

AN OIL STRIKE IN HELL: CONTEMPORARY LEGENDS ABOUT THE CIVIL JUSTICE SYSTEM

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I. THE "JAUNDICED VIEW" OF AMERICAN CIVIL JUSTICE

The wide stream of disillusionment with the civil justice system that emerged in the 1970s¹ does not really have a name, so let me supply one. I call it the "jaundiced view." By this I refer to a set of beliefs and prescriptions about the legal system based on the perception that people are suing each other indiscriminately about the most frivolous matters, and juries are capriciously awarding immense sums to undeserving claimants. The system is arbitrary, unpredictable, berserk, demented; it has spun out of control. The resulting "litigation explosion" is unraveling the social fabric and undermining the economy.²

The current consternation about law reflects an intersection—better a collision—between the two master trends of American legal life in the twentieth century. The first of these we might call the expansion of remedy. There has been a progressive extension of the scope and availability of legal protections and

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1. Perhaps the earliest major marker of this "turning away from law" was the 1976 "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" (known as the "Pound Conference") organized by Chief Justice Warren Burger. See 70 F.R.D. 79 (1976). See also Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter Galanter, *Reading the Landscape*] (noting the emergence and rise of this stream of criticism). The jaundiced view's displacement of an earlier critique of the legal system, emphasizing the failure to supply justice to all, is traced in Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994).

2. Examples of these characterizations are found in Galanter, *Reading the Landscape*, *supra* note 1; *infra* text accompanying notes 36–41.

remedies for more of life's troubles and problems to more and more people, including those who earlier were largely excluded from it—injured workers and consumers, blacks, women, the disabled, prisoners, and so on. This enlargement of remedy has been accompanied by (or some might say accomplished by) a cultural shift: the expansion and elaboration of the notion of rights. Although particular components of this shift may be contested, the general direction remains clear: law has become the master wall-to-wall orderer of our social life. Reliance on the legal system and expectations of what it can accomplish have risen, and broad sections of the public believe that it will secure them remedy and vindication in many of life's adversities.³

The other master trend is less familiar and less visible: the increasing extent to which law is shaped by and for large organizational actors—artificial persons rather than natural ones.⁴ In our century, purposive corporate organizations (political/business/associational) have displaced spontaneous “communal” or “primordial” institutions (such as families, religious fellowships, networks of transactors, neighbors, and friends) as the predominant forms of organizing human activity.⁵ More of our lives consist of dealings with these corporate actors. They are, by virtue of their scale and rationality, effective players of the legal game and enjoy enduring and cumulative advantages over individuals.⁶ More and more of the legal world is devoted to servicing them, whether we measure this by expenditures on legal services⁷ or by the total effort expended by lawyers.⁸ Increasingly, the law

3. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985).

4. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users* (1996) (unpublished manuscript, on file with author).

5. James S. Coleman, *The Rational Reconstruction of Society: 1992 Presidential Address*, AM. SOC. REV. 58 (Feb. 1-15, 1993).

6. Marc Galanter, *Why the 'Haves' Come Out Ahead*, 9 L. & SOC'Y REV. 95 (1974).

7. An ever-increasing share of the ever-growing legal services “pie” is purchased by businesses and governments rather than individuals. In 1967, individuals bought 55% of the product of the legal services industry, and businesses bought 39%. With each subsequent five year period, the business portion has increased and the share consumed by individuals has declined. By 1992 the share bought by businesses increased to 51% and the share bought by individuals dropped to 40%. Individuals' expenditures on legal services increased 261% from 1967 to 1992, while law firms' income from business increased by 555% during that period. Even this more than double rate of growth understates the growth of business expenditures on legal services, for it includes only outside lawyers and does not include in-house legal expenditures, which greatly increased during this period. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CENSUS OF SERVICE INDUSTRIES: LEGAL SERVICES* (1972, 1977, 1982, 1987, 1992). Figures for 1967 are estimates developed in Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 L. & SOC. INQUIRY 431 (1989). (The legal services category includes all law practices that have a payroll, which means virtually all lawyers in private practice.)

8. In JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982), the authors estimated that in 1975 “more than half (53 percent) of the total effort of Chicago's bar was devoted to the corporate client sector, and a smaller but still substantial proportion (40 percent) is expended on the personal client

is becoming an arena for routine and continuous play by organizations. Individuals enter that arena briefly in life emergencies, while at the same time they consume more and increasingly vivid images of it.

These trends entwine in curious ways. The legal system has grown prodigiously, and law has become more elaborate and more visible, occupying a larger part of the symbolic universe in which we live. At the same time cost and remoteness remove the courts as an option in almost all disputes for all individuals. The law proliferates new symbols of rights and entitlements—enlivening consciousness and heightening our expectations of vindication—at the same time that it becomes more menacing and more difficult to use.

The higher expectations that individuals bring to the law have provoked a massive recoil. Starting in the 1970s, unease among elites about the expansion of law joined with interest group concern to curtail liability and to promote campaigns deriding law and lawyers. Such campaigning intensified in the mid-1980s with corporate spokesmen and their political allies mournfully reciting the woes of a legal system in which Americans, egged on by avaricious lawyers, sue too readily, and irresponsible juries and activist judges waylay blameless businesses at enormous cost to social and economic well-being.

