LITIGATION AS VIOLENCE

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A lawyer in his prime, well-known regionally as a successful litigator, successful at least by the standards of generating business, income, and sizable recoveries for his clients, once told a class of first-year law students that when he takes a case, he "sues everybody and then figures out later who is liable." Although this statement raised the question of how this lawyer skirts Rule 11,[1] it also raised the question of how a prominent member of the legal profession could speak so blithely about casually suing another person. Maybe in response to this lawyer's statements, I began to think about how filing a lawsuit is serious business—that the person being sued is going to be hurt, even if the likelihood of losing the lawsuit is small. At some point early in my first-semester contracts course, I began to take time away from the day's assignment to ask my students, "Would you rather be slapped hard in the face by a stranger as you walked with your friends down a crowded Main Street, or be sued for $100,000 more than your insurance coverage for a traffic accident that the evidence will clearly show you did not cause?" The responses vary from year to year. Yet, even though I instinctively felt that being sued was worse than being slapped hard in the face, I still did not think of a lawsuit as a "violent" act, or that the suit and resulting worry, aggravation, time, and money spent qualified as "violence." But the title to this Colloquium, "Law as Violence," sparked my imagination and more serious consideration. Surely I have not spent the better part of my life helping people become better at visiting violence on other people. But as the idea of litigation as violence began to take hold, I am now not so sure.

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1. The court rule governing attorney conduct in litigation, Rule 11, provides, "By presenting to the court a pleading . . . an attorney . . . certifies that to the best of the person's knowledge . . . formed after an inquiry reasonable under the circumstances: . . . (2) the claims . . . are warranted by existing law or by a nonfrivolous argument for extending . . . existing law or for establishing new law; [and] (3) the factual contentions have . . . or . . . will likely have evidentiary support." FED. R. CIV. P. 11(b). The rule authorizes the court to sanction attorneys for violation of the rule. *See* FED. R. CIV. P. 11(c)(1).

I began my inquiry into whether a lawsuit can be considered an act of "violence" by consulting a dictionary. As expected, the first definition of violence given by *Webster's* is "exertion of physical force so as to injure or abuse (as in warfare effecting illegal entry into a house)."[2] But Mr. Webster backs off from the physical nature of violence in the second definition, "injury as if by distortion, infringement or profanation," levels off in the third definition, "intense, turbulent, or furious and often destructive action or force" but weakens with "vehement feeling or expression" and then slides away from physicality even further in the fourth definition, "undue alteration (as of wording or sense in editing a text)," as in "Johnny, you have been doing violence to the rules of grammar since high school." According to these definitions, violence does not have to include a physical act that injures; other, nonphysical actions can be seen as violence.[3]

Synonyms offered by *Webster's* are also meaningful, the majority connoting physical force, sudden calamitous events causing immediate bloodletting, or physical damage to property. These include "beating, belting, bludgeoning, buffeting, clubbing, cudgeling, flogging, hammering"[4] But the list of synonyms for "violence" also includes words not normally used to describe physical force or damage, including "coercion, compulsion, constraint, duress, pressure"[5] Clearly the litigation process can be characterized by these same words: "coercion, compulsion, constraint, and pressure." Not infrequently, practicing lawyers use words of violence to describe what it is like "in the trenches." "This case is a battle," and "killing them with motions" are phrases commonly heard when lawyers describe their practice. The literature on the practice of law bears this out. For example, in *It's War! Tips on Preparing and Running a Litigation War Room*, the authors even employ the concept of "triage" (the process by which physicians decide which patients to treat first based on how ill or seriously injured they are)[6] in order to explain an integral part of trial strategy.[7] In *A*

2. *Violence Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/violence (last visited July 18, 2014).

3. *Id.* If editing a text can be thought of as violence, then forcing someone to appear in court and answer to the law can also be thought of as violence.

4. *Id.*

5. *Id.*

6. *Triage Definition*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/triage (last visited July 21, 2014).

