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Reconsidered: Toward a Less Costly,
More Accessible Litigation System**

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Book Review: Civil Justice Reconsidered: Toward a Less Costly, More Accessible Litigation System,

by Steven P. Croley, (New York: NYU Press, 2017), 304 pp., hardback, US \$55, ISBN: 9781479855001.

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A camel, they say, is a horse designed by a committee. By that token, civil litigation is justice designed by the common law. But even though the appearance of both the camel and the system of civil litigation does not betray the existence of any design, much less an intelligent one, careful investigation reveals how both camels and common law courts are awe-inspiringly robust evolutionary adaptations to the complex environments where they evolved. This insight—regarding law, not camels—is but one of the many payoffs of reconsidering civil justice.

In this accessible book, Professor Croley brings to bear his synoptic view of the civil justice literature and his expertise as a practicing attorney. This book addresses a much broader audience than its title might imply, going beyond the cadre of civil procedure and private law aficionados and hoping to inspire and instruct policymakers, involved citizens, and scholars at large. To that end, Croley's exposition is clear and comprehensive, devoid of jargon, and assumes little background knowledge.

The book advances two arguments that partition it into two fairly distinct halves. The first half seeks to dispel the widespread perception that the American system of civil litigation is corrupted by rapacious plaintiffs who leverage the sympathy of gullible juries to extract payments they do not deserve. Croley's careful evaluation of the evidence suggests that the camel is much stronger than that. Upon closer examination of the empirical literature on trial outcomes, he finds little evidence of pro-plaintiff bias, and he notes that across many domains of civil justice, defendants are almost just as likely to prevail as plaintiffs. Croley is also skeptical of the allegation of excessive money judgments: Once one accounts for the severity of the injury involved, the money damages seem to be fairly proportional. While Croley freely admits that there are many who misuse the legal system, he finds that the idea of widespread abuse is largely overstated. The balance of evidence, Croley concludes, does not support those reformers who seek to limit the access of plaintiffs to the courts.

Rejecting the case for limiting plaintiff's access does not mean that the system is optimal. Far from it. Rather than over-participation by unmeritorious plaintiffs, Croley's second proposition is that the real problem is *under*-participation by meritorious plaintiffs. He argues that many are deterred by the cost, length, and complexity of the process and so fail to file claims even when they have a real cause of action. To overcome that, Croley proposes an interesting paradigm which can be dubbed *more cases, less litigation*. If the legal procedure were less complicated, less tolerant of those who file vexatious and frivolous motions, and more streamlined, a larger number of meritorious plaintiffs would be able to access justice at a lower cost.

Moreover, if our society were to extend more resources to legal aid, it would remove another critical roadblock on the way to justice.

From the *more cases, less litigation* viewpoint follow localized and practical reforms of three types: sanctioning attempts to over-litigate cases; providing venues with truncated procedures for resolving small and medium-sized claims; and, expanding legal aid subsidies. In all of that, Croley rejects radical alternatives and favors changes on the margin. Such changes are argued to be better in part because they stand a chance of actual implementation, but also because they are more amenable to empirical evaluation. This resonates well with another theme in this book, the belief that civil procedure should be experimented at the local level, channeling the idea of states as laboratories of democracies that can breed camels more adaptive to the 21st century.

Croley's approach in this book is careful and fair; he takes counter-evidence seriously and acknowledges the limits of supporting evidence. This even-handed analysis of the evidence marks the book's primary contribution: A trusted guide for the perplexed reader who seeks to learn more about the realities of civil litigation in America in a highly politicized area. His reform proposals are equally careful and measured and provide a useful roadmap for a host of non-boat-rocking reforms that still carry the promise of bolstering civil justice in America and potentially also elsewhere.

Besides its many strengths, there are some caveats. The book's dual goals—to show that over-litigation is not a severe problem but under-litigation is—are not always consonant with each other. While the evidence for the existence of a pro-plaintiff bias is carefully dissected, citing dozens of studies, the point that meritorious plaintiffs under-participate is not directly proven empirically. Instead, Croley