The legal system can be restored to sanity only by “reform.” The needed reforms, it turns out, make it more difficult for individual claimants to use the system to challenge corporate entities, reduce levels of accountability, place ceilings on remedy, and in some cases move organizational disputes with workers, customers, and patients from public forums into “alternative” forums sponsored by the corporation itself.⁹ This program expresses the growing impatience with individual claims in a legal world increasingly dominated by corporate entities.¹⁰

sector.” *Id.* at 42. When the study was replicated twenty years later, the researchers found that about 61% of the total effort of all Chicago lawyers was devoted to the corporate client sector and only 29% to the personal/small business sector. The number of lawyers in Chicago had doubled meant that the total effort devoted to the personal sector had increased by 45%, but the corporate sector grew by 126%. To the extent that lawyers serving the corporate sector were able to command more staff and support services with their effort, these figures understate the gap in services delivered. John P. Heinz et al., *Chicago Lawyers: Hemispheres, Tectonic Plate Movements, and Continental Drift* (May 29, 1997) (unpublished paper prepared for delivery at the 1997 annual meeting of the Law and Society Association, St. Louis, MO) (on file with author).

9. See Joseph Sanders & Craig Joyce, “*Off to the Races*”: *The 1980s Tort Crisis and the Law Reform Process*, 27 Hous. L. Rev. 207 (1990); Linda Lipson, *The Evolution of Products Liability as a Federal Policy Issue*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE* 247 (Peter H. Schuck ed., 1991) [hereinafter *TORT LAW AND THE PUBLIC INTEREST*]; Glenn Blackmon & Richard Zeckhauser, *State Tort Law Legislation: Assessing Our Control of Risks*, in *TORT LAW AND THE PUBLIC INTEREST* 272, *supra*; Martha Middleton, *A Changing Landscape*, A.B.A. J., Aug. 1995, at 56. A useful scorecard identifying the lineup of interest groups is found in T.R. Goldman, *Tort Reform: Interests and Agendas*, *LEGAL TIMES*, Apr. 17, 1995, at S30. Pondering the course of “this insular reform movement,” Robert Rabin observed that cost pressure...[became] the driving force, the sufficient impulse for action. As a consequence, with no guiding conception of social welfare,

The jaundiced view resonates with cultural themes of individualism and self-reliance and has a strong nostalgic component.¹¹ Although beliefs and grievances about the litigation explosion, undeserving claimants, excessive regulation, the legalization of life, and the ascendancy of lawyers are widely shared, they are embraced with particular fervor by large portions of American elites.¹² The jaundiced view is very much the view of "top people," including politicians, media people, businesses people, and medical people—and large sections of the legal elite.

A telling portrait of the views of business elites is provided by John Lande, who interviewed senior executives in publicly-held firms about their views of litigation:

Most said that they were dissatisfied with the results in their experience with litigation and even more were dissatisfied with the process. Most believe that the courts are not sensitive to the needs of businesses. Many had doubts about the process of finding the facts, especially when juries make the decisions, and questioned the fairness of court outcomes. They were virtually unanimous that there has been a litigation explosion and the vast majority believed that most suits by individuals against businesses are frivolous.... [T]heir overall views of litigation are strongly correlated with the perceived views of their organizational superiors and the leaders of their professions. As critical as they were of litigation, they thought

the reforms of the 1980s became, in essence, victim take-away programs. The salient question became how benefit levels could be reduced via ceilings on noneconomic loss, disincentives to sue, elimination of parties defendant, denial of collateral source recoveries, and so forth, thereby diminishing the economic burden on a heterogeneous group of injury-producing activities.

Robert Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13, 22-23 (1988).

10. Marc Galanter, *Planet of the APs*, *supra* note 4.

11. David Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 L. & SOC'Y REV. 551 (1984); Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL. & SOC'Y 95 (1991); Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implication for the Litigation Explosion Debate*, 26 L. & SOC'Y REV. 85 (1992); Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996).

12. As one pollster summed up his findings on animus against lawyers:

By and large, those who see lawyers in a more favorable light than average tend to be downscale, women, minorities, and young....

Americans who are more critical than average tend to be more establishment, upscale, and male. The higher the family income and socioeconomic status, the more critical the adults are. Pluralities of college graduates feel unfavorably toward lawyers, while pluralities of non-college graduates feel favorably.

Peter D. Hart Research Assocs., *A Survey of the Attitudes Nationwide Toward Lawyers and the Legal System* 4-5 (1993).

these opinion leaders were even more so. As a group, they widely share a fear and loathing of litigation, distinguishing themselves from their leaders in that (they believe that) their own antipathy is somewhat less intense.¹³

II. LEGAL LEGENDS AND ELITE FOLKLORE

One of the accomplishments of law and society scholarship has been to criticize and refute the body of belief I have called the jaundiced view.¹⁴ Contrary

13. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 51-52 (1998). The thrust of Lande's interviews is confirmed by a great deal of survey evidence. For example, a 1992 survey of executives by *Business Week* found that sixty-two percent felt "that the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies." *The Verdict from the Corner Office*, BUS. WK., Apr. 13, 1992, at 66. This was a survey conducted by Louis Harris Associates, Inc., in early 1992 of 400 senior executives at corporations drawn from the "Business Week Top 1000" companies. A 1987 survey of 450 small business executives in Louisiana depicted a similar dismal view of the liability system. Archer W. Honeycutt & Elizabeth A. Wibker, *Liability Crisis: Small Business at Risk*, 26 J. SM. BUS. MGMT. 25 (1988). Overwhelming majorities strongly agreed that "[p]eople's increased willingness to sue is a major cause of the 'liability crisis'" (75%); that "[t]he size of liability awards often bears little relationship to actual injuries" (69%); that "[t]he court system tends to hold some people more liable than seems reasonable for their degree of fault" (66%); and that "[j]uries tend to award money to injured persons based on sympathy rather than actual fault" (58%). Those disagreeing with these assertions ranged from 2% to 4%. *Id.* at 28.