7. Scott Hilton & Chris Ritter, *It's War! Tips on Preparing and Running a Litigation War Room*, FOCAL POINT LLC (May 27, 2008), http://www.thefocalpoint.com/insights/articles/6/155; *see also* Mark B. Baer, *A Comparison Between Actual War and Family Law Litigation*, PASADENA FAM. L. BLOG (Feb. 9, 2013), http://www.markbaeresq.com/Pasadena-Family-Law-Blog/2013/February/A-Comparison-Between-Actual-War-and-Family-Law-L.aspx; Edwin Lamberth, *Is Litigation War?*, ALA. INJ. L. ADVISOR (July 16,

Comparison Between Actual War and Family Law,[8] the author concludes with the following:

> In closing, I think it worth pointing out that Sun Tzu did not believe in a "scorched earth" strategy. He wrote "to shatter and destroy [a country] is not so good." Thus, while you might agree that litigation is war, our goal is not to destroy or shatter our opponent. Instead, for the trial lawyer, the goal should be to receive adequate compensation for clients, and, in certain cases, punish corporate wrongdoers for fraud or reckless conduct. In doing so, we can follow the rules of war, which, in my opinion, include professionalism and courtesy.[9]

Although dictionaries, thesauruses, and the language attorneys use in describing their practice indicate that litigation can be considered violence, an even better comparison can be drawn by examining the effects of physical assault on people who have clearly suffered physical violence and comparing these effects with the effects experienced by those involved in civil litigation. Elizabeth Stanko and Kathy Hobdell have studied the effects of violence on both women and men. For their article *Assault on Men: Masculinity and Male Victimization*,[10] they interviewed thirty-three men, all victims of physical assault ranging from simple assault to grievous bodily injury, most stemming from "unfair fight" attacks by strangers.[11] The emotional consequences of physical violence on these men were generally described as post traumatic stress disorder and could be separated into two classes of emotional harm. The first class includes anxiety, disruption of sleep, anger, and depression.[12] The second is marked by feelings of fear, vulnerability, hypervigilance, mistrust, hatred, and desire for revenge.[13]

Now compare these emotional consequences of violent physical assault with the emotional consequences attendant to involvement in litigation. Although studies of psychological harm accompanying litigation are not plentiful, they do exist, even enough to give two names to the phenomenon. The Program in Psychiatry and the Law at Harvard Medical School created the terms "critogenic" and "critogenesis" to refer to litigation-caused emotional injury.[14] The

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2012), http://www.alabamainjurylawadvisor.com/litigation-process/is-litigation-war/.

8. Lamberth, *supra* note 7.

9. *Id.*

10. *See* Elizabeth A. Stanko & Kathy Hobdell, *Assault on Men: Masculinity and Male Victimization*, 33(3) BRIT. J. CRIMINOLOGY 400 (1993).

11. *Id.* at 403.

12. *Id.* at 407–08.

13. *Id.*

14. Thomas G. Gutheil et al., *Preventing "Critogenic" Harms: Minimizing Emotional Injury from Civil Litigation*, 28 J. PSYCHIATRY & L. 5, 6 (2000). The

other term used in the literature to refer to this same injury is "litigation response syndrome" ("LRS").[15] The psychological damage associated with critogenesis/LRS is apparently best described by the symptoms associated with it. One psychologist lists these symptoms as stress, anxiety, depression, irritability, difficulties in concentration, loss of motivation, loss of social involvement, loss of enjoyment and pleasure in life, aches and pains, low self-esteem, feelings of detachment or estrangement from others, exaggerated startle response, and recurring thoughts relating to litigation.[16] Where the litigation concerns personal injury, this same psychologist adds other symptoms, including problems associated with post-traumatic stress disorder, insomnia, tension, restlessness, dizziness, appetite disturbances, low energy, lowered self-esteem problems, disruptions of attention and concentration, indecisiveness, agitation, feelings of hopelessness and pessimism, disruptions of sexual functioning, distressing dreams, headaches, numerous other physical complaints, and related problems affecting marriage and family life.[17] One defendant was even diagnosed manic-depressive during the course of her lawsuit, although she recovered immediately after its conclusion.[18]

Psychiatrists working in the area list "sleeplessness, anger, frustration, headaches, inability to concentrate, humiliation, anxiety, loss of self-confidence, isolation, and helplessness" as common symptoms.[19] In their article on the problem, Dr. Thomas Gutheil and his colleagues pay specific attention to retraumatization, boundary violation, loss of privacy, prolongation, and arrest of the healing process from the wrong that generated the lawsuit.[20] Some litigants with special vulnerabilities or personality traits have reported temporary amnesia, deafness, blurred or distorted vision, temporary blindness, fainting, quasi-seizure activity, muscle tremors, loss of the ability to speak, and other problems.[21] One litigant reported he lost track of what he was doing and wandered away as if in a trance en route to three successive, independent psychological evaluations, failing to appear for

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word was created to mean "law-caused," coming from the Greek "crites," which means to judge, and "genic," meaning sprung from.

15. *See* Paul R. Lees-Haley, *Litigation Response Syndrome*, 6 AM. J. FORENSIC PSYCHOL. 3, 3 (1988). Dr. Lees-Haley states that "LRS is an important but largely unrecognized problem that should be of concern to psychologists." *Id.* The point of this Essay is that LRS should also be of great concern to lawyers.