explains that litigation is expensive and litigation finance is limited, and on this basis “one would expect some legal harms to go unremedied” (p.124). Similarly, he notes that legal aid is limited and that there are several roadblocks that prevent access to civil justice. Still, he never fully proves the existence of a real, widespread shortfall of cases of social importance. Admittedly, a problem of under-participation likely exists, but the rigor applied to reject the over-participation thesis is markedly different from what is used to establish the under-participation hypothesis. This tension runs even deeper. Croley’s dismissal of the pro-plaintiff bias is built, in part, on the observation that in a broad range of civil categories, plaintiffs lose almost as often as they win. This evidence, he admits, is not conclusive, but he considers it highly “suggestive” of a neutral, unbiased system. But if, as Croley argues in the second half of the book, many meritorious plaintiffs are chilled from participating, then that means the current pool of plaintiffs has *too few* meritorious plaintiffs. This presents the following dilemma. If current win rates suggest a neutral system, there is no need to reform. And if reform were to take place, it would lead to plaintiffs winning more than 50% of the cases (as even more meritorious cases would join the pool of cases), which—by this metric—would indicate bias.

Importantly, it is disputed whether win-rates are indicative of anything. As shown by Priest and Klein¹ and Shavell,² among others, the distribution of win rates can wear many shapes that are largely independent of the whether the legal standard favors one party or the other. Recently, Klerman and Lee have questioned this prevailing

¹ G.L. Priest and B. Klein, “The Selection of Disputes for Litigation”, (1984) 13 *Journal of Legal Studies* 1.

² S. Shavell, “Any Frequency of Plaintiff Victory at Trial is Possible” (1996) 25 *Journal of Legal Studies* 493.

wisdom,³ but the debate is still ongoing.⁴ A lively illustration of the difficulty of drawing inferences from win rates comes from the Israeli criminal justice system, where over 99% of criminal charges result in guilty verdicts.⁵ This fact seems to suggest an almost overwhelming anti-defendant bias, but a closer look at the data reveals a very different picture. The police and attorney general are either very risk-averse or highly lenient, and they winnow out the vast majority of cases, so that the ones that proceed to trial are uncharacteristically strong.⁶ As a result, the prosecution almost always wins, but despite that, it is hard to speak of a pro-plaintiff bias.

Another issue, and one that is common to the broader civil justice scholarship, is the faint attention that is paid to the largest source of civil cases: debt collection lawsuits. Every year, about 8 million cases are filed in as suits by creditors and debt buyers against consumers for allegedly unpaid debts. These cases amount to over 50% of all civil cases, leading far ahead of any other category of cases. Indeed, the average American is far more likely to encounter such a

³ D. Klerman and Y.A. Lee, "Inferences from Litigated Cases" (2014) 43 *Journal of Legal Studies* 209.

⁴ J.B. Gelbach, "The Reduced Form of Litigation Models and the Plaintiff's Win Rate" (2016), work in progress, available online at <https://pdfs.semanticscholar.org/f18d/fece631c5c9d0feb21edf516562a0b5aaf87.pdf> [Accessed 31 July 2018].

⁵ O. Gazal-Eyal, I. Galon and K. Weinshall, "Outcomes Ratios in Legal Proceedings" (Hebrew) (Israeli Courts Research Division, 2012), *Center for the Study of Crime, Law & Society Research Paper*, <http://elyon1.court.gov.il/heb/Research%20Division/doc/Research1.pdf> [Accessed 31 July 2018]. (Only 7 out of 1187 cases that were litigated to a verdict in the lower courts resulted in the exoneration of the defendant, amounting to roughly 0.5%).

⁶ Israeli Police, "Year in Review" (Hebrew) (2015), <https://www.police.gov.il/Doc/TfasimDoc/shnaton2015.pdf> [Accessed 31 July 2018] (roughly 16% of the police cases result in criminal charges). State Attorney, "Year Summary 2015" (Hebrew), <http://www.justice.gov.il/Units/StateAttorney/Publications/OnTheAgenda/Pages/1-07-16.aspx> [Accessed 31 July 2018] (reporting that 78% of the cases were closed by an administrative decision).

lawsuit than to be involved in a contractual dispute or a medical malpractice lawsuit. In this context there is alarming evidence of a systematic failure of the civil litigation system in a way that favors plaintiffs. In many of these cases, service is shoddy, evidence is scant, the consumer appears *pro se*—if she is participating at all—and the plaintiff's representative has all but the most rudimentary familiarity with the case. As one judge put it, these cases tend to “lack a nano of a modicum of a scintilla of a prima facie case”.⁷ Yet, plaintiffs routinely win a default judgment in their favor, with very little judicial oversight or screening.⁸ This is not to say that debt lawsuits are by their nature frivolous, but the lack of any judicial oversight is a recipe for disaster, leading the regulator itself to exasperatedly decry debt litigation as a “broken system.”⁹