14. The following incomplete list provides a sense of the provenance of the empirically based literature on the civil justice system: 15 L. & SOC'Y REV. (1980-1981) (special issue on dispute processing and civil litigation); Marc Galanter, *Reading the Landscape*, *supra* note 2 (published in 1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); VALERIE HANS & NEIL VIDMAR, JUDGING THE JURY (1986); Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921 (1988); U.S. GENERAL ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED (1988); James Henderson & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); HERBERT M. KRITZER, THE JUSTICE BROKER (1990); Theodore Eisenberg & James Henderson, *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1992) [hereinafter Galanter, *News from Nowhere*]; Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 IOWA L. REV. 1 (1992); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort System*, 140 U. PA. L. REV. 1147 (1992); VERDICT: ASSESSING THE CIVIL JURY SYSTEM (Robert E. Litan, ed., 1993); 16 JUST. SYS. J. (1993) (special issue on torts); FRANK A. SLOAN ET AL., SUING FOR MEDICAL MALPRACTICE (1993); STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995); Carol J. DeFrances et al., *Civil Jury Cases and Verdicts in Large Counties* (Bureau of Justice Statistics Special Rep. NCJ-154346, July 1995); Michael Rustad & Thomas Koenig, *Reconceptualizing Punitive Damages in Medical Malpractice: Targeting Amoral Corporations, Not 'Moral Monsters'*, 47 RUTGERS L. REV. 975 (1995); Steven K. Smith et al., *Tort Cases in Large Counties*

to our expectations, error did not retire from the field; it proved quite resilient. The kind of knowledge that law and society scholars proffered has had some impact on courts and legislatures, but it has not carried the day in wider popular or political forums. We were belatedly jolted from a naive faith that the relation of systematic social inquiry to popular belief is one of diffusion from the knowing to the unknowing. Instead we find ourselves embroiled in a contest among competing "knowledges." As I became absorbed in this contest, I became interested in the arena as well as the teams. To shift metaphors, academically-based social inquiry and the jaundiced view are like two streams flowing into a lake, coloring it, affecting its temperature and composition, but being diluted and absorbed by it. I became interested in the lake of beliefs and the springs that feed it. For want of a better term, I call this the lake of legal culture—our beliefs and expectations about the law.

How has the jaundiced view managed to sustain itself against a now-formidable mass of empirical data that shows that so many of its key assertions are at best exaggerated and in many cases entirely mistaken? Its flourishing, I believe, is connected with the kind of "knowledge" that it is. Although it contains items that resemble the products of systematic social inquiry, it is not such a product. Instead, it is a set of legends that are resilient and that resonate with many of the basic themes of our legal culture, such as individual responsibility and self-reliance.

Folklorists define legends as "prose narratives regarded by their tellers as true; unlike myths, [legends] are generally secular and are set in the less-remote past in a conventional earthly setting."¹⁵ Typically the account is of "a happening in which the narrator or an immediate personal contact was not directly involved"—these events have happened to or were learned by a friend of a friend. These stories, which are variously known as "contemporary legends," "belief tales," "urban myths," or "urban legends,"¹⁶ and which vary greatly in length and degree of elaboration, are presented as propositions for belief.¹⁷ "The contemporary legend is a distinctive folklore genre because of the role of the mass media in its diffusion.... Although the media do not create these legends, they provide a forum in which diverse audiences are exposed."¹⁸

(Bureau of Justice Statistics Special Rep. No. NCJ-153177, Apr. 1995); NEIL VIDMAR, *MEDICAL MALPRACTICE AND THE AMERICAN JURY* (1995); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); the voluminous work of the RAND Corporation's Institute for Civil Justice (e.g. DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* (1991), and ERIK MOLLER, *TRENDS IN CIVIL JURY VERDICTS SINCE 1985* (1996)).

15. JAN HAROLD BRUNVAND, *THE STUDY OF AMERICAN FOLKLORE: AN INTRODUCTION* 106 (1978); JAN HAROLD BRUNVAND, *THE VANISHING HITCHHIKER: AMERICAN URBAN LEGENDS AND THEIR MEANINGS* 3-4 (1981).

16. GARY ALAN FINE, *MANUFACTURING TALES: SEX AND MONEY IN CONTEMPORARY LEGENDS* 2 (1992).

17. *Id.* at 35 n.3.

18. *Id.* at 11. Fine concludes that such legends "have minimal effects on the fundamental economic or social structure of society" *Id.* at 32. Impact on "the fundamental economic or social structure" is a high standard for measuring effects. I submit that the

The legal legends we shall be discussing bear many of the accepted indicia of folklore: they occur in multiple versions, there is no single authoritative text, they are formulaic, and they are conveyed in settings detached from any practices of active testing for veracity. Anonymity of origin and oral transmission are present, but are not as dominant as they are in the best-known kinds of folklore. The origins of the contemporary legal legends discussed here are often anonymous, but sometimes there are identifiable "contributions of known individuals."¹⁹ These legal legends, while widely disseminated orally, do not rely primarily on oral transmission. The media play a major role in transmitting them.²⁰

These stories differ from systematic social inquiry about law in a number of ways. When the latter is challenged, the path of argument leads back to some detailed and verified observations by an identified observer using methods open to critical scrutiny. The inquiry is cumulative in the sense that the results are grounded in a fund of already established knowledge. Systematic social inquiry allows for revision and qualification in the light of later information and analysis. No such framework of cumulative and critical inquiry is present in the case of legends. It is the difference between census data or an article in a refereed journal and the widely circulated stories about Proctor & Gamble's connection with the Devil or the unlucky diner who discovers that a half-eaten piece in her basket of fried chicken has a distinct rodent-like tail.²¹ While such legends give expression to genuine and deep concerns shared by large numbers of people, they are not very useful guides for devising policies to address the role of corporations or to monitor the safety of the food supply.

