WHERE HAVE ALL THE CASES GONE? THE STRANGE SUCCESS OF TORT REFORM REVISITED†

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ABSTRACT

Just over a decade ago, we published an article in the Emory Law Journal titled The Strange Success of Tort Reform, which was inspired by our interest in the possible connection between tort reform and the declining number and rate (per 1000 population) of tort cases. The article argued that tort reform could succeed in decreasing tort litigation, even in the absence of much formal change in the law. It could do so through sophisticated and aggressive public relations efforts aimed at reshaping the market environment in which plaintiffs’ lawyers work in ways that made their practices more financially precarious. Since that article’s publication, there has been considerable and continuing distress about the apparent demise of the civil jury trial. In this article we revisit our earlier argument about tort reform’s strange success with this concern in mind. In doing so, we agree—to an extent—with those skeptical about a decline in the number of jury trials. At least in terms of auto accident cases—the most prevalent kind of tort case and the type of case that accounts for a large proportion of jury trials—it is not that jury trials are vanishing, it is the cases themselves. We think the important question is more about whether there is something affecting the number of cases that come into the civil justice system, rather than just how they leave it. In other words, it is more a question about tort reform’s impact on the front end of the process rather than the back.

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INTRODUCTION

“Unless there’s a way to make money practicing law, rights don’t make any difference.”¹ This is what a Texas plaintiffs’ lawyer told us in describing the consequences of tort reform’s impact on his practice.² Just over a decade ago we published an article in the Emory Law Journal titled The Strange Success of Tort Reform.³ A part of the 2004 Thrower Symposium that focused on tort reform, the article was driven by our interest in the possible connection between tort reform and the declining number and rate (per 1000 population) of tort cases.⁴ It took an unusual tack for a law school symposium and argued that tort reform could succeed even in the absence of much formal change in the law⁵—formal changes in the law being the more typical focus for law school symposia. Tort reform could do so, we said, through sophisticated and aggressive public relations efforts and political campaigns aimed at reshaping the market environment in which plaintiffs’ lawyers work.⁶ This reshaping, in turn, would make it much harder for the practices of these lawyers to remain profitable.⁷ Market reshaping and profitability become important because these lawyers are the gatekeepers of the civil justice system.⁸ They provide meaningful access to the rights and remedies the law offers.⁹ In other words, they close the gates to the courthouse by focusing tort reform activity on the gatekeepers.

In retrospect, that success may not be all that strange. It can be seen as a part of what some may see as a broader, long-term “war on civil justice.” This “war” is consistent with an even broader, conservative political movement and its interest in reshaping the law to serve its interests.¹⁰ Relatedly, since the early 2000s there has been considerable distress about the apparent demise of

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² Id. at xii–xiii.
⁴ Id. at 1225–27.
⁵ Id. at 1229.
⁶ Id. at 1227–28.
⁷ Id. at 1229.
⁸ Id.
⁹ Id. at 1229.
the civil jury trial as perhaps the key form of court-centered litigation.\textsuperscript{11} We want to revisit our earlier argument about tort reform’s success in light of more recent patterns and changes in tort cases and the contemporary concerns about the declining incidence of court-centered litigation—especially with regard to civil jury trials.\textsuperscript{12} And, we want to do so in the context of the research we have done since that earlier article. As will become clear, we agree—to an extent—with those skeptical of the recent concern over jury trials and the consequences of their apparent demise. At least in terms of auto accident cases—the most prevalent kind of tort case, accounting for a large proportion of jury trials\textsuperscript{13}—it does not appear that juries are vanishing, although it might be that the cases themselves may have at certain points in time.\textsuperscript{14} We are not, however, skeptical about the war on civil justice itself and its possible success. We think the important question is more about whether cases continue to come into the civil justice system rather than just how they leave it. In other words, it is more a question about tort reform’s impact on the front end rather than on the back.

Our 2004 \textit{Emory Law Journal} article focused on Texas, where we have been doing research related to civil justice for many years and continue to do so. Texas is our laboratory and our focus here.\textsuperscript{15} For this Article we are interested in what has happened more recently with regard to tort cases and dispositions, especially trials. The 2004 article explored changes in tort litigation rates and dispositions—specifically auto accident cases—in light of the ways in which plaintiffs’ lawyers altered their practices based on their perceptions of the tort reformers’ public relations and political campaigns.\textsuperscript{16} Those alterations ranged from leaving the practice area altogether to taking fewer auto cases, to screening cases more stringently, and even to turning away

\begin{itemize}
  \item \textsuperscript{13} Daniels & Martin, supra note 3, at 1228 n.13.
  \item \textsuperscript{14} Id. at 1236–37.
  \item \textsuperscript{15} Texas has a substantial, longstanding, and differentiated plaintiffs’ bar. It has a twenty-five-plus-year history of increasingly intense tort reform activity that includes legislative and rule changes as well as the lobbying efforts and public relations campaigns on the part of special interest groups with national ties. Finally, Texas has become the poster child for tort reform success. It provides an excellent locale for systematically examining the impact of tort reform on plaintiffs’ lawyers and their practices. See DANIELS & MARTIN, supra note 1, at xiv.
  \item \textsuperscript{16} Daniels & Martin, supra note 3, at 1236–37.
\end{itemize}
certain kinds of clients they would have taken previously (clients with good cases).\textsuperscript{17}

Here we reexamine those issues with updated data on tort cases, dispositions, and on plaintiffs’ lawyers collected after the 2004 article. The major source for the earlier article was a survey of Texas plaintiffs’ lawyers we completed in 2000 and the in-depth interviews with plaintiffs’ lawyers done prior to the survey.\textsuperscript{18} The major source for this Article is a second survey of Texas plaintiffs’ lawyers we conducted in 2006, along with a second round of interviews.\textsuperscript{19} The two surveys and the two rounds on interviews included many questions in common that allow for comparisons at two different points in time.\textsuperscript{20}

Among the common questions were ones about:

- perceptions of tort reform and juries;
- personal and professional backgrounds;
- reasons for choosing a plaintiffs’ practice;
- nature of practices;
- nature of clients;
- how clients are obtained and screened;
- views of advertising and other means of attracting clients;
- firm organization and financing; and
- professional and political activities.\textsuperscript{21}

With regard to professional background and nature of practice, we specifically asked if they were certified by the Texas Board of Legal Specialization.

Certification is important to our re-examination in light of the concerns over vanishing trials. Established in 1974, the Board certifies Texas lawyers in twenty-one different practice areas.\textsuperscript{22} Certification signals a well-understood

\textsuperscript{17} Id. at 1259–61.
\textsuperscript{18} Id. at 1237.
\textsuperscript{19} DANIELS & MARTIN, supra note 1, at 241–43.
\textsuperscript{20} For the details of our Texas plaintiffs’ lawyers’ research, see id. at 241–42.
\textsuperscript{21} Id. at 242.
level of specialized expertise and experience, and gaining certification is no simple matter—fewer than 10% of all Texas lawyers are certified in at least one of the twenty-one areas. It requires a set number of years of relevant experience and passage of a written exam, and it must be periodically renewed. The two most relevant for plaintiffs’ lawyers and this Article’s discussion are personal-injury trial law and civil trial law. Certification in personal injury trial law, civil trial law, or both represents a commitment to a specialized practice that is litigation-focused. For us, the question is whether the interest in these two certifications is waning.

Finally, juries have always played an important role in our research on civil justice and tort reform, and they do in this Article as they did in the earlier one. Both of our plaintiffs’ lawyer surveys and our interviews included a host of questions probing—in detail—lawyers’ perceptions of juries and jury behavior in ways that allow us to explore the connections to the strange success of tort reform. Most of these questions were among the ones that literally appeared verbatim in both surveys. Here we use that information in addressing the concern over the demise of trials, especially jury trials.

Despite the apparent strange success of tort reform through the first decade of the 2000s, there have been some recent, interesting changes in the number of auto accident cases and trials that our research cannot yet fully explain. This is still a very dynamic civil justice system and these recent changes will require additional research to understand.

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25 Id.
26 Daniels & Martin, supra note 3, at 1242–44.
I. CONTEXT: “THERE’S SOMETHIN’ HAPPENIN’ HERE, WHAT IT IS AIN’T EXACTLY CLEAR”

The context for our 2004 article was the idea—then still very much alive—of a litigation explosion, one that seems to have lost traction in the face of empirical evidence. A 2013 article by a journalist and long-time astute observer of the Texas civil justice system nicely captures the more contemporary context with its different focus—civil juries. Writing in the Dallas Morning News, Mark Curriden highlighted the decline in jury trials and opened with a 1997 quote from Judge Patrick Higginbotham: “There are certain elites in this country who don’t trust juries. . . . The future of our jury system is very much in danger.” Curriden noted that at the time, “most lawyers and judges scoffed at the suggestion,” but, since 1997, “civil jury trials have plummeted to 40-year lows.” He pointed out that between 1997 and 2012 there was a 64% decline in civil jury trials in the Texas district courts. Citing figures representing a 63% decline over the same time period, he added that civil jury trials in Texas federal courts showed “an equally significant decline.”