In light of these severe issues with the handling of debt collection lawsuits, Croley's marginalist approach may be palliative at best. Civil litigation is not designed to process cases where participation is systematically lacking, and it certainly incapable to do so at the scale necessary to manage 8 million additional lawsuits every year. Indeed, if Croley's proposals will have their desired effect, the result will be a deluge of routine, small cases that the system—already rebuked for being lethargic and overburdened—will have to resolve. There is simply not enough capacity for that. Fortunately, there are viable alternatives, ranging from *qui tam* type lawsuits to

⁷ *Am Express Bank, FSB v Dalbis*, No.300082/10, 2011 WL 873512, at 12 (NY Civ Ct 14 March 2011) (internal quotation marks omitted).

⁸ Y. A. Arbel, “Adminization: Gatekeeping Consumer Contracts” (2018) 71 *Vanderbilt Law Review* 121.

⁹ Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration* (Federal Trade Commission, 2010).

ideas like the class defense mechanism.¹⁰ A recent proposal in this area is the so-called Adminization of certain legal processes, whereby a governmental agency (such as the Federal Trade Commission) randomly samples cases that were filed in state courts and audits them, levying fines where wrongdoing is detected.¹¹ This approach adds a cost-effective layer of consumer protection, that works well independent of consumers' participation gap. Even the cases that are not audited would benefit from Adminization, because plaintiffs would be overall more hesitant to engage in abuse if there is a risk of audit and fines. But what is most important is that these solutions scale well and are thus much more effective than standard solutions that try to cram millions of additional cases into the already clogged arteries of the civil justice system.

Croley's most secure footing is in the tort context and his analysis is best read as a careful analysis of the state of the art in the tort-reform debate. Indeed, most of the examples and data in the book are drawn from this domain. Still, it is worth remembering that a significant portion of tort reform has shapeshifted in recent years. Tort reformers today are not only lobbying for explicit anti-plaintiff measures (such as damages caps) but instead, they pursue alternative strategies that avoid the branding of tort reform and thus sometimes garner the unwitting support of traditional opponents. In the last decade, a systemic effort to lobby for apology laws—laws that make apologies inadmissible at trial—led to legislative changes in most US states, Republican and Democratic alike. In reality, it was recently argued, these apology laws are covert tort reform, as they allow

¹⁰ A. Hamdani and A. Klement, "The Class Defense" (2005) 93 *California Law Review* 685.

¹¹ Arbel, "Adminization: Gatekeeping Consumer Contracts" (2018) 71 *Vanderbilt Law Review* 121.

tortfeasors to escape substantial liability with bespoke, strategic apologies.¹² Croley's proposals are centered on traditional tort reform efforts and so would do relatively little to address these new frontiers.

Despite these issues, I should emphasize, Croley's proposals are sensible and helpful. The only recommendation that may prove counter-productive is his support of a civil "*Gideon*" right; i.e., the provision of subsidized lawyering to indigent plaintiffs. Croley finds it essential to expand legal aid budgets and subsidies and, in particular, to impose more requirements of pro bono work on lawyers. Putting aside my critique of the cost-effectiveness of poverty alleviation through legal aid,¹³ it is interesting to reflect on the idea of mandatory pro bono requirements from the perspective of the Effective Altruism movement.¹⁴ Practicing lawyers in the US have a notoriously bimodal distribution of wages and salaries, with a mass of lawyers who make almost four times the wages of the other mass.¹⁵ If a top-earning lawyer is providing pro bono representation to an indigent plaintiff,

¹² Y. A. Arbel and Y. Kaplan, "Tort Reform through the Backdoor: A Critique of Law & Apologies" (2017) 90 *Southern California Law Review* 1199; B. McMichael, R. Van Horn and W. K. Viscusi, "Sorry is Never Enough: How State Apology Laws Fail to Reduce Medical Malpractice Liability Risk" (2019, forthcoming) *Stanford Law Review*.

¹³ Y. A. Arbel, "Adminization: Gatekeeping Consumer Contracts" (2018) 71 *Vanderbilt Law Review* 121.

¹⁴ P. Singer, *The Most Good You Can Do: How Effective Altruism Is Changing Ideas About Living Ethically* (New Haven, Connecticut: Yale University Press, 2015).

¹⁵ See <https://www.nalp.org/salarydistrib> [Accessed 31 July 2018]