Cary Coglianese recently documented the widespread administrative law legend that eighty percent of all the rules promulgated by the Environmental Protection Agency are challenged in court.²² He found that this belief "has woven its way into an exhaustive body of work by journalists, government officials and scholars" and has "permeated the literature."²³ Originating in speeches by former EPA administrator William Ruckelshaus in the early 1980s, this belief has turned up as fact not only in news accounts, but also in EPA training manuals, in the pronouncements of popular critics of the legal system like Philip K. Howard, and even in the work of accredited scholars like James Q. Wilson.²⁴ Coglianese calculates that the actual litigation rate "turned out to be much lower than widely believed." For "rules issued during the 1987-91 period covered by the EPA

instance described in this paper displays important ("non-minimal") effects on politics and culture.

19. GENE BLUESTEIN, *POPLORE: FOLK AND POP IN AMERICAN CULTURE* 23 (1994).

20. In the intermixture of anonymous and authored materials and of oral and media transmission, these legends resemble what Bluestein calls "poplore." *Id.*

21. FINE, *supra* note 16, at 176-84 (Proctor & Gamble); 120-37 (Kentucky Fried Rat).

22. Cary Coglianese, *Assessing Consensus: the Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

23. *Id.* at 1296 n.183.

24. *Id.* at 1296, 1296 n.84. In his Appendix D, Coglianese provides fifty-eight examples.

docket, even conservatively calculated...only 26 percent of rules issued were challenged."²⁵ There are important consequences to stripping away the legendary figure, for the much-touted superiority of negotiated rulemaking as an alternative to the ordinary rulemaking process must now be debated on quite different grounds.

Law is not the only sphere of public life in which the discourse is infused with legend. Barry O'Neill attempted to trace the origins of the much-cited contrasting lists of "top problems of the public schools in the 1940s and 1980s."²⁶ In the 1940s list, the problems run from talking to chewing gum to not putting paper in wastebaskets; in the 1980s, they range from drug abuse to pregnancy to assault. In researching the origin of this item, O'Neill found that the list was composed in 1982 by born-again Fort Worth education activist T. Cullen Davis, who combined old reports of teachers' classroom problems with items in a 1970s questionnaire asking school principals whether they had reported certain crimes.²⁷ As the list migrated through fundamentalist newsletters into political speeches and anti-drug literature, it was cited by increasingly respectable sources. After pundit George Will reported it as factual in a 1987 *Newsweek* column, it was taken up by CBS News, Senator John Glenn, columnist Anna Quindlen, actor Tom Selleck, former Secretary of Education William Bennett, and Harvard President Derek Bok.²⁸ As O'Neill describes it:

Senators, mayors, state education officials, university professors, deans...accepted the lists as factual. They were reported in all the major news magazines.... [T]hey became commonplace in grass-roots America, popping up in *Dear Abby*, *Ann Landers* and countless letters to the editor. They have become the most quoted "results" of educational research, and possibly the most influential.²⁹

Another problematic "crisis" is described by Joel Best, who examines the rise during the 1970s and 1980s of beliefs about the widespread victimization of children at the hands of kidnappers, abusers, and Satanists.³⁰ Promoted by "big numbers, broad definitions, and horrible examples,"³¹ rather than by systematic inquiry, the perception fostered belief that children were threatened by predatory deviants. The media played a major role in circulating and magnifying perceptions of the threat. However, legends can flourish independently of the media. For example, Best tracks the perception of a new kind of deviant discovered in the 1970s: "the Halloween sadist who gave dangerous, adulterated treats to children."³² Although reported incidents are few, and "the data offer no justification for the

25. *Id.* at 1298.

26. Barry O'Neill, *The History of a Hoax*, N.Y. TIMES MAG., Mar. 6, 1994, at

46.

27. *Id.* at 46, 48.

28. *Id.* at 46, 49.

29. *Id.* at 46.

30. JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS (1990).

31. *Id.* at 60.

32. *Id.* at 132.

claim that Halloween sadism stands as a major threat to U.S. children.... Halloween sadism is now an established urban legend; it can remain as a taken-for-granted, if dormant, part of American culture."³³ The principle channel for the dissemination of this lore is not the media but word of mouth.³⁴

In pointing out that some streams within the contemporary discourse on civil justice are in important respects folkloric, I do not use folklore in any pejorative sense. Folklore expresses deep and abiding sentiments and perspectives, and examining it can illuminate our dispositions that are otherwise difficult to fathom. To avoid misunderstanding, I would emphasize that, as the examples above show, contemporary legends of this kind are not confined to the political right, nor are academic credentials proof against such gullibility.³⁵ My point is how deeply this kind of discourse has penetrated current debate about legal policy.

If we look at the assertions that make up the jaundiced view, we can identify at least three kinds of items: global characterizations, atrocity stories, and assertions about aggregate patterns.

33. *Id.* at 136, 144.

34. *Id.* at 137.

35. Thus, a former chair of the President's Council of Economic Advisors, lamenting slow growth, says, "[l]aw schools have been flooding the nation with graduates who are suffocating the economy with a litigation epidemic of bubonic plague proportions." Paul W. McCracken, *The Big Domestic Issue: Slow Growth*, WALL ST. J., Oct. 4, 1991, at A12.

His successor, as chair of the Council of Economic Advisors told the National Economists Club that our legal system has become:

an albatross around productivity.... We spend more time and more resources actively suing each other or taking defensive actions to prevent lawsuits that could be generated toward or diverted toward productive social uses.... And I think we badly need to do that. I think part of the problem lies in the nature of our civil justice system, and everything from malpractice reform to product liability reform to changing the basic nature of our civil justice system, some of these economic incentives, that we get more of a balance into our civil justice system to stop some of the frivolous lawsuits.

Michael Boskin, *Remarks to the National Economists Club, Washington, D.C.*, FED. NEWS SERVICE, Mar. 31, 1992, available in LEXIS, News Library.