A quote from a well-known Texas plaintiffs’ lawyer was offered by Curriden to characterize the stakes: “This means justice in Texas is at a 40-year low.” However, the concern about civil jury trials is not one-sided. Curriden also quoted the then-head of the Texas Association of Defense Counsel as saying that the decline in jury trials is “profoundly negative” and “an unhealthy trend for those seeking justice”—a trend he believed would continue. The causes offered for this decline include lawyers’ distrust of juries, cost (especially for discovery), the use of mediation or arbitration, tort reform, and appellate court decisions.

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27 The first two lines of the opening stanza of the popular mid-1960s song written by Stephen Stills and recorded by Buffalo Springfield, Buffalo Springfield, For What It’s Worth, on Buffalo Springfield (Atco Records) (1966). The inspiration for using the lines here comes from Texas Chief Justice Nathan Hecht’s use of these lines to characterize the situation in Texas in his article The Vanishing Civil Jury Trial. See Hecht, supra note 12, at 170.
28 See Daniels & Martin, supra note 3, at 1225–27.
29 Curriden, supra note 11.
30 Id.
31 Id.
32 Id.
33 Id.
34 Id.
35 Id.
36 Id.
Interestingly, another district court judge in Texas, Judge Xavier Rodriguez, addressed the same kinds of declines in jury trials, but he was not so sure it was an “end of justice as we now know it.”37 His concern was federal practice, and he noted a host of changes that might have made jury trials less attractive (for example, discovery costs) or lessened the need for jury trials (for example, mediation, arbitration, jury waivers, better case management by judges).38 The judge noted, “[I]f cases are not being tried because of the costs and delays attended in getting a case to a jury, then procedural reform of our system is imperative.”39 On the other hand, he asked, “If voluntary mediations settle cases after informed decisions are made, why is this not a form of collaborative justice that is touted and praised in many legal circles?”40 Still, the judge bemoaned what he saw as the lack of research on what kinds of cases are tried, and specifically those tried to a jury, and saw potential problems if certain kinds of cases no longer go to a jury. “If civil jury trials are declining in cases addressing rights of assembly, free speech and expression, and denial of due process, that may be troubling.”41

With regard to Texas state trial courts, similar observations about declining jury trials and the reasons behind them can be found in a 2005 law review article by then Texas Supreme Court Justice Nathan Hecht (now Chief Justice).42 His particular interest was civil jury trials in Texas.43 Chief Justice Hecht, like all of the others addressing the issue, did not question the decline in civil jury trials, and he summarized the findings of an influential 2004 article by Marc Galanter—The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts44—noting, “[B]y any measure, the number of jury trials in federal courts has declined precipitously since about 1985.”45 In turning to Texas specifically, he examined data from the Texas Office of Court Administration for fiscal years (September to August) 1986 to 2004.46 Using those materials he concluded that “annual numbers of jury trials

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38 Id. at 338–40, 345, 347–48, 351.
39 Id. at 365–66.
40 Id. at 365.
41 Id. at 364.
42 Hecht, supra note 12, at 163–64.
43 Id. at 166.
44 See Galanter, supra note 12.
45 Hecht, supra note 12, at 166; see also Galanter, supra note 12.
46 Hecht, supra note 12, at 168.
in civil cases declined fairly evenly between 1986 and 2004,”—a decline of 49%.47

Like Judge Rodriguez and Curriden, Chief Justice Hecht looked for possible explanations in a number of factors—for example, cost (especially discovery), delay, perceptions of jury behavior, arbitration and mediation, tort reform and other substantive changes in the law, changes in procedural law, and judges acting more as case managers.48 Unlike Judge Rodriguez and Curriden, Chief Justice Hecht seemed skeptical of the growing concern over jury trials and the idea that the decline in trials represents an end of justice as we now know it.49 And he is not alone. In his observations on Galanter’s article and its influence, one prominent commentator—law professor and political scientist Herbert Kritzer—reminds everyone that despite the recent outrages, concerns about “vanishing” jury trials are not new and go back to at least to the 1920s.50

A key part of Chief Justice Hecht’s skepticism goes to his characterization of those pushing the issue:

It must fairly be said that civil disputes are being resolved sufficiently to the satisfaction of the public and the bar that the decline in civil jury trials was scarcely noticed until fairly recently. Increasingly, the pretrial process is but a preface to mediation. This seems to have met with judicial approval, and if the bar and litigants are discontent, at least they have raised little objection.51

With regard to those decrying the trend to fewer jury trials because of the many benefits of such trials, he added, “Jury-trial defenders sound like someone selling cod liver oil as a soft drink and insisting that people should buy it because it is good for them, even though it costs more than soda and leaves a bad taste in the mouth.”52

Regardless of the causes of the decline and the proffered solutions to remedy the problem, Chief Justice Hecht is resigned to what he thinks may be inevitable. “The civil jury trial, as a dispute-resolution product, is losing its

47 Id. at 169–70 (emphasis added).
48 Id. at 172–181.
49 Id. at 181–83.
51 Hecht, supra note 12, at 181.
52 Id. at 182.
market,”53 and he is not sure the trend can be stopped. It has “continued . . . over decades, cannot easily be reversed and will likely be irreversible at some point.”54 Still, Chief Justice Hecht—while he may not want to ally himself with the “jury-trial defenders”—finds the decline in civil jury trials troubling. “My own view is not only that the civil jury trial is well worth preserving, but that it must be preserved to assure public participation in civil dispute resolution, the continued development of the common law, and a bar well-trained in advocacy.”55 For Chief Justice Hecht, perhaps the problem with the current concern over the decline in civil jury trials is not so much the decline (which does worry him) as it is those pushing the issue—the jury-trial defenders trying to sell cod liver oil. At least in Texas, many of those defenders are his political adversaries and are at odds with him on a variety of issues dealing with the civil justice system—especially with regard to tort matters and the practices of plaintiffs’ lawyers.56

It is worth noting that Texas is not the only state in which concern over declining jury trials has become an issue in light of the Galanter article. For instance, in early 2015 the Iowa State Bar Association reported on the continued decline in civil jury trials in Iowa District Courts. In 2014, across the state there were only 184 civil cases with jury verdicts entered . . . . During 2014, there were 13 Iowa counties where no trial verdict was entered in Iowa District Court whatsoever, civil or criminal. In total, 61 counties had three or fewer jury verdicts.57

In 2010, the Florida Bar believed the issue was so serious that a special committee was created to investigate the matter with specific attention to Florida’s courts.58 Galanter’s article, once again, was a key impetus for the committee’s concern.59 The committee issued its report in 2011, and among its findings was that the number of civil jury trials in the Florida circuit courts declined significantly between fiscal years 1986–1987 and 2009–2010 (64%), as did the percentage of all civil dispositions accounted for by jury trials.

53 Id.
54 Id. at 183.
55 Id.
58 See FLA. BAR, REPORT OF THE SPECIAL COMMITTEE TO STUDY THE DECLINE IN JURY TRIALS 1 (2011).
59 Id.
(88%). The pattern for non-jury trials was no less dramatic—an 88% decline in the number of non-jury trials. Interestingly, from 1986–1987 to 1992–1993, non-jury trials accounted for more dispositions than jury trials (ranging from 2% to 3%). After that, with the exception of 2007–2008, jury trials were more prevalent. The two sets of declines together tell us trials (jury and non-jury) themselves declined as a percent of all dispositions. Between 1986–1987 and 1989–1990, 4% of dispositions were trials. By 2008–2009, the percentage dropped below 1% of all dispositions.

In reading any number of pieces on the jury issue—like the ones just mentioned—one quickly finds the lodestar for much of the concern: Galanter’s 2004 article *The Vanishing Trial*. The article emerged from the 2003 Litigation Section of the American Bar Association Symposium on the Vanishing Trial and was updated in a 2011 paper by Galanter with Angela Frozena. The findings from the original article have been summarized in many places and there is no need to do so again. Its basic message is one of a substantial decline in the number of trials (civil and criminal, jury and bench) and in the percentage of matters (civil and criminal) disposed through a trial—jury or bench. The possible reasons outlined by Judge Rodriguez and by Chief Justice Hecht are the ones found in Galanter’s work. It should be noted that the focus of the Galanter article was primarily on the federal courts, but it did touch on state courts generally.

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60. *Id.* at 2–3. That report noted similar investigations elsewhere across the country. *Id.* at 1–2.
61. See *id.* at 22 tbl.2.
62. See *id.*
63. See *id.*
64. See *id.*
65. See *id.* (Circuit Civil Dispositions fiscal years 1986–1987 through 2009–2010). The Florida committee also looked at civil matters (not involving traffic cases) in the county courts. See *id.* at 27 tbl.7. The situation there was different in that jury trials were always a negligible percentage of dispositions. See *id.* In only three times between 1986–1987 and 2009–2010 did jury trials account for even 0.1% of civil dispositions. See *id.* However, non-jury trials declined noticeably as a percentage of all civil dispositions. See *id.* In the late 1980s, the percentage ranged from 6% to 8% of dispositions. See *id.* In 2003–2004, the percentage had dropped to 1%. See *id.* (County Civil Dispositions fiscal years 1986–1987 through 2009–2010).
69. See Galanter, supra note 12.
70. See *supra* notes 39–44, 50 and accompanying text.
The message remains unchanged in the 2011 update of the article, which opened, “The recent data on civil trials can be summed up in two stories: no news and big news. The no news story is that the trend lines regarding the decline of trials are unchanged. The big news story is that the civil trial seems to be approaching extinction.” For the federal courts, Galanter and Frozena reported not only a

long-term decline in the percentage of cases that reach trial . . . [but] an absolute decline that has been proceeding without interruption for about a quarter century . . . .