16. *Id.* at 10.

17. *See* Paul R. Lees-Haley, *Litigation Response Syndrome: How Stress Confuses the Issues*, 56 DEF. COUNS. J. 110, 113 (1989).

18. *Id.*

19. Gutheil et al., *supra* note 14, at 5, 11.

20. *Id.* at 5.

21. *Id.*

appointments each time.[22] Importantly, and maybe surprisingly, the studies show that the psychological suffering of litigants is not limited to defendants whose interests might be most at risk, but are also experienced by plaintiffs.[23] Nor are these injuries limited to the immediate parties to the lawsuit. They extend to the witnesses and, to a substantial degree, to spouses and close relatives who are drawn into the cycle of civil combat.[24]

All of this seems to tell us that litigants commonly suffer emotional damage similar in kind and intensity to the emotional damage suffered by victims of physical violence.[25] So, do the similarities between the psychological harms resulting from both physical violence and the psychological harm resulting from litigation, together with the dictionary definitions, synonyms, and language used by lawyers to describe litigation practice all mean that we can characterize civil litigation as "violence"? If the operative word is "can," then the answer is yes. Viewing the term "violence" in this broader light makes it easier to think of even civil litigation as violent to people engaged in it, although this may be due more to learning the softer side of the word "violent" than to being persuaded of the harder side of civil litigation. Of course many will continue to believe that unless an activity is accompanied by physical impact and physical injury, the activity cannot be considered violent. This is reasonable. But in the end, it makes little difference. The important idea is that civil litigation regularly brings with it serious emotional harm.

Whether we characterize civil litigation as violence or simply recognize that civil litigation causes the serious emotional harm described earlier in this Essay, the remaining question is, what can and should the legal profession do about this phenomenon? Well, first of all, not all violence is bad, or, at least, it is often necessary. In fact, some is good, necessary, and just. A person experiencing a ruptured appendix needs and wants a doctor to cut into his body. The cutting is physically violent to the patient, causing physical and emotional pain. The surgeon certainly knows that she is causing pain and suffering to the patient, and knowing this, she must take this expected physical pain and accompanying psychological damage into consideration when she recommends and then carries out the surgery. In the same way, many of the critogenic/LRS harms are

22. Lees-Haley, *supra* note 17.

23. Gutheil et al., *supra* note 14, at 7–9 (discussing the unexpected emotional cost of litigation to plaintiffs).

24. "Close relatives, especially spouses, also can be affected by LRS. Sometimes their complaints are more severe than those of the primary litigant, even when they are not themselves parties to the suit." *Id.* at 111; *see also* Lees-Haley, *supra* note 17.

25. However, fear, vulnerability, hyper vigilance, hatred, and desire for revenge are exceptions, which, while present in victims of physical violence, are not listed as emotional symptoms suffered by those involved in civil lawsuits.

probably an unavoidable accompaniment of any dispute resolution system.[26] Dr. Gutheil states, "[C]ritogenesis relates to the *intrinsic and often inescapable harms* caused by the litigation process itself, even when the process is working exactly as it should."[27] After all, each party is asking the court to order the other to do something the other does not want to do.

A serious approach to lessening the critogenic/LRS harms would likely examine each step and practice in the litigation process, attempt to gauge the serious psychological injuries caused by each step and practice, and then think of ways to reform them to lessen the harm while still meeting the needs of the step and practice. Changing any of the suspected primary causes of critogenesis/LRS would be a complicated matter. For example, it is reasonable to expect that the problem is most egregious in cases of unjustified lawsuits and unwarranted co defendants. Rule 11[28] is designed in part to handle this, but the attempt to more strictly scrutinize lawsuits under Rule 11 is itself controversial as an invasion of a citizen's right to be heard in court.[29] In any case, experience has shown that it will take more than a concern for the emotional suffering of parties in litigation to move courts to revise Rule 11.[30] Another significant cause of critogenesis/LRS is the length of civil litigation. Professor Daniel W. Shuman points out studies showing that delays in the litigation process are a particular cause of psychological harm to litigants.[31] Maybe surprisingly, critogenesis/LRS is ephemeral. It dissipates soon after the litigation ends, regardless of whether the underlying economic or physical harm continues, and regardless of who wins the lawsuit. It simply accompanies the litigation.[32] At least one expanding litigation practice might already be lessening the incidence and severity of critogenesis/LRS—studies have shown that alternative dispute resolution processes are accompanied by fewer symptoms of critogenesis/LRS.[33]

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26. In societies operating without the rule of law, the dispute is settled by the more physically, politically, or economically powerful party simply forcing its solution on the other party. *See, e.g., Rule of Law,* U.S. INST. PEACE (Jul. 20, 2014, 1:15 PM), http://www.usip.org/guiding-principles-stabilization-and-reconstruction-the-web-version/7-rule-law.