Another distinguished economist buys into the legend of the effect of liability on competitiveness. In an 831-page opus, Michael Porter devotes less than half a page to product liability, observing that "a prominent example of an area where regulatory policy can work for or against national advantage is *product liability*. Product liability laws can benefit competitive advantage by acting like a sophisticated buyer to encourage the development of better products." MICHAEL E. PORTER, *THE COMPETITIVE ADVANTAGE OF NATIONS* 649 (1990). Porter continues, without providing or citing any supporting evidence that in the United States, "product liability is so extreme and uncertain as to retard innovation. The legal and regulatory climate places firms in constant jeopardy of costly and, as importantly, lengthy product liability suits. The existing approach goes beyond any reasonable need to protect consumers, as other nations have demonstrated through more pragmatic approaches." *Id.*

A. Global Characterizations

First, there are global characterizations: for example, the legal system "is no longer fair,"³⁶ is "a shambles,"³⁷ is "berserk"³⁸ and "demented."³⁹ It has "spun out of control."⁴⁰ Americans are "crazily litigious,"⁴¹ or are even having a "mad romance...with the litigation process."⁴² These characterizations are so sweeping that they can be assessed only by examining what their authors make of more particular and measurable elements of the system.

B. Atrocity Stories

At the other extreme in terms of particularity are atrocity stories. These are tales that supposedly exemplify alarming trends or typify actors who are producing them. The origin and deployment of many of the famous litigation horror stories were analyzed a decade ago and shown to be exaggerated or outright fabrications.⁴³ Let me trace the fate of just one of these stories: the Psychic and the CAT scan.

On March 27, 1986, a civil jury in Philadelphia deliberated on the medical malpractice claim of Judith Haimen, who had experienced an allergic reaction to the dye injected during a CAT scan examination ten years earlier. In addition to the immediate injuries, she contended that she later experienced severe recurring headaches that prevented her from using her psychic powers and forced her to abandon her business as a spiritual advisor. Three police officers testified that she had helped them solve crimes with her psychic powers. Because she had not shown that the headaches were the result of the allergic reaction, Judge Leon Katz instructed the jury not to consider her claims about her psychic powers and loss of business, but to "consider only the damages related to the immediate allergic

36. Aetna advertisement, WALL ST. J., Apr. 8, 1986, at 9.

37. Robert H. Bork, *Foreword*, in MAX BOOT, *OUT OF ORDER: ARROGANCE, CORRUPTION, AND INCOMPETENCE ON THE BENCH* xi (1998).

38. Aetna advertisement, *supra* note 36.

39. Theodore B. Olson, *Was Justice Served?* WALL ST. J., Oct. 2, 1995, at A16.

40. This was popularized by President George Bush. *See, e.g.*, Public Papers of the Presidents, 27 WEEKLY COMP. PRES. DOC. 1484 (Oct. 13, 1991). It was in use at least five years earlier, Michael Abramowitz, *W. Va.'s Malpractice Insurance Crisis Ends*, WASH. POST, May 24, 1986, at D9, and it is still used by critics such as Maryland Legislator Philip Bissett. *Trial Lawyers' Lucrative New Target: Franchise Operations*, THE CAPITAL (Annapolis, MD), Oct. 26, 1997, at A11.

41. DAN QUAYLE, *STANDING FIRM: A VICE PRESIDENTIAL MEMOIR* 284 (1994).

42. Sen. Mitch McConnell, 132 CONG. REC. S948 (daily ed. Feb. 4, 1986) (Statement made on previous day).

43. Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989); Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL. & SOC'Y 95 (1991); Steven Brill II & James Lyons, *The Not-So-Simple Crisis*, AM. LAW., May 1986, at 1, 12-17; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

reaction, which included nausea, welts and hives."⁴⁴ Nevertheless, the eight person jury, after deliberating for 45 minutes, awarded her \$988,000 (\$600,000 for her injuries and \$388,000 in pre-judgment interest), and the defendant moved to set aside the verdict.⁴⁵ The case immediately became a poster child for tort reform, attracting wide media coverage and word-of-mouth circulation.⁴⁶ A few days after the verdict (while the motion to set it aside was pending), *The Washington Post* editorialized on the need for liability reform and observed that "jury awards such as the one for the Philadelphia psychic that shock the public...aid the cause of the reformers."⁴⁷

Four and a half months later, finding that the jury had either disregarded his instructions or made an award that was "grossly excessive," Judge Katz set aside the award and granted the defendant's request for a new trial.⁴⁸ The case was transferred to another judge for a second trial. After some preliminary skirmishing about the qualifications of the medical expert who had testified at the first trial regarding administration of the dye, the case went to trial on January 3, 1989. Reversing the previous ruling, Judge Bernard Goodheart decided that the proffered expert did not qualify as an expert. Since the plaintiff had no other experts, she was non-suited. On January 14, 1991, a divided bench of the Pennsylvania Superior Court upheld the trial judge's ruling.⁴⁹

Although the case was dead, it continued to walk abroad. Several debunking accounts in the legal press were ineffective to drive a stake through the heart of such a good story.⁵⁰ A year after the verdict President Reagan, addressing the College of Physicians in Philadelphia, followed a joke about a hypochondriac with the observation that

Sometimes it seems as though the courts are ready to award damages even to that man [the hypochondriac].

44. *Says Her Powers Vanished, "Psychic" Awarded \$988,000 in Hospital Cat-Scan Lawsuit*, L.A. TIMES, Mar. 30, 1986, at 20.

45. Michele DiGirolamo, *Psychic Gets \$1 Million in Damages*, UPI DOMESTIC NEWS, Mar. 29, 1986; *Says Her Powers Vanished, "Psychic" Awarded \$988,000 in Hospital Cat-Scan Lawsuit*, *supra* note 44; Fredric N. Tulskey, *Did Jury's Award Consider Psychic's Loss of 'Powers'*, NAT'L L.J., Apr. 14, 1986, at 9.