Although the rates of decline vary from one case type to another, decline is general. There is no major category of cases that is exempt . . . . We think it is fair to say that decline has become institutionalized in the practices and expectations of judges, administrators, lawyers, and parties.

Galanter and Frozena reported that the patterns for the state courts are similar: “The steady fall in the absolute number of trials begins later in the states, in the early-1990s as opposed to the mid-1980s for the federal courts. In both state and federal courts, the decline in jury trials is preceded by a decline in bench trials.” Trials declined for all kinds of cases.

There is an apparent and seldom questioned consensus on the vanishing trial, especially the jury trial. One interesting exception is the commentary of Professor Herbert Kritzer. He wondered whether the data for the federal system—which lie at the heart of the claims about juries—are as clear-cut as some believe. “Without a doubt, some types of trials, such as the jury trial in federal court, have declined in frequency, but the answer to the question of whether trials have generally declined depends on what one chooses to include in the category of 'trials.'” After exploring different versions of what counts as a trial in the federal system and different parts of the available federal data, Kritzer noted that

over the last thirty years there has been a pattern of decline in the total number of trials in the federal district courts, regardless of what is defined to count as a trial. However, the nature of that decline, and whether that decline has stabilized or, possibly for criminal cases,
reversed course so that there is now a pattern of some increase, depends on how one defines a trial.\textsuperscript{77}

Kritzer looked beyond the federal trial courts to other federal adjudicatory processes:

[\textit{W}hile Galanter\textquoteright s work shows that federal trials in which lay jurors determine which side prevails have decreased, the number of federal adjudicatory proceedings in which parties have the opportunity to present evidence and challenge the opposing side\textquoteright s evidence (with the assistance of skilled counsel if desired and affordable) before a neutral decision maker is large, and may actually be growing.\textsuperscript{78}]

With regard to the states, Kritzer was especially skeptical of specific, generalized claims that dominate the discussion—and for good reason. He noted,

Analyzing the statistics from state courts is challenging due to differences in how states define \textquoteleft trial,\textquoteright as well as differences in the use of general jurisdiction courts rather than those of specialized or limited jurisdiction. Some states have unified court systems in which there is only a general jurisdiction court, but in many unified court systems, there are specialized dockets for cases such as traffic, family (divorce), probate, and small claims.\textsuperscript{79}

Things get even more complicated when other court-like bodies are included in the analysis because of the very different ways states handle these bodies and the kinds of disputes handled.\textsuperscript{80}

With respect to the possible cause or causes of any decline in civil trials—jury or non-jury—Kritzer looks at the matter somewhat like Judge Rodriguez and Chief Justice Hecht. Drawing on his own research on the process of civil litigation, he focused on the incentive structure for lawyers and their clients and argued,

Given that the cost of trials in private civil cases falls largely on the parties, one can ask whether the decline is itself a rational and positive development. . . .

. . . If parties look at the economic realities, including costs and uncertainties over outcomes, and conclude that a settlement is

\textsuperscript{77} Id. at 426.
\textsuperscript{78} Id. at 429.
\textsuperscript{79} Id. at 430.
\textsuperscript{80} Id. at 433.
preferable to the costs and risks associated with going to trial, particularly a jury trial, why is that a negative development?\textsuperscript{81}

This is especially the case for smaller matters in which “the costs of going to trial tend to be a, probably the, driving force; even for plaintiffs paying lawyers on a percentage-fee basis, a compromise settlement will often put more money in the plaintiff’s pocket than will a fully successful trial.”\textsuperscript{82}

Whatever may be said about the reasonableness of the various descriptions of patterns and changes in the federal courts with regard to trials, general statements about what is happening in state courts do seem particularly problematic. There are just too many differences among the states in structure and the reporting of data, as Kritzer rightly pointed out; but there are also too many differences among different kinds of cases—especially in the state courts. Too often the claims about state courts—where, of course, most of the action has always been—are stated in the most general terms about all cases—civil or criminal. At best, for civil cases, commentators may remove family cases or probate or juvenile matters from the analysis of state courts. The Florida Bar’s report, for example, excluded family and probate,\textsuperscript{83} and Chief Justice Hecht removed family and juvenile matters.\textsuperscript{84} But even this leaves a lot of variation with very different kinds of cases still included in the mix. It is not clear what is actually happening in state trial courts despite the bold claims. What is needed, as Judge Rodriguez suggests, is research on dispositions for different kinds of cases—especially what kinds of cases are tried and, more importantly, tried to a jury.\textsuperscript{85}

II. WHERE HAVE ALL THE CASES GONE? TEXAS CASES AND DISPOSITIONS

To characterize his skepticism over the recent concern over jury trials and the possible consequences, Chief Justice Hecht turned to a popular 1960s song recorded by Buffalo Springfield and written by Stephen Stills: For What It’s Worth.\textsuperscript{86} For Chief Justice Hecht, as we have seen, it is not clear whether all of

\textsuperscript{81} Id. at 440; see also HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 9–19 (2004).

\textsuperscript{82} Kritzer, supra note 50, at 440.

\textsuperscript{83} See FLA. BAR, supra note 58, at 22 tbl.2.

\textsuperscript{84} See Hecht, supra note 12, at 168.

\textsuperscript{85} Galanter, supra note 12, at 506–13; see Kritzer, supra note 50, at 429–36 (containing Kritzer’s critique of the Bureau of Justice Statistics/National Center for State Courts material, which Galanter relies upon).

\textsuperscript{86} See Hecht, supra note 12, at 170; BUFFALO SPRINGFIELD, supra note 27.
the fuss over jury trials is really worth it. 87 To an extent, we agree—but for different reasons—because we think the more important question is about cases coming into the civil justice system rather than just how they leave it. Hence our borrowing from another popular song for our title—Where Have All the Flowers Gone—hoping those readers who remember the song will also remember its refrain “When will they ever learn?” and its variant in the very last stanza, “When will we ever learn?” 88

We opened our earlier article by noting the decline in the raw number of new tort filings in the Texas district and county courts between 1995 and 2001, as well as a decline in the rate of new filings (filings per 1,000 population) over the same period. 89 Tort cases, especially auto accident cases, were our concern and will be here as well. Despite the recent generalized claims about one way in which matters may leave the courts—trials, and especially jury trials—we again will start our consideration of the Texas situation with what’s coming into the system: tort filings and rates.

Figures 1A and 1B build on material presented in the earlier article 90 and extend it through 2014. Figure 1A presents data on the combined raw number of tort filings in the district and county courts. 91 It shows a long decline that started in the mid-1990s (when the tort reform movement really started to gather steam in Texas). 92 It was interrupted in the early 2000s with a jump in filings to a level almost as high as it was in 1995. Anecdotal evidence from Texas plaintiffs’ lawyers suggests that some of this may have been the result of lawyers trying to file cases before another set of major tort measures enacted in 2003 took effect. 93 But after 2003, the decline continued until 2009 when filings leveled off.

87 See Hecht, supra note 12, at 181–82.
89 See Daniels & Martin, supra note 3, at 1225.
90 Specifically, Figure 1 in the earlier piece, which went to 2003. See id. at 1232 fig.1.
92 For a discussion of the trajectory of tort reform in Texas, see DANIELS & MARTIN, supra note 1, at 33–54.
93 See Colin Pope, Flurry of Suits Tied to Tort Reform, AUSTIN BUS. J., (June 8, 2003), http://www.bizjournals.com/austin/stories/2003/06/09/story2.html (“Lawsuit filings in Travis County more than quadrupled in the days just before Texas lawmakers passed tort reform legislation. . . . With expectations
As the lines in Figure 1A reflect, the leveling off appears to be driven by auto accident filings and not torts generally. The number of auto accident filings bottomed in 2008, and then increased again reaching a level in 2014 close to the highest levels in 1995 and 2003 (Figure 1A). After the 2003 spike, the decline for non-auto tort cases continued with no leveling off. The high for non-auto filings was in 1995, and the decline bottomed out in 2008—a 38% decrease. Even with the increase in auto filings starting in 2009, the decrease in all tort filings from 1995 to 2014 is still substantial—27%.

Figure 1B presents data for the rate of filings per 1,000 population, and the decline for the total rate is more dramatic than the decline for raw filings—a decrease of 49% between the high point of 1995 and 2014. The decrease from 1995 to the bottom point in 2008 is 52%. Even though the filing rate for auto cases increased after 2008, it did not reach the high point for auto filing rates, which was in 1996. Between 1996 and 2014, the auto filing rate declined by 33%, and between 1996 and the bottom point in 2008, the decline was 45%. The decline for non-auto tort cases between the high point in 1995 and the bottom in 2014 was 72%. The reason for the more dramatic declines in rates as that lawmakers would approve a tort reform package before May’s end, plaintiffs’ lawyers rushed to the county courthouse in Austin—and courthouses across the state—to beat legislators to the punch.