27. Gutheil et al., *supra* note 14.

28. *See* FED. R. CIV. P. 11(b).

29. *See* Charles M. Yablon, *The Good, the Bad, and the Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65, 108 (1996).

30. *Id.*

31. *See* Daniel W. Shuman, *When Time Does Not Heal: Understanding the Importance of Avoiding Unnecessary Delay in the Resolution of Tort Cases*, 6 PSYCHOL. PUB. POL'Y & L. 880, 883–95 (2000).

32. *See* Lees-Haley, *supra* note 17, at 110; Lees-Haley, *supra* note 15.

33. *See, e.g.*, Brent K. Marshall et al., *Technological Disasters, Litigation Stress, and the Use of Alternative Dispute Resolution Mechanisms*, 26 L. & POL'Y 289 (2004) (contending that adversarial litigation is particularly damaging

Small, narrowly focused changes to the Rules of Civil Procedure or Professional Rules of Conduct might provide small alleviations of critogenesis/LRS here and there. For example, a number of years ago a local physician was sued for alleged malpractice in the delivery of a baby.[34] The physician's medical partners were named as defendants in their capacity as partners. Even though these partners had nothing to do with the alleged malpractice, every front-page story during the week-long trial mentioned their names in connection with the baby's injuries. Whatever psychological harm these physicians suffered from the mere fact that they were defendants was likely exacerbated by the daily association of their names with the alleged malpractice. A rule allowing the sealing of their names as defendants could make the harmful publicity less likely, reducing to some extent the critogenesis/LRS injury flowing from their inclusion in the lawsuit without changing the substantive law on liability. Another change might be to simply require lawyers to inform their clients of what they are getting into before they decide to sue, which might lead to some small decrease in litigation. Because an awareness of the likelihood of psychological suffering could be expected to deter some clients from filing suit, attorneys have a financial incentive not to advise the client of these problems. A court rule requiring attorneys to inform their clients of the serious psychological harms that often accompany litigation might be appropriate. Maybe a standard-approved notification form, like the *Miranda* form used in criminal procedures, could be drafted, perhaps requiring that a certification of such notice be placed on complaints and answers and signed by the attorney, such as is provided in the Bankruptcy Code.[35]

It is also likely that if more lawyers were aware of the severity of the psychological effects of litigation on the people involved, some uncertain lawsuits would not be filed, some questionable defendants would not be named, some possible witnesses would not be deposed, and some would not be called to testify at trial. We certainly expect a surgeon to be aware of the physical and emotional damage her patient would suffer from a contemplated operation or medication and to weigh these factors in deciding to recommend the surgery or drug regimen. In fact, such deleterious effects from the

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psychologically, particularly in the context of technological disasters, and advocating for bypassing the litigation process altogether via alternative dispute resolution mechanisms).

34. The following anecdote is based on a trial court case that occurred in my local community during my career.

35. Section 342(b) of the Bankruptcy Code requires the clerk of the court to give each individual debtor written notice of the purposes of the different bankruptcy chapters, and this is accomplished by having the attorney certify on the bankruptcy petition that she "delivered to the debtor the notice required." *See* 11 U.S.C. § 342 app. at 1175 (Supp. III 2009) (Official Form 1, Exhibit B); *see also* 11 U.S.C. § 342(b)(1) (2012).

contemplated violence—the surgery or the chemical assault—will sometimes lead physicians to advise against surgery or the drug regimen. The same would likely be true for attorneys who understood the severity of critogenesis/LRS.[36]

But the fact is, most lawyers are not aware of the seriousness of the potential damage. It is not that many experienced trial attorneys do not realize that people involved in lawsuits as parties or witnesses are often nervous and upset as they prepare for preliminary questioning and testimony under oath. Many do. But it is unlikely that many really recognize the seriousness of this emotional distress and the clinical nature and labeling of the problem. Additionally, a great number of practicing attorneys are not experienced litigators. Few, if any, lawyers were told in law school about the serious emotional effects caused to defendants by suing them, or about the same effects on plaintiffs or other nondefendant client and witnesses. Not once over the decades of tens of thousands of talks and discussions with lawyers and professors have I heard any mention of the pain brought on others by assisting a client in bringing a suit or lining up witnesses. If the over forty thousand law students who enter law schools each year were exposed to the deleterious effect of litigation on people brought into lawsuits, we must expect that this would have some effect, at least at the margins.

