action*, as a type of fiction, is not a masterpiece of world law-related literature, like *The Merchant of Venice*¹⁸³ or *The Trial*,¹⁸⁴ it is, nevertheless, a best-selling literary expression of American popular culture. As noted by Richard A. Posner, "anyone who has even a nodding acquaintance with modern American popular culture realizes that it is suffused, even preoccupied, with legal themes."¹⁸⁵ Viewed as a work of popular American literature, Harr's book is significant on at least three different levels.

First, *A Civil Action* is a window on an emerging cultural obsession with the American tort system. At the close of the twentieth century more and more American tort cases are mass torts and, with increasing frequency, pit class action plaintiffs against Fortune 500 corporations and large government bureaucracies. We frequently call upon our juries, consisting mostly of the unemployed, the underemployed and minority group members, to grasp arcane scientific evidence needed to decide liability and damages issues and thereby decide the fate of multibillion dollar enterprises. Courtrooms around the country have become amphitheatres for pitched battles involving toxic materials and hazardous products; filing cabinets full of documents, multimedia computer displays, and in-courtroom computers have become the new weapons of legal gladiators. Yet, busy, generalist trial court judges and, often, minimally-educated jurors find it arduous, and at times impossible, to decide these complex mass toxic tort cases based on the black letter law and the scientific evidence. So, by just muddling through and making it up as they go along, our courts and juries manage to cope. But the perception of justice being served is often tarnished as the public comes to see how "big money" talks and everyone else walks. This "stacked deck" problem in American civil justice is brilliantly depicted in *A Civil Action*.

Second, Harr's factional account provides an intriguing view of how laypersons often regard the law. His book is full of riveting and humorous references to lay perceptions of the pomposity of the law, lawyers, and legal institutions. Take, for example, the tearful reaction

182 See *supra* note 22 and accompanying text.

183 WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*.

184 FRANZ KAFKA, *THE TRIAL* (Willa & Edwin Muir trans., Shocken Books 1995).

185 POSNER, *supra* note 31, at 481. See also Symposium, *Popular Legal Culture*, 98 YALE L.J. 1545 (1989).

of a twenty-two-year-old woman, Patti D'Addieco; who was hired to help out around Schlichtmann's law office to Jan Schlichtmann's tirades in the discovery portion of the Woburn case. Schlichtmann wanted the woman to assemble every medical record of every child plaintiff in the case—" [h]e wanted her to find the report of every visit to a doctor, of every scraped knee, sore throat, and common cold."¹⁸⁶ When the assistant insisted that she could not assemble the complete records of plaintiff Anne Anderson because one of her former doctors was dead, the following command bellowed forth out of Schlichtmann's lungs, reducing his assistant to tears: "I don't care! . . . Dig the man out of his fucking grave! Go to his widow's house and get them out of the fucking basement! Do you think Facher cares why you can't get the medical records?"¹⁸⁷

Another example was Anne Anderson's and Reverend Bruce Young's negative reactions to Schlichtmann's counselling skills regarding the settlement with Grace. Bruce Young's cynical view of Schlichtmann's discussions with the plaintiff-families was based on Young's belief that Schlichtmann had "sold out" for his own benefit and then made the situation worse by disingenuously patronizing his clients about the value of the settlement. Anne Anderson viewed Schlichtmann's discussions about settlement possibilities with the plaintiffs as akin to Schlichtmann treating his clients like children while, all along, systematically excluding her input.¹⁸⁸

¹⁸⁶ HARR, *supra* note 1, at 198. "For those children with leukemia, the records consisted of thousands of pages—lab tests, chemotherapy protocols, the notes of nurses, doctors, social workers, and psychiatrists. And for the adults, some records dated back to the 1930s." *Id.* at 198-99.

¹⁸⁷ *Id.* at 199. As humorously related by Harr,

Some months later Patti D'Addieco got her revenge. For Schlichtmann's birthday, she wrote a song—the "Schlichtmann Rap"—and sang it to him at the office party.

Now let me tell you a story 'bout a man named Jan
 Gonna rock you into justice like no other mother can
 You can see it in his smile as he's walkin' into trial
 His hands'll be washed and his clothes'll have style
 Now I want medical records and I want 'em done right
 I don't care if you gotta stay here all night
 I want 'em perfect and I want 'em neat
 And if you fuck 'em up, you be walking on the street.
 What, no juice? I made it perfectly clear
 That there's always gotta be some juice in here
 And it's gotta be natural and it's gotta cost more
 Than any other juice in any other store
 Now before we end this Schlichtmann rap
 Lemme tell ya one more thing 'bout this Schlichtmann chap
 He's got a quick tongue and he's got a keen wit
 And the best thing about him is he can take this shit.

Id. at 199-200.

¹⁸⁸ See *supra* note 154 and accompanying text.

Finally, a third significant feature of *A Civil Action* is its highly-wrought satirical and political characterization, which resembles Tom Wolfe's novelistic work of popular fiction—*The Bonfire of the Vanities*.¹⁸⁹ Jonathan Harr's factional account delicately and indirectly ridicules, censures, and derides the egotistical and money-grubbing world of the "big shot" trial lawyer. True to the satirical form, Harr's work is "a kind of protest, a sublimation and refinement of anger and indignation."¹⁹⁰ In a way, Harr's dystopian treatment of Judge Skinner, Schlichtmann, Facher and Cheeseman, and the other less visible lawyers in his tale, is reminiscent of George Orwell's bitter treatment of various political figures in *Animal Farm*.¹⁹¹ Unlike *Animal Farm*, however, where the characters are fabled caricatures of contemporary figures, the characters in *A Civil Action* do not need animalistic embodiment. Harr achieves the same literary effect by depicting the respective characters—through their own words, their own actions, their own failures to act—as tabloid-like caricatures of your average "slippery" American lawyer.

A Civil Action is also a political narrative with Schlichtmann portrayed as a lawyer trying to buck the establishment, send a message, and hold corporate America accountable for its poisons.¹⁹² In his quest, he faces huge obstacles put in place by powerful business interests and a conservative legal culture. It is ironic that he represents lower middle class victims of chemical contamination but tries to "walk the walk" and "talk the talk" of the big shot trial lawyers, representing Fortune 500 companies, whom he opposes. In the end, Schlichtmann functionally loses his political-legal battle just as Sherman McCoy, the Wall Street bond dealer who thinks of himself as a "Master of the Universe," owns a lavish Park Avenue apartment, and drives a Mercedes, loses his political-legal struggle in *The Bonfire of the Vanities*.¹⁹³

Tom Wolfe's New York is ruled by snobbery, greed, fear and vanity; the legal system which snags Sherman McCoy is a warped one in which only the most unscrupulous and avaricious lawyers thrive. Similarly, Jonathan Harr's Boston, portrayed in *A Civil Action*, is governed by a plethora of human vices. The legal system that professionally and personally defeats Jan Schlichtmann is only marginally responsive to

189 TOM WOLFE, *THE BONFIRE OF THE VANITIES* (1987).

190 CUDDON, *supra* note 177, at 828.

191 GEORGE ORWELL, *ANIMAL FARM* (1946).

192 HARR, *supra* note 1, at 417.

193 WOLFE, *supra* note 189.

injustice. One concludes from reading *The Civil Action* that the system is in need of a major overhaul.¹⁹⁴

¹⁹⁴ I am indebted to Richard A. Posner's analysis of *THE BONFIRE OF THE VANITIES* and helpful insights and inspiration he provided; his "law and literature" analysis has helped shaped my own view of *A CIVIL ACTION*. See POSNER, *supra* note 31, at 481-89.

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