46. A columnist in *Playboy* provided the "grapevine version" that he "heard...before I read it in the papers...[that a] psychic had had a brain tumor removed and claimed that after the operation, she suffered headaches so severe that she could no longer make contact with the spirits. She sued the doctor; won \$1,000,000." Craig Vetter, *Psychic Whiplash*, PLAYBOY, Aug. 1986, at 33. This is not far from the version that still circulates in mainstream publications. See *infra* note 58.

47. *Liability Reform is Coming*, WASH. POST, Apr. 1, 1986, at A18.

48. *Psychic's \$988,000 Award Voided*, L.A. TIMES, Aug. 9, 1986, at 20; Michele DiGirolamo, *Judge Overturns \$986,000 Jury Award to Psychic*, UPI, REGIONAL NEWS, Aug. 8, 1986.

49. The dismissal was affirmed without published opinion on Jan. 14, 1991. *Haimes v. Temple Univ. Hosp.*, 576 A.2d 1141 (Pa. Super. Ct. 1991).

50. Gary A. Hengster, *Psychic's Case to Be Retried*, 72 A.B.A. J., Dec. 2, 1986, at 23; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

Last year a jury awarded one woman a million dollars in damages. She'd claimed that a CAT scan had destroyed her psychic powers. [Laughter] Well, recently a new trial was ordered in that case, but the excesses of the courts have taken their toll. As a result, in some parts of the country, women haven't been able to find doctors to deliver their babies, and other medical services have become scarce and more expensive."⁵¹

Five years later, Peter Huber enlisted the story in his campaign against "junk science" in the courtroom:

The most fantastic verdict recorded so far was worthy of a tabloid: With the backing of "expert" testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million. The trial judge threw out that verdict. But scientific frauds of similar character if lesser audacity are attempted almost daily in our courts, and many succeed.⁵²

Like President Reagan, Huber knew how to use a non-event to score a rhetorical point. The story about an outrageous claim and outrageous award became a story about outrageous expert testimony.⁵³

A month later, Huber's account of junk science tarnishing the legal process underwent a deft piece of editing by the President's Council on Competitiveness, who quoted his account of the case as follows: "With the backing of 'expert' testimony from a doctor and police department officials, a soothsayer who decided she had lost her psychic powers following a CAT scan persuaded a Philadelphia jury to award her \$1 million."⁵⁴ Cutting off Huber's account short of the reversal by the trial judge, the Council continues: "Stories such as this are becoming almost commonplace. 'Expert' witnesses regularly offer...."⁵⁵

The Council transforms a cautionary tale of something bizarre that almost happened into a report of something typical and prevalent.⁵⁶ Liberated from its

51. Remarks at a Luncheon for members of the College of Physicians, Public Papers of the Presidents, Apr. 1, 1987.

52. Peter Huber, *Junk Science in the Courtroom*, FORBES, July 8, 1991, at 68. An almost identical passage also appears in PETER HUBER, *GALILEO'S REVENGE: JUNK SCIENCE IN THE COURTROOM* 3-4 (1991).

53. Just what expert or other testimony about psychic powers (apart from the police officers who testified that Ms. Haimes had employed her psychic powers to help them solve crimes) was admitted and who proffered it is not clear from an examination of published accounts of the case. According to the defense attorney "there were three or four days of testimony about these powers," but he did not offer his rebuttal evidence because "the judge ruled before I presented my case." Richard Galli, quoted in Hengster, *supra* note 50.

54. PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* 5 (Aug. 1991) [hereinafter, *AGENDA*].

55. *Id.*

56. Thus, Neal M. Cohen, senior vice-president at Apco Associates, a Washington public relations and lobbying firm, advises that the first step to "overcome the

anti-climactic ending,⁵⁷ the tale of the psychic and the CAT scan is free to occupy its rightful place in the canon of tort horror stories.⁵⁸

The continuing flow of such stories is promoted by sources such as the internet site *ATRA [American Tort Reform Association] Horror Stories: Stories That Show A Legal System That's Out of Control*.⁵⁹ To get a sense of the current crop of atrocity stories, I downloaded the *ATRA Horror Stories* site, last updated in November 1997, in February of this year. It contained ten stories. In four, the report was not of a legal outcome, but of an outrageous claim. A fifth was a claim that had been thrown out of court; a sixth led to a verdict for the defendant. Two of the ten appear to have been settled. Of the two that were adjudicated, one was a class action that was settled, and one was an award to an individual plaintiff. The latter was the Horror Page's lead story:

A West Virginia convenience store worker Cheryl Vanender was awarded an astonishing \$2,699,000 in punitive damages after she injured her back when she opened a pickle jar, according to the Charleston Daily Mail. She also received \$130,066

political strength of the trial lawyers in order to accomplish real reforms" is to "make Judith Haimes into as notorious a public figure as Willie Horton was in the 1988 presidential campaign.... Her case is just one example of the thousands of absurd cases that trial lawyers clog the courts with..." Neal M. Cohen, *Busting Liability Reform Dike*, J. COM., Sept. 30, 1991, at 12A.

57. The Council on Competitiveness' style of editing is not unique. In his much-cited book, Walter K. Olson recounts the Haimes case:

Judge Leon Katz ordered the jury to disregard the psychic-damage claims, but after 45 minutes of deliberation it came back with an award of \$986,000. Over the strenuous objections of Ms. Haimes's lawyer, Judge Katz ordered a new trial, declaring the verdict "grossly excessive."

Four years later the litigation was still dragging on.

WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 152-53 (1991).

A year later, in CHARLES J. SYKES, *A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER* (1992), Sykes relies on Olson's account of *Haimes* but finds it sufficient to conclude that "[t]he judge in the case ordered the jury to ignore the claim of psychic damage, but the jurors took only forty-five minutes to return an award of \$986,000." *Id.* at 127.

58. See, e.g., Joseph Perkins, *A Pestilence of Lawsuits*, SAN DIEGO UNION-TRIB., Sept. 18, 1992, at B-7; Joe Dirck, *Let's Sue Syndrome*, THE PLAIN DEALER, May 2, 1993, at 11H; C.W. Griffin, *Warning: Scientific Evidence Can Be Soporific*, WASH. POST, Dec. 11, 1996, at A25. Of the many critics who have been scandalized by the outrageous award that did not occur in the *Haimes* case, none have seen fit to comment on the genuine outrage revealed by the procedural history of the case. Although the available data does not allow us to apportion responsibility among lawyers, judges, administrators, legislators, or others, there is surely cause for dismay in a system in which it took Judge Katz four and a half months to rule on a simple motion, in which Judge Goodheart terminated the plaintiff's case by reversing his earlier ruling on the morning of the second trial, and in which the case was disposed of by the Superior Court some ten years after filing (and fifteen years after the injury).

59. American Tort Reform Assoc., *Stories that Show a Legal System That's out of Control*, (visited Feb. 21, 1998) <<http://aaabiz.com/atra/ath.htm>>

in compensation and \$170,000 for emotional distress. State Supreme Court Justice Spike Maynard called this award an "outrageous sum," stating in his dissenting opinion: "I know an excessive punitive damages award when I see one and I see one here." The court, however, upheld most of the punitive damages: \$2.2 million. *Legal Briefs*, Issue Seven, August 15, 1997.⁶⁰

Although the name was slightly off, I was able to find the West Virginia Supreme Court decision in this case.⁶¹ The trial court had found punitive damages justified by the defendant's

illegal course of conduct for a period of nearly five years...[including] refusing to accommodate plaintiff's work restrictions, refusing to reinstate plaintiff after suffering a compensable workplace injury, discharging plaintiff from employment, refusing to rehire plaintiff...retaliating against a manager who testified contrary to [defendant] Sheetz, Inc.'s position and retaliating against plaintiff upon her negotiated return to work by requiring her to perform work activities which defendant's managers knew she could not perform without risking re-aggravating her injuries or causing new injury.⁶²

On appeal, the West Virginia Supreme Court, applying its earlier punitive damages holdings and the then-new holding of the U.S. Supreme Court in *B.M.W. v. Gore*,⁶³ found the ratio of punitive to compensatory damages excessive as to the unlawful termination and failure to rehire claims on the ground that the evidence was insufficient to show that these actions were prompted by malice or involved fraud, trickery or deceit.⁶⁴ However, with regard to the retaliation claim, the court upheld the verdict's high ratio since it found the evidence "crossed the line from reckless disregard of an individual's rights to willful, mean-spirited acts indicative of an intent to cause physical or emotional harm."⁶⁵

The other adjudicated case in which plaintiffs recovered was a class action by county jail inmates in Massachusetts:

Inmates at a county jail sued for cruel and unusual living conditions: bunk beds, cells lacking a sink and toilet, and no way to exercise in the winter. These criminals were awarded \$2 million dollars, paid by the taxpayers of Massachusetts. Each inmate who

60. *Id.* *Legal Briefs* is a publication of the National Center for Public Policy Research, a right-wing lobbying group in Washington. The account in *Legal Briefs* contained the same information as the Horror Stories site, with an indication that the story was taken from the *Charleston Daily Mail*. The several stories in that newspaper (July 18, 1997; Aug. 5, 1997; Aug. 17, 1997) and an editorial on July 22, 1997, provided ample accounts of the courts' findings of illegal, deceptive, and hurtful conduct on the part of the defendant.

61. *Vandevender v. Sheetz, Inc.*, 490 S.E.2d 678 (W. Va. 1997).

62. *Id.* at 689.

63. 517 U.S. 559 (1996).

64. *Vandevender*, 490 S.E.2d at 693.

65. *Id.*

was a party to the suit got \$10 tax-free for each day he was jailed. Their award included damages plus 12% interest from the time the case was settled until the time they collected their windfall. *That's Outrageous!*, Reader's Digest, March 1995.⁶⁶

The *Horror Stories* item was about half of the *Reader's Digest* item, which was in turn about half of a column in the *Boston Globe* by Bella English, printed almost two years after the Massachusetts Department of Corrections settled a case regarding lack of toilet facilities in a pre-Civil War jail that had been retired from service before the settlement.⁶⁷

What does my little survey tell us? First, that a substantial portion of the horror stories are stories of nutty claims that, if they are pursued at all, are quickly discarded by courts.⁶⁸ Second, the stories invariably tell of a claim by an individual against an institution, governmental body, or corporation. If grotesque or unfounded claims are brought against individuals by other individuals or by corporate entities, they do not ascend into the pantheon of horror stories, nor do accounts of grotesque or frivolous defenses. It is a universe in which corporations and governments are victims, and individuals (and their lawyers) are the aggressors. Third, these stories are neither experiential nor analytic accounts, but disembodied cartoon-like tales that pivot on a single bizarre feature (for example, the pickle jar, psychic powers). They are abstracted from media accounts and re-circulated by entrepreneurial publicists through a succession of other media. In the course of this recirculation, they are further simplified and decontextualized. They are placed in a timeless narrative present.⁶⁹ The focus is on the claimant and the triviality of the claim. Thus, the West Virginia horror story emphasizes the pickle jar but omits the violation of state policy concerning reemployment of injured workers, the retaliation, and defendant's stonewalling of plaintiff's early offer to settle for "\$30,000 plus her job back."⁷⁰

The same pattern of decontextualization is displayed in what is certainly the best known contemporary legal legend, the McDonald's coffee case.⁷¹ The

66. American Tort Reform Assoc. website, *supra* note 59.

67. See READER'S DIG., Mar. 1995, at 75-76; Bella English, *Getting Paid for Doing Time*, BOSTON GLOBE, Sep. 19, 1994, at 17. The settlement is reported in Andrew Blake, *943 ex-inmates to split \$1.4m*, BOSTON GLOBE, Dec. 13, 1992, at 56.

68. Of course, in some (though far from all) of these drop-outs, fighting their preliminary stages imposes significant costs—financial, reputational, and emotional—on defendants. Much of the seething resentment of litigation is generated by the perceived unfairness of such burdens. See Lande, *supra* note 13, at 35-38.

69. For example, one of the November 1997 ATRA Horror Stories is a tale of a case filed by a bank robber against the bank for injury caused by a security device that exploded in his pants pocket. The media reported such a case filed by the imprisoned bank robber in 1987 and presumably dismissed long ago. Michael Morgan, *Robber Suing Over Burns from Exploding Cash Pack*, RECORD (Bergen), Aug. 12, 1987, at A13. But it is served up ten years later as proof that the system is out of control.

70. *Vandevender*, 490 S.E.2d at 688.

71. *Liebeck v. McDonald's Restaurants*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994). Useful accounts of the course of that litigation are contained in Gregory Nathan Hoole, Note, *In the Wake of Seemingly Exorbitant Punitive Damage*

story of the spill, the suit and the \$2.9 million award is abstracted from the facts about the extent of plaintiff's injury (third degree burns on legs and groin necessitating skin grafts); the defendant's practice of serving coffee twenty or so degrees hotter than the standard in the trade; its earlier encounter with some seven hundred claims of this type, some of which it settled (for a total outlay of more than \$500,000); the defendant's refusal of plaintiff's initial request for payment of her medical (and attendant) expenses (about \$11,000), which it countered with an offer of \$800; its rejection of settlement proposals by her lawyer and of a court-appointed mediator's recommendation that the parties settle for \$225,000; and the subsequent judicial reduction of the punitive award (from the jury's \$2.7 million, supposedly an estimation of two days of McDonald's coffee sales, to \$480,000, three times the amount of the compensatory damages); or the subsequent settlement between the parties.⁷²

As it circulates, the story may be assimilated to a template that outlines a ready-made interpretation, such as "[i]t's just another in a long line of irresponsible awards made by emotionally-manipulated jurors with someone else's money."⁷³ A few months after the award, *The Oakland Tribune* editorialized:

There is probably one in the paper today, if you take the time to look. There usually is: A numbing tale of a citizen hauling someone into court over something absurd....

....

The poster woman for this sort of ludicrous lawsuit is an 81-year-old New Mexico woman who sued McDonald's after she spilled her hot McDonald's coffee in her lap....

Is there any doubt in anyone's mind that our legal system is being badly abused? Greedy lawyers, victims out to make a buck, and a culture that encourages people to sue instead of accepting their own responsibility or working things out, have clogged courts with cases that don't belong there.

Add a growing public belief in "deep pockets"—the notion that corporations and public agencies have bottomless pits of money, so why not sue?—and you have a nation of victims who see

Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree? 22 J. CONTEMP. L. 459 (1996); Elizabeth Sherowski, *Hot Coffee, Cold Cash: Making the Most of Alternative Dispute Resolution in High-Stakes Personal Injury Lawsuits*, 11 OHIO ST. J. ON DISP. RESOL. 521 (1996); Andrea Gerlin, *A Matter of Degree: How a Jury Decided that a Coffee Spill is Worth \$2.9 million*, WALL ST. J., Sep. 1, 1994, at A1; S. Reed Morgan, *McDonald's Burned Itself*, LEGAL TIMES, Sep. 19, 1994, at 26 (account by plaintiff's attorney).

72. As a result of this confidential settlement, "the parties ended up settling for an undisclosed amount not exceeding \$600,000." Hoole, *supra* note 71, at 472 n.105.

73. Mike Rosen, *Coffee and \$2.9 Million to Go*, DENVER POST, Aug. 26, 1994, at B-11.

going to court as tantamount to buying a lottery ticket. You have nothing to lose, and may win big.⁷⁴

Or the story may be fleshed out with "facts" that summon a grim interpretation. A year after the award, an angry reader (or a public relations flack posing as one) wrote to Ann Landers:

I hope it's not too late to write about the lawsuit involving the woman who spilled McDonald's coffee on her lap and sued for \$2.9 million....

...[T]he plaintiff was 81 years old. I say she was a malingering old biddy who pumped up her alleged injuries to get more money. Spending eight days in the hospital was her lawyer's way of creating a situation to make her case appear legit. Third-degree burns my eye! There are plenty of unethical doctors who will testify to anything as long as they get a fat fee.

Nothing was said about the woman riding in her grandson's sports car or how fast he was going. In the accounts of the case I read, it said there was no place to put the coffee cup, so she placed it between her legs. What kind of an idiot does that in a sports car? Where is the common sense here?

And as for the 700 reported claims of burn injuries from 180-degree coffee, where is the reality behind this? When you make coffee at home, the temperature of the fresh cup is lower than that. Do you then fill your cup and go tearing around in a sports car, for heaven's sake...?

...[F]ar from being a victory for the consumer, this case merely encourages unethical, greedy lawyers and their greedy clients to continue to perpetrate such frauds on gullible juries....

...[I]t's high time the juries took a healthy dose of reality and sent these plaintiffs packing. Not only that, but we all should express our outrage at the continued abuses of the legal system—
STILL ANGRY IN ATLANTA⁷⁵

C. Assertions About Aggregate Patterns

More general than these atrocity stories, but more specific than the global characterizations, are assertions about aggregate patterns, ranging from conclusory nuggets like the litigation explosion, runaway juries, and greedy lawyers, to more

74. Editorial, *A nation of lawyers*, THE OAKLAND TRIB., May 5, 1995, at A14.