94 Rates are generally used to chart patterns and changes over time or across sites because the assumption is that—all things being equal—more people mean more cases. However, the Texas tort data may lead one to rethink the assumption.
compared to raw filings is that the Texas population increased steadily as the number of cases decreased.

In addition to information on filings, in the earlier article we also presented data on dispositions in the district courts. Starting with 1981–1985, those data showed a sharp decline in the percentage of auto cases disposed through agreed judgments—or settlements. The data also showed an increase in the percentage of cases disposed by a dismissal by plaintiff or for want of prosecution. The percentage of cases disposed by a trial (bench or jury) stayed relatively stable—just above 10%.

Figure 2 also builds on material presented in the earlier article. It extends the trend for agreed judgments through 2014 and adds more detail. It shows the percentage of auto cases and non-auto cases in the district and county courts disposed by an agreed judgment. What is important here is the general pattern over time, which suggests an environment less conducive to settlement. For each type of case in the district court, the pattern is one of a steady decline. For auto cases, it is one of decline from 1985 to 2010, and then a leveling off (a decrease of 59% from 1985 to 2014). For non-auto cases, it is a decline from

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95 See Daniels & Martin, supra note 3, at 1236–37.
96 Id.
97 Id.
98 Id.
99 Figure 3 in the earlier article. See id. at 1236 fig.3.
1993 (the pattern was stable between 1985 and 1993) to 2004, and then a slight increase and a leveling off (a decrease of 44% from 1993 to 2014). For the county court, the pattern for both types of cases is also a decline, but the pattern levels off in 2009.

Figure 2
Percent Disposition by Agreement: By Court and Case Type

Figure 3 again builds on material in the earlier article, extending the trend for cases disposed by dismissal by plaintiff or for want of prosecution to 2014. It adds detail by including auto and non-auto cases for district and county courts. Again, what is important in a rather messy picture is the general pattern over time. For both kinds of cases in the district court the pattern is one of increase. The increase for auto cases is 60%, and for non-auto cases it is 43%. Like Figure 2, this suggests a more hostile environment for tort cases.

100 Figure 3 in the earlier article. See id.
Figures 4A and 4B extend the trends in the earlier article\textsuperscript{101} for cases disposed by a trial through 2014, adding more detail. Again, what is important are the general patterns over time. Figure 4A presents data on the percentage of auto cases disposed by a trial (jury plus non-jury) and the percentage disposed by a jury trial. For both the district and county courts there is a clear downward trend for trials from the high points in 1998 to 2014—decreases of 50% and 60%, respectively. However, jury trials are not the reason for the overall trend. While the \textit{number} of jury trials dropped significantly—from a high of 887 in 1998 to a low of 339 in 2009, with an increase to just 448 in 2014—as a \textit{percentage} of dispositions, jury trials were always a relatively small percentage of dispositions and range narrowly between 4% and 2%. If one wants to argue about the vanishing of jury trials, it can only be as a reflection of the declining volume—the vanishing—of auto cases. Non-jury trials drove the decline in trials, dropping from a high point of 12% of auto case dispositions in 1998 to 5% in 2014.

Figure 4B presents data for non-auto cases. The patterns are somewhat different, but again, jury trials do not appear to be vanishing as a percentage of dispositions in either court, representing only a small percentage of dispositions. Non-jury trials are another matter. In county courts, the percentage of non-auto cases disposed by a non-jury trial dropped

\textsuperscript{101} Figure 3 there again. See id.
dramatically, from a high of 20% in 1995 to 7% in 2014. In the district courts, the percentage declined steadily until hitting a low of 7% in 2004, then rose again to 11%, only to drop to 8% in 2014.
The patterns for trials in general in Figures 4A and 4B are varied, but the evidence of vanishing jury trials is scant at best. Juries have always been a small proportion of dispositions, but they held their own even as non-jury trials noticeably declined. Only by focusing on the raw numbers, which will always be a function of the changing numbers of cases, can one find something to point to, and it is not clear if that makes sense. If justice in Texas has reached a low point, it is because of fewer cases coming into the courts that allow people to pursue the remedies and rights the law provides, fewer agreed judgments for those cases that do come in, and more cases dismissed by plaintiff or for want of prosecution.

Figures 5A and 5B offer another way of looking at trials. Each shows the percentage of all trials disposed by a jury trial and by a non-jury trial. Figure 5A presents the data for auto cases in the district courts. Both forms of trial stay within a fairly narrow range: between 75% and 81% for non-jury trials and between 19% and 30% for jury trials. Noticeably, in the most recent years, the percentage of jury trials increased, hitting its high of 30% in 2014, and the percentage of non-jury trials decreased accordingly, hitting its low of 70%.
Figure 5B presents the data for auto cases in the county courts. Again, both forms of trial stay within a fairly narrow range: between 76% and 89% for non-jury trials, and between 11% and 24% for jury trials. Noticeably, in the most recent years, the percentage of jury trials increased, hitting its high of 30% in 2014, and non-jury trials decreased accordingly, reaching its low of 70%.

In our earlier article, we argued that the general patterns in dispositions suggest a shift in the informal processes that characterize the handling of most auto cases, with the key factors being a decline in settlements and plaintiffs’ lawyers deciding to drop out of the formal system rather than to go to trial—unless the case is seen as a particularly good one. Jury trials are not vanishing. The interesting question is what might explain such patterns and whether tort reform and its attendant public relations campaigns might help in providing an answer. To find out, we turned to our research on plaintiffs’ lawyers and their perceptions of tort reform and its effects on their practices. We pay particular attention to auto accident cases.

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102 *Id.* at 1237.
III. TEXAS PLAINTIFFS’ LAWYERS AND TORT REFORM: WHEN WILL WE EVER LEARN?

A. One Obvious Factor: The Raw Material—Accidents

Clearly, as we noted in the earlier article, the question is not about an explosion of auto tort litigation in Texas—far from it. The question, rather, is what factors might foster a very real decline—at least through 2008. Before turning to plaintiffs’ lawyers and their views, we must address one obvious answer—a decline in the raw material. Perhaps the decline is a function of fewer accidents, especially those with injuries or deaths. Figure 6 extends a similar figure from the earlier article103 and addresses this possibility. It uses a filing rate, but one different than the one calculated using population in Figure 1B. It is a statewide filing rate for auto cases (district and county courts combined) per 1,000 injuries or deaths in auto accidents.104 As we did before, we took this rate for 1985, the first year in our series, and set it to zero. Then we subtracted the original 1985 rate (103.5 filings per 1,000 injuries and deaths) from the rates of each succeeding year. Where the data in the figure in the earlier article ended in 2000, Figure 6 goes through 2014.

If changes in filings were driven largely by changes in injuries and deaths, then we would expect to see little movement from the zero-line after 1985, but Figure 6 shows substantial movement from that line. During the long decline in auto filings, the bars in Figure 6 noticeably grow downward, meaning fewer filings than what might be expected from any declines in the raw material alone.105 The bars increase starting in 2010, more than what might be expected from the rise in injuries and deaths. The downward movement of the bars roughly mirrors the major rounds of tort reform in Texas through the mid-2000s—although auto accident cases were never a direct target of tort reform legislation. The upward movement in the most recent years came as tort reform fervor waned and accidents increased.

103 Figure 2 in the earlier article. See id. at 1235 fig.2.
105 Statistics collected by the Texas Department of Transportation show that injuries and deaths did decline during these years, and increased in the most recent years. See id.
Our last round of Texas plaintiffs’ lawyers research ended before the upturn after 2008, but preliminary work in 2015 found plaintiffs’ lawyers suggesting a variety of possibilities in combination with the possible waning of tort reform. One was an increase in the minimum liability coverage for Texas automobile owners that took effect in 2011. This increase was the second step in a planned program of increasing the required minimum coverage. The first step took effect in 2008. Another possibility points to the economic recovery and higher speed limits. A more specific one points to the oil and gas boom in Texas and its impact on highway safety, and the sense by

106 “The current minimum liability limits are $30,000 for each injured person, up to a total of $60,000 per accident, and $25,000 for property damage per accident. This basic coverage is called 30/60/25 coverage.” Automobile Insurance Made Easy, TEX. DEP’T OF INS. (Feb. 2015), http://www.tdi.texas.gov/pubs/consumer/cb020.html.


plaintiffs’ lawyers that juries will side with their clients and award substantial verdicts.\textsuperscript{110} Only additional research can sort out these—and other—possibilities.

B. More than Law on the Books: “We Work to Change the Way People Think About Personal Responsibility and Civil Litigation”\textsuperscript{111}

In the earlier article we speculated that something else might be affecting auto filings—specifically, the potential influence of an important side of tort reform: the broad political campaign aimed at altering the environment in which civil litigation takes place.\textsuperscript{112} Tort reform has always been about more than changing the law on the books. One need only look to the mission statement of the American Tort Reform Association (ATRA): “ATRA’s goal is not just to pass laws. We work to change the way people think about personal responsibility and civil litigation.”\textsuperscript{113}

In the words of political scientists William Haltom and Michael McCann, in addition to ATRA’s conventional politicking, its “most central role may be to formulate and reformulate ‘common sense’ regarding torts in particular and civil justice in general. . . . Its mastery of the arts of perception and persuasion has augmented ATRA’s success at conventional politicking by publicizing and popularizing tort reform messages.”\textsuperscript{114} ATRA is by no means alone in an effort that goes back at least sixty years. Thomas Burke has observed that “tort reformers have helped to reshape public discourse about litigation, undermining the heroic view of lawyers and lawsuits that has always competed in the American mind with more unsavory images of the legal profession.”\textsuperscript{115}

\textsuperscript{110}\textsuperscript{}$4M Awarded in Verdict\textsuperscript{,} L O N G V I E W N E W S-J. (N o v. 3, 2015, 4:00 AM), http://www.news-journal.com/news/2015/nov/03/4m-awarded-in-verdict/ (reporting on a verdict rendered in Gregg County, which is in East Texas: “A jury in Longview concluded a weeklong trial last Friday with one of the largest awards in recent memory, according to courthouse officials. William and Heather Crist won a finding of gross negligence in a $4 million verdict against an oil field service company and its driver in a November 2011 wreck on Interstate 20 in Gregg County”).

\textsuperscript{111} About ATRA, AM. TORT REFORM ASS’N, http://www.atra.org/about/ (last visited May 25, 2016).

\textsuperscript{112} See Daniels & Martin, supra note 3, at 1262.

\textsuperscript{113} About ATRA, supra note 111.

\textsuperscript{114} H A L T O M & M C C A N N, supra note 10, at 43–44.

\textsuperscript{115} T H O M A S B U R K E, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 30 (2002).
We, and others, have written extensively about the politics of such efforts,116 and there is no need to repeat our comments here. A few matters, however, are relevant to the discussion in this Article. There is a key, consistent theme—the all too familiar vision of a civil justice system run amok for which “we all pay the price” and in which juries play a major role. For instance, a full-page advertisement titled “Me? I’m Paying for Excessive Jury Awards?” appeared in the March 9, 1953, issue of Life (a mass-circulation magazine).117 It showed a woman standing at a grocery store checkout, about to take money out of her purse to pay for her purchase. The surprised look on the woman’s face reflects the question in the ad’s title, which is a reminder that the prices paid for goods and services depend on the decisions civil juries make. This ad was part of a series of ads that appeared in the Saturday Evening Post and Life magazine in 1953.118 The ads apparently gained some traction in Texas with a history of the Texas Trial Lawyers Association noting the organization’s concern in the early 1950s, with material in national publications tied to “certain interest groups” and “a well-organized drive to influence prospective jurors against plaintiffs’ attorneys and so-called big verdicts.”119

This ad, its companions in the early 1950s, and later public relations efforts well into the 2000s also incorporated another consistent theme: juries. Juries are important, and their decisions have consequences that reach well beyond the immediate parties to a suit. The idea is that those who serve on juries must keep these broader consequences in mind. That early ad with the woman at the grocery checkout lets people know not only that the price of goods and services is affected by jury verdicts but also that jury verdicts play an important role in the settlement of the many matters that end short of a formal trial.120

120 See Me? I’m Paying for Excessive Jury Awards, supra note 117.
Formal tort reform groups began forming in Texas from the mid-1980s to the mid-1990s as the tort reform movement gained substantial steam and the public relations campaigns grew along with it. The campaign to shape the public mind has, in a sense, even become institutionalized in Texas with the annual “Lawsuit Awareness Week” each October. Writing in the October 2, 2014, issue of the Journal (Friendswood, Texas), reform advocate Connie Scott reminded readers that despite tort reform legislation (of which there has been much in Texas), the dangers of abuse are still out there and vigilance is needed. She said,

Lawsuit abuse hurts us all. . . .

October 6–10 is Lawsuit Awareness Week, an observance that Texans Against Lawsuit Abuse takes very seriously as part of our year-round work to educate and raise awareness about the costs of lawsuit abuse, the benefits of reform and the importance of . . . jury service. After telling readers that filing a lawsuit may not be in one’s best interest if wronged (arbitration may be better), Scott moves on to juries and jury service. “Fighting lawsuit abuse also means each of us doing our part to serve on a jury when called. . . . We’re all too frequently ‘talking the talk’ on the importance of a fair civil justice system, but we aren’t ‘walking the walk.’” At the time of the article, Scott was president of Bay Area Citizens Against Lawsuit Abuse, one of a number of local chapters of the statewide organization Texans Against Lawsuit Abuse.

Lawsuit Awareness Week for 2015 was celebrated October 5–9—just one week before the symposium of which this Article was a part—with those same themes in the forefront. In a website posting, DeWitt Gayle, chairman of Citizens Against Lawsuit Abuse of Central Texas, stated, “October 5–9 is . . .
Lawsuit Abuse Awareness Week, part of the year-round effort by Texans Against Lawsuit Abuse (TALA) to educate and raise awareness about the costs of lawsuit abuse, the benefits of legal reform and the importance of basic civic duties like jury service.”

We all pay the price for the lawsuit abuse problem, he says, “[I]t impacts all of us—from our livelihoods, jobs and small businesses, to our personal access to health care providers, our schools and government.”

Again, arbitration is encouraged and Gayle urges everyone to “consider arbitration over litigation when facing your own lawsuits in civil matters.” As is jury service: “Each one of us—as citizen, voter, taxpayer, business owner and consumer—has the power to help curb abusive lawsuits and ensure fair access to our courts. Start by showing up to serve on a jury when summoned.”

As to the causes of lawsuit abuse and its many deleterious consequences, it’s the usual suspects: “[W]e have suffered the effects of aggressive and entrepreneurial personal injury lawyers who turn litigation into a cottage industry that can impact the entire state.”

Perhaps the best-known example of the “year-round work to educate and raise awareness” is the billboard advertising along Texas highways that appears to be aimed at potential jurors. The billboards have been around for many years, at least from the mid-1990s. They still are, as reflected in a 2013 newspaper article about that year’s Lawsuit Awareness Week: “The campaign . . . includes radio advertising airing on stations across the state, billboard advertising, [and] a social media campaign[].”

Among the many commentaries on the billboards, the most interesting comes from a 2000 article by a law professor at St. Mary’s School of Law:

In some metropolitan areas, it is virtually impossible for potential jurors to reach the courthouse for jury duty without driving past one

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128 Id.
129 Id.
130 Id.
131 Id.
132 See Calve, supra note 121, at 16.
or more huge signs intended to sway their attitudes about lawsuits.

One billboard advertisement that was ubiquitous in major Texas cities during the 1990s read: “Lawsuit Abuse: We All Pay, We All Lose!” [It was] [s]ponsored by a defense-oriented group styling itself as “Citizens Against Lawsuit Abuse.”

Utilizing some anecdotal evidence, he went on to talk about a civil case in San Antonio, saying that fifty prospective jurors had been asked whether they had seen highway billboards complaining about lawsuit abuse. Forty-nine of the fifty persons reported that they had. In a footnote, he mentioned that he was one of those forty-nine prospective jurors.

In light of the research reported in the earlier article, we speculated that these public relations campaigns could help explain the decline in auto filings. Those campaigns—at least in the eyes of plaintiffs’ lawyers—altered the market environment in which plaintiffs’ lawyers do business. More specifically, as with the ad campaign of the early 1950s, plaintiffs’ lawyers believe the recent campaigns influence the informal process that settle the vast majority of cases, leading plaintiffs’ lawyers to change their practices in ways consistent with a decline in filings generally and in auto filings in particular.

C. Lawyers’ Perceptions of Tort Reform: Strange Success at Work

Our surveys provide us with three ways to look at patterns and changes in lawyers’ views of tort reform, their perception of jury behavior, and the effects of both on the market environment and their practices. One is to generally compare responses to the 2000 survey to those of the 2006 survey. A second is to compare the responses in each survey for the lawyers we call the repeaters—the 163 lawyers who responded to both surveys. The former approach allows us to look at plaintiffs’ lawyers as a whole and at aggregate patterns and changes. The latter provides a picture of changes in specific, individual practices.

135 Id. at 249.
136 Id.
137 Id. at 249 n.3.
138 Daniels & Martin, supra note 3, at 1236.
139 Id.
140 Id.
Our research on Texas plaintiffs’ lawyers identified a plaintiffs’ bar with an identifiable structure and hierarchy.\(^{141}\) In describing that structure, we organized survey respondents into four groups based on the value of their typical case when those values are arrayed from lowest to highest.\(^{142}\) This provides the third way of examining our survey data. For the purposes of this discussion, we are particularly interested in the group we called Bread-and-Butter 1 (BB1) lawyers, those in the bottom quartile of the array because auto accident cases are most important for these lawyers (making up 51\% of their caseload in the 2000 survey and 51\% in the 2006 survey\(^{143}\)). Using these three different approaches, we might not expect to see major changes given the relatively short time between surveys, so any identifiable change is interesting—as are the general patterns.

Plaintiffs’ lawyers believe that tort reform has harmed their practices.\(^{144}\) The 2006 survey asked lawyers about some of the main pieces of tort reform legislation passed since 2000 and the effects of each on their practices. Figure 7 presents the results of that inquiry. As might be expected, none had a positive effect.\(^{145}\) Two reforms were seen as having a particularly negative impact. The first was the imposition of caps on non-economic damages in health care cases—specifically a $250,000 cap not indexed to inflation.\(^{146}\) The second was a change in proportionate responsibility for third parties, which expanded the range of parties—including unnamed parties—a defendant could bring into a suit.\(^{147}\) This is important in light of the rules governing joint and several liability, and whether and how much a given defendant might have to pay.\(^{148}\) While most plaintiffs’ lawyers handle little if any medical malpractice, the damage cap may still be a problem because they will seek to refer such cases to the specialists for a fee and the cap may affect the specialists’ willingness to accept paid referrals.\(^{149}\)

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141 See Daniels & Martin, supra note 1, at 141–75; Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs’ Practice in Texas, 80 TEX. L. REV. 1781 (2002).
142 Daniels & Martin, supra note 1, at 143.
143 Id. at 142–47.
144 Id. at 1247–50.
145 The responses of the BB1 lawyers in the 2006 survey are little different than those in Figure 7 for all respondents—percent negative: 75\%, 82\%, 78\%, 49\%, and 51\%, respectively.
147 Id. at 489–92.
148 Id. at 489–96.
149 Medical malpractice cases are the most referred case in Texas. See Daniels & Martin, supra note 1, at 182–83.
Changes for the submission and proof of damages and changes for product liability cases were also clearly negative. The former dealt with showing net loss for certain damages after taking tax liabilities into account. The latter, as one commentator summarized the 2003 legislative changes, “affected [sic] major changes in the products liability arena through: (1) the creation of presumptions of no liability in certain cases; (2) the creation of a 15 year statute-of-repose; and (3) the creation of immunity for passive sellers.”

Fee shifting (“not just of litigation expenses, but of attorney’s fees as well”) after offers of settlement seems to have not made a substantial impact, even though it has long been a priority for tort reform interests in order to discourage litigation. The lack of much impact may be explained by the remarks of a one-time Texas tort reform supporter who was familiar with the process behind the tort reform legislation and the political interests driving it:

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152 Morrison, supra note 146, at 496.
Some of the leadership in TLR [Texans for Lawsuit Reform] had always wanted to have it and they just said, this has got to—we just have to have a deal where if the plaintiff loses a case, he has to pay the defendant’s attorney fees, and that would really deter a lot of suits. . . . But you know, the plaintiff doesn’t have any money most of the time . . . so they fiddled around with it and fiddled around with it and fiddled around with it and came up with some complicated plans . . . but it was so complicated and so dreamed up in the minds of guys who were not day-to-day practitioners that it’s almost never been used.  

The supporter concluded that the provision worked “the exact opposite of what they were trying to put together” by allowing the plaintiff to collect attorney’s fees from the defendant.

Equally important are broader shifts in the legal environment in which plaintiffs’ lawyers work. Both surveys asked the same questions regarding the effects of shifts in the environment, and the responses from both respondent pools showed a strong sense that changes in the environment were harming their practices. Figure 8 presents data on three questions asked in both surveys and shows the percentage of respondents in each survey rating the matter in question negative. It clearly shows the ongoing importance of these environmental factors.

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154 Daniels & Martin, supra note 1, at 52 (alteration in original).
155 Id. at 52–53.
156 For a more detailed context, see Daniels & Martin, supra note 1, at 51–53. See also Elaine A. Carlson, The New Texas Offer-of-Settlement Practice—The Newest Steps in the Tort Reform Dance, 46 S. Tex. L. Rev. 733, 735 (2005); Morrison, supra note 146, at 496.
Almost all respondents to each survey identified the public relations campaigns as having a negative impact; 74% of the respondents to the 2006 survey indicated that that impact was strongly negative. Just fewer than 90% of the respondents to each survey rated changes in settlement valuations as having a negative impact, with 56% of those in the 2006 survey rating it as strongly negative. Figure 2, earlier in this discussion, showed the steady decline for agreed judgments in both auto and non-auto cases in district and county courts. Substantial majorities of the respondents to each survey rated changes in jury verdicts as having a negative effect (25% reported a strongly negative effect). Only one of the enacted reforms tested in the 2006 survey—caps in health care cases—received a strongly negative response from more than one-half of the respondent pool (59%); the next highest strongly negative response was 36% for proportionate liability for third parties. In short, there appears to be a great intensity of concern among plaintiffs’ lawyers about changes in the environment that are affecting their practices—changes that are at the least as important as enacted tort reform measures, and perhaps even more so.157

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157 For the repeaters, the public relations campaigns were seen negatively by over 90% of them in both surveys. Jury verdicts were seen negatively by 76% of the repeaters in 2000 and by 68% in 2006. Settlement valuations were seen negatively by 87% in 2000 and 88% in 2006.
The responses for the BB1 lawyers to the 2006 survey tell the same story. Ninety-five percent of them rated the public relations campaigns as having a negative effect, with 78% identifying the effect as strongly negative. Eighty-two percent rated changes in jury verdicts as having a negative impact, with 39% deeming that factor as strongly negative. Ninety-six percent of the BB1 lawyers rated changes in settlement valuations negatively, with 78% saying strongly so.

D. The Importance of Juries for Changes in the Market Environment:

"Fighting Lawsuit Abuse Also Means Each of Us Doing Our Part to Serve on a Jury When Called"158

The public relations campaigns, as we noted in the earlier article, have aggressively touted reform in Texas and are especially pernicious in the view of plaintiffs’ lawyers.159 Among other things, the campaigns have tried to speak to potential jurors about the tort reform movement’s message.160 Plaintiffs’ lawyers fervently believe the campaigns have “poisoned” the jury pool, with very real consequences for their practices.161 The connection between the campaigns and juries is crucial to understanding plaintiffs’ lawyers’ perceptions of changes in their working environment and ultimately their responses to those changes.

In the lawyers’ view, the campaigns have been quite successful because their experience says that juries have become more pro-defense, more anti-plaintiff, and more anti-plaintiffs’ lawyer.162 This has affected the going rates that shape the settlement process. Insurance companies have toughened their stance in the settlement process and are more willing to litigate163 (this is consistent with the material presented above on the disposition of auto cases and the value of cases164). In the plaintiffs’ lawyers’ view, the process of resolving claims has become riskier, longer, and costlier.165

Both of our surveys asked a series of questions about lawyers’ sense of changes in jury behavior over the five years prior to the survey. Specifically,
we asked about assessments of liability and awards of economic and non-economic damages. Figure 9 presents the responses to both surveys from respondents who had been in practice for at least five years. The vast majority of respondents to both surveys believed that juries were less likely to find for plaintiffs or to award damages, especially non-economic damages. The results for BB1 lawyers were nearly identical in each survey. The responses with regard to non-economic damages are particularly important, as this is where the lawyer is likely to cover his out-of-pocket expenses for the case, to earn his fee, and to gain whatever profit there might be. This is because plaintiffs’ lawyers are loath to cut the money that goes to the client’s economic losses in order to enhance their return. Doing so could undermine a lawyer’s reputation and damage word-of-mouth referrals that are a key source of business.166

When asked in the 2006 survey whether respondents (those with at least five years in practice) believed that juries were making lower awards than in the five years prior for cases with comparable injuries, 88% said “yes” (91% of the 2000 respondents said “yes”). Again, responses for BB1 lawyers and for

the repeaters were quite similar—for both sets of lawyers the responses were 85% or more in each survey.

Changes in jury behavior are bad enough, but there is more harm in the lawyers’ view. It is the harm to the “going rates” and the settlement process that disposes of most matters. Stingier and more hostile juries mean stingier and costlier settlements. It is worth quoting again a lawyer we quoted in the 2004 article: “[O]verhead costs are continuing to increase, and the litigation costs are continuing to increase, but the settlements have been less and continue to be so. The insurance companies are more willing to litigate.” This “hardheaded approach,” we said in the earlier article, “prolongs the process of bringing a matter to conclusion and makes it more expensive and risky for the plaintiffs’ lawyer who usually fronts all of the expenses of pursuing a case.” At the extreme, it could drive a lawyer out of business. As one lawyer told us,

I believe tort reform was a major force in my decision to close my practice. I found jury verdicts decreased due to the propaganda disseminated by insurance companies and big business, and this resulted in insurance adjusters offering less money to settle cases. I began to decline representation in cases I used to accept and was working harder and receiving less money in cases I took.

This lawyer was a BB1 lawyer who was certified in Personal Injury Trial Law.

Issues of cost and time, as we saw, are among those factors commentators point to as reasons for the demise of jury trials. Both of our surveys asked lawyers about cost, time, and pre-trial settlement values and whether these matters had changed over the five years prior to the survey. Figure 10 shows that in both surveys respondents indicated a belief that the time it took to conclude a matter had increased, as had the cost, and that pre-trial settlement values had not. Eighty-five percent of 2000 respondents and 90% of 2006 respondents reported that settlement values had decreased—62% of 2006

167 Daniels & Martin, supra note 3, at 1248.
168 Id.
169 Daniels & Martin, supra note 1, at xi.
170 As we noted in the Introduction, certification signals a well-understood level of specialized expertise and experience, and gaining certification is not simple. See supra Introduction. It requires a set number of years of relevant experience and passage of a written exam, and it must be periodically renewed. Id. Certification in personal injury trial law represents a commitment to a specialized practice that is litigation-focused. Id.
171 See Hecht, supra note 12, at 172–74.
respondents indicated that they had decreased significantly while 27% said that they had decreased moderately. Fifty-seven percent of 2006 respondents reported that the cost of pursuing a case had increased significantly (33% moderately), and 35% said the time it took to bring a case to conclusion had increased significantly (27% moderately). Responses for the repeaters are again nearly identical, as are those for the BB1 lawyers with at least five years’ experience—with the exception of pre-trial settlement values. For them, 95% said these values had decreased, 79% saying significantly.172

Figure 10.
Perceptions of Changes in Insurer Behavior for 5 Years Prior to Survey

![Bar chart showing perceptions of changes in insurer behavior for 5 years prior to survey.]

To explore the issue of decreasing settlement values in more detail, both surveys asked whether the common multiplier used by insurers to settle cases had changed compared to five years prior to the survey (special damages—demonstrated economic losses—multiplied by a particular figure).173 Holding the level of damages constant, a lower multiplier would mean a lower settlement.174 In the 2000 survey, the multiplier measured as a mean of the responses was 1.7 (median 1.7). In the 2006 survey, the multiplier measured as

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172 See trends in supra figs. 2 & 3.
173 Daniels & Martin, supra note 3, at 1249.
174 Id.
a mean of responses slipped to 1.3 (median 1.5). For BB1 lawyers, it was also 1.3 (median 1.5).

In the view of Texas plaintiffs’ lawyers, tort reform has altered the market environment in which they work in ways detrimental to their practices. The lawyers’ perceptions are consistent with the data presented earlier on decreasing agreed judgments and increasing numbers of cases dismissed by plaintiff or for want of prosecution. If insurance companies are holding firm, for some lawyers it may mean settlement or nothing given the cost, time, risk, and diminished willingness of juries to render favorable verdicts. The lawyers’ views are also consistent with the decreases in auto accident filings—at least until 2009 and the more recent increases. Some of this, as Figure 6 suggests, may be the result of more injuries and deaths in auto accidents, but not all. Unfortunately, the research reported here was completed before the pattern changed.

We might not expect to see the patterns on jury verdicts found in Figures 4A and 4B, especially the uptick for jury trials as compared to non-jury trials in recent years found in Figures 5A and 5B. Additionally, we found no significant decrease in jury trials, which may have been expected in light of a “go ahead and try your case” approach from insurance companies. Apparently there are still lawyers willing and able to take the dare. Or, it may be that lawyers’ perceptions of juries are changing, or they are taking better cases, but again, our research stopped too soon to address these possibilities or others.

E. Changes in Plaintiffs’ Lawyers’ Practices: “I Believe Tort Reform Was a Major Factor in My Decision to Close My Practice”

If we assume that plaintiffs’ lawyers are at least to some degree rational actors, we would expect to see changes in their practices as their market environment changed, especially in light of their perceptions of tort reform and its impact. We found few lawyers who went as far as literally closing their practices, but there have been changes in practices. In our surveys, we looked at a set of factors for which we might expect to see changes if the market was

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175 Id. at 1250.
176 See supra fig.2.
177 See supra fig.3.
178 See supra figs.1A, 1B.
179 See DANIELS & MARTIN, supra note 1, at xi (quoting a letter from a Texas plaintiffs’ lawyer to the authors).
180 Id. at xv–xvi; KRITZER, supra note 81, at 9–19.
becoming less favorable to lawyers’ practices or had already become so: the overall size of caseload; the percent of caseload made up by contingency fee cases; the percent of caseload made up by auto cases; the number of calls; the percentage of calls signed to a contract; the value of a typical case; and the percentage of respondents certified by the Texas Board Legal Specialization in Personal Injury Trial Law and/or Civil Trial Law. Again, we included this last item because of the concern raised by some that the vanishing of trials, and especially jury trials, will mean fewer capable litigators and less interest on the part of lawyers to become proficient in this area.181 But we also add it in light of the patterns we found in jury trials in the Texas statistics. Table 1 presents these elements of practice for all respondents to both surveys.182 Table 2, which appears a bit later, presents data for the repeaters (the 163 lawyers who responded to both surveys). Information on the BB1 lawyers will be included in the discussion.

Table 1. Comparison of 2000 and 2006 Survey Respondents on Key Practice Factors

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<td>% Contingency Fee (mean)</td>
<td>75%</td>
<td>88%</td>
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<td>% Auto (mean)</td>
<td>33%</td>
<td>32%</td>
</tr>
<tr>
<td>Calls per Month (mean)</td>
<td>19</td>
<td>24</td>
</tr>
<tr>
<td>% Calls Signed (mean)</td>
<td>27%</td>
<td>23%</td>
</tr>
<tr>
<td>Case Value (median 2006$)</td>
<td>$43,000</td>
<td>$38,000</td>
</tr>
<tr>
<td>% Certified in PI Trial Law and/or Civil Trial Law</td>
<td>30%</td>
<td>37%</td>
</tr>
</tbody>
</table>

The two tables show that there are some important patterns or similarities between the two surveys as well as some important differences. For both surveys, caseloads are not especially large, although there are a few with very large caseloads (for 2000, the 75th percentile was ninety-two cases, and for 2006, it was sixty cases). The bulk of the business of these lawyers is done on a contingency fee basis—and it appears more so in the second survey.

Auto accident cases in fact make up the largest percentage of their business by far (next highest for both 2000 and 2006 is medical malpractice—11% in

181 See Galanter, supra note 12, at 521–22; Hecht, supra note 12, at 181.
182 The figures in Table 1A for the 2000 survey are different than those that appeared in the 2004 article. See Daniels & Martin, supra note 3, at 1250–62. Material there was for lawyers in practice for at least five years (n=466); material here is for all respondents (n=552). Id.
both surveys). Auto cases are, in reality, the bread-and-butter of the plaintiffs’ bar’s business. One-third of the 2000 survey respondents had at least 50% of their caseload in this area, as did 38% of those responding to the 2006 survey.

Only 20% of respondents in the first survey reported handling no auto cases, but that percentage increased to 25% in the second survey. For some lawyers, the percent is even greater. For the BB1 lawyers, the percentage was 51% in the 2000 survey and 50% in the 2007 survey. Only 7% of these lawyers said they handled no auto cases in 2000, and 13% said no auto cases in 2006.

As we go from this group to the lawyers in the other three quartiles, the percentage of caseload made up by auto cases decreases but is still substantial for all but the final group. For lawyers in the second quartile (we called them Bread-and-Butter 2—BB2) the percentage was 40% in the 2000 survey and 44% in the 2006 survey. For the third quartile (Heavy-Hitters 1—HH1), the percentages were 27% and 28%, respectively. For the last quartile, the lawyers with the highest case value (Heavy-Hitters 2—HH2), the percentages drop to 14% and 13%.

It is for this last group that we find auto cases not being the largest percentage of their business. Instead, medical malpractice is (23% in 2000 and 28% in 2006), followed by products liability (12% in 2000 and 17% in 2006).183 Auto cases are much less important for these lawyers, with 45% in 2000 and 50% in 2006 reporting that they handled no auto cases. But, auto cases are still important to them because auto cases are key to the practices of the lawyers in the other groups, especially BB1s and BB2s. The heavy-hitters rely heavily on lawyer referrals as a source of their business, and this means a substantial amount of referrals from those lawyers whose practices are built on auto cases.184 As one of those heavy-hitters emphatically said, “if my referring lawyers go away, I’m in trouble.”185

The typical number of calls per month is modest in both surveys, but somewhat higher in the second. The percentage of calls being signed to a contract is also modest, but is lower in the 2006 survey. BB1 lawyers became a bit choosier from the 2000 survey to the 2006 survey, signing 35% and 26% of calls, respectively. In both surveys the heavy-hitters were the choosiest,

183 Each of these increases is interesting in light of the fact that during the first decade of the 2000s, Texas passed tort reform legislation aimed directly at these areas. See TEX. CIV. PRAC. & REM. CODE §§ 74.001–74.507 (2015) (medical malpractice); id. §§ 16.012, 82.003, 82.007–82.008 (products liability).
184 DANIELS & MARTIN, supra note 1, at 176.
185 Id. For an examination of the referral system in Texas, see id. at 176–204.
signing only 18% of calls in 2000 and 12% in 2006. The repeaters also became choosier, signing 27% in 2000 and 24% in 2006. In other words, for most lawyers there is some real screening going on.186

The typical case value is modest in both surveys. For all respondents the typical case value dropped slightly in the 2006 survey: from a median value of $43,000 in the 2000 survey to a median value of $38,000 in the 2006 survey (all figures in 2006 dollars). For the lawyers in the two lower quartiles (BB1 and BB2), the lawyers for whom auto cases are the most important, their typical case values were modest to begin with and dropped in the second survey. For the BB1 lawyers the figures are $7,020 for the first survey and $5,500 for the second. For the BB2 lawyers the figures are $29,250 and $20,000, respectively.

Finally, these lawyers are much more likely to be certified than lawyers in Texas generally. In fiscal year 2006–2007, 10% of the in-state members of the bar in Texas were certified in one of the twenty-one areas of specialization, but a much larger percentage of each survey’s respondents are certified.187 Despite the strange success of tort reform, it appears that there is still a noticeable interest among plaintiffs’ lawyers in a litigation-focused practice.

In the 2000 survey, we asked those with five or more years in practice about changes in their practices, and we reported on these findings in the earlier article. Here, instead, we can look at the 163 repeaters for changes in identifiable individual practices. The results shown in Table 2 for the repeaters are consistent with the aggregate changes for all respondents. The typical caseload is smaller, and unlike 2006 respondents in the aggregate, the repeaters had a smaller percentage in contingency fee cases. These lawyers became somewhat less invested in such work. The percentage of caseload made up by auto cases also became somewhat smaller than the 2006 aggregate figure.

186 Id. at 147–62.
Table 2. Comparison of Repeating Respondents on Key Practice Factors

<table>
<thead>
<tr>
<th></th>
<th>2000 Survey</th>
<th>2006 Survey</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caseload (mean)</td>
<td>78</td>
<td>66</td>
</tr>
<tr>
<td>% Contingency Fee (mean)</td>
<td>81%</td>
<td>71%</td>
</tr>
<tr>
<td>% Auto (mean)</td>
<td>36%</td>
<td>34%</td>
</tr>
<tr>
<td>Calls per Month (mean)</td>
<td>20</td>
<td>22</td>
</tr>
<tr>
<td>% Calls Signed (mean)</td>
<td>26%</td>
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<td>Case Value (median 2006$)</td>
<td>$35,100</td>
<td>$27,500</td>
</tr>
<tr>
<td>% Certified in PI Trial Law and/or Civil Trail Law</td>
<td>33%</td>
<td>41%</td>
</tr>
</tbody>
</table>

In 2006, the repeaters were getting a bit more in terms of calls per month but were signing a smaller percentage to a contract compared to 2000. The typical case value is down. The repeaters’ typical case value dropped from a median of $35,100 in 2000 to $27,500 in 2006 (in 2006 dollars). Despite these changes in their practices, a larger percentage of the repeaters were certified in Civil Trial Law or Personal Injury Trial Law in 2006—8% more than in 2000. Again, these lawyers appear committed to trial practice, and it suggests, despite the changes, that there may be a substantial number of lawyers in Texas committed to practice in this area.

Finally, we found among the 163 repeaters forty lawyers who were BB1 lawyers in 2000, and over one-half (58%) remained so in 2006. Two-thirds of these forty lawyers saw the size of their caseload decrease along with the proportion of the caseload made up by auto cases—56% saw a decrease, but auto cases were still the mainstay for these BB1 lawyers in 2006—50% of business. Their typical case value in 2006 was higher than that for all BB1 lawyers, but still a very modest $10,000. Finally, among those forty lawyers, 30% were certified in Civil Trial Law or Personal Injury Trial Law in 2000, and 35% were certified in 2006.
Figure 11 looks at the changes in repeaters’ practices in a different way, one more focused on change. For each of the factors in the tables above except certification, it shows the percentage of repeaters with more, less, or the same amount. Figure 11 shows, with the exception of percent auto, the direction of change is clearly less rather than more. This is especially so for caseload totals, number of calls from potential clients, the percent of those calls signed to a contract, and case value. Clearly, the pattern is generally one of retrenchment.

To gain a better sense of how the changing market environment—or at least lawyers’ perceptions of it—may affect lawyers’ practices, we asked lawyers in each survey about a hypothetical auto accident case. It was a simple, low-value case with only soft tissue injuries and minimum property damage, and with clear liability running to the other party, who was adequately insured. Lawyers in each survey were asked if they would take the case. The idea underlying the question is that this is the kind of simple, inexpensive-to-prepare case that we might expect many plaintiffs’ lawyers to take, especially those for whom auto accident cases make up a substantial proportion of their business.
Figure 12 presents the answers to that question. By way of context, we asked lawyers in the 2000 survey with five or more years in practice whether they would have taken the hypothetical case five years prior to that survey. Three-quarters responded affirmatively, and this would coincide with the peak for the raw number of auto accident filings and the rate of those filings in the Texas trial courts (see Figures 1A and 1B). As Figure 12 shows, 43% of all respondents to the 2000 survey would have taken the case at the time of the survey. That percentage dropped further in the 2006 survey to 34%, consistent with the long decline in the number of auto filings and the rate of filings.

Again, the repeaters are similar to all respondents. Forty-four percent of the repeaters would have taken the case in 2000, while only 32% would have done so in 2006. Looking at them, we can examine change in a more precise way—whether individual lawyers changed their minds about this case, and if so, how. Figure 13 presents data for repeaters on whether and how they may have changed their minds on this case. It shows that 45% would not have taken the case at either point in time. Only 19% said they would take the case at both points in time. Just about one-quarter would have taken the case in 2000 but not in 2006. Only 12% changed from not taking the case to taking it, perhaps suggesting the unattractiveness of such a case for most lawyers.
For those who said they would take the soft-tissue auto case, we also asked if they would take that case with certain kinds of clients: one who is unemployed, one who has a criminal record, and one who had been a plaintiff in a previous case. From our interviews, these appeared to be among the least desirable clients in light of the public relations campaigns and the perceived changes in jury behavior. For those who would take the case in 2000, most would also take each of these three clients, but the client with a criminal record was the least attractive. Eighty-nine percent would take the unemployed client; 65% would take the client with a criminal record; and 80% would take a client who had previously been a plaintiff. When we look at the responses in the 2006 survey for all who would have taken the case, the results are almost the same: 87%, 66%, and 78%, respectively. We must keep in mind, however, that less than a majority in each survey would take the case under any circumstances—and fewer in the 2006 survey. In practice, this means that each of these clients, especially the one with a criminal record, is looking at a situation in which most lawyers would not take their case even with good liability and an insured defendant.
CONCLUSION

We began our discussion with a quote from a Texas plaintiffs’ lawyer about the connection between lawyers and access to the rights and remedies the law provides, and a lawyer’s ability to make a living practicing law and protecting these rights. For access to these rights to be meaningful, to be anything but window dressing, a person needs a lawyer—and legal representation is not free. Our purpose here has been to revisit an argument we made in the earlier Emory Law Journal article about a possible connection between aggressive tort reform-oriented public relations and political campaigns, plaintiffs’ lawyers’ practices, and the lawyers’ role as gatekeepers for the civil justice system. More specifically, this meant re-examining our argument in light of more recent patterns and changes in Texas tort cases and the contemporary concerns about the declining incidence of court-centered litigation—especially with regard to “vanishing” civil jury trials. We think the important question is more about whether cases continue to come into the civil justice system rather than just how they leave it.

In the earlier article, we concluded that our empirical story suggested that tort reform—in the form of those public relations campaigns—can succeed without formal changes in the law. It can do so by altering the environment in which plaintiffs’ lawyers do business, making it harder, in the lawyers’ estimation, to stay profitable. We called this tort reform’s “strange success” and identified it as part of long-playing strategy that some may rightly call a “war on civil justice.” The empirical story in this Article is consistent with our earlier one about retrenchment on the part of plaintiffs’ lawyers, but only up to a point.

We found that not only the rate per 1,000 population but also the raw number of filings for auto accident cases and all tort cases continued to decline from the lows that animated our interests in the earlier article. We found that plaintiffs’ lawyers continued to see their business environment as a hostile one with the public relations campaigns as a key cause, and that this affected their practices in ways consistent with the decline in case filings. We also found that jury trials in these cases were vanishing only if one looked at the raw number

188 See supra Part I.
189 See generally Daniels & Martin, supra note 3.
190 Id. at 1262.
191 Id.
192 Id.
of jury trials. When viewed as a percentage of dispositions, these trials were not vanishing. The key was fewer cases, and fewer cases meant fewer jury trials. Hence our view, in line with the strange success of tort reform, is that the important question is more about whether cases continue to come into the civil justice rather than just how they leave it.

Our empirical story here, as noted, is consistent through the first decade of the 2000s with declining auto filings but, as we saw, after that the pattern for auto cases changed. There are more filings (beyond what would be expected from an increase in accidents) and what may even be an uptick in the percentage of the cases going to a jury trial as opposed to a non-jury trial. There is not a similar change for other tort cases (which may have been directly affected by formal legislation). The research reported here ended before these apparent changes began (we say apparent because we do not know if they will continue), and the changes raise an interesting and important question—why? Earlier we offered a few possibilities from some recent, preliminary research on our part, including changes in auto insurance requirements, a recovering economy, higher speed limits, the oil/gas boom, and a waning of tort reform itself. Added to these possibilities is the increasing interest on the part of plaintiffs’ lawyers, shown in our surveys, in trial advocacy as indicated by the unusually high proportion of plaintiffs’ seeking and receiving formal certification in Civil Trial Law or Personal Injury Trial Law. One thing does appear certain—this is a dynamic civil justice system that begs for continuing research.

See supra Part IV.A.