Even if universal lawyer understanding of critogenesis/LRS would not lead to changes in litigation rules and practice, the apparent fact of such harm compels the legal justice system to educate all lawyers of its existence for at least three other reasons. First, all lawyers owe it to their clients to warn them of the critogenic/LRS harm that might accompany their involvement in a lawsuit. Can you imagine a surgeon advising a patient on a knee replacement and then *not* warning the patient of the intense pain that usually accompanies the required rehabilitation? In their articles on critogenic harms, Gutheil and his colleagues point out that "[m]any of these would-be litigants have only the faintest idea

36. For example, doesn't the public expect that land developers have at least a rudimentary understanding of the importance of trees, other plant life, and water conservation when they begin a housing development? Although this understanding will not mean that a particular developer will refrain from clear-cutting the land as she begins a thirty-acre residential development, certainly her knowledge of the broad value of trees, plant life, and water conservation will make it more likely that she would not clear-cut, but clear selectively and judiciously. Consider this: if we take a group of one hundred randomly selected developers who have had no formal exposure to the value to society of trees, plants, and water conservation, and a second group who have attended a four-hour seminar on the value of such, can we expect that in the course of a year's work the second group will have preserved more trees, plants, and water than the first group? This must be our expectation, compelled by the very idea of the value of education.

of what being a plaintiff actually entails."[37] As stated by one psychiatrist who has studied the problem, litigants are unprepared for the "forces of aggression that are released and sanctioned by our judicial system" and the aura of combat that surrounds litigation, "and [that such] combat produces casualties."[38] Most attorneys, otherwise adept at preparing clients on the facts and law, "fail to prepare the client for the *emotional* burden of the litigation process itself."[39]

Second, all lawyers owe it to their clients to make them aware that if the critogenic/LRS symptoms are occurring, these symptoms might be coming from the litigation as a natural, intrinsic accompaniment, and not from some other troubles or personal failures. Remember, we are talking about stress, anxiety, depression, irritability, difficulties in concentration, loss of motivation, loss of social involvement, loss of enjoyment and pleasure in life, aches and pains, low self-esteem, feelings of detachment or estrangement from others, exaggerated startle response, recurring thoughts relating to litigation, sleeplessness, anger, frustration, headaches, inability to concentrate, humiliation, anxiety, loss of self-confidence, isolation, helplessness, and in some cases, tension, restlessness, dizziness, appetite disturbances, low energy, indecisiveness, agitation, feelings of hopelessness, pessimism, disruptions of sexual functioning, distressing dreams, temporary amnesia, deafness, blurred or distorted vision, temporary blindness, fainting, quasi-seizure activity, muscle tremors, loss of the ability to speak, and other problems.[40] Third, as lawyers and members of society, we owe it to ourselves to be aware of the personal sufferings of others that accompany and arise out of the work that we do.

Educating lawyers in critogenesis/LRS should begin in law school. There has already been some movement in introducing law students to the emotional needs of clients. Quoting American Bar Association President Karen J. Mathis in her article *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*,[41] Professor Kristin B. Gerdy states, "[C]aring is as much a part of the legal profession as intelligence."[42] Bringing critogenesis/LRS to the attention of students would fit well with this endeavor.

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37. Gutheil et al., *supra* note 14, at 7.

38. Larry H. Strasburger, *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, 2 J. AM. ACAD. PSYCHIATRY L. 203, 203 (1999).

39. Gutheil et al., *supra* note 14, at 8.

40. *See supra* notes 15–17, 19 and accompanying text.

41. Karen J. Mathis, *Clients, Empathy, and Compassion: Introducing First-Year Students to the "Heart" of Lawyering*, 87 NEB. L. REV. 1 (2008).

42. *Id.* at 2; *see also* Peter Reilly, *Teaching Law Students How to Feel: Using Negotiations Training to Increase Emotional Intelligence*, 21 NEGOTIATION J. 301 (2005).

At bottom, even if the need for unfettered, professional free discretion and the right of the individual client to decide whether to bring suit leads us to conclude that the rules of civil procedure and professional responsibility should not or will not be modified, making lawyers and the public more aware of the serious psychological harm to those involved in litigation is a moral obligation of the profession and would likely lessen the harms over time. As attorneys, we each have a moral obligation to know who will be hurt by our actions and a professional obligation to tell our clients of the harm that will likely accompany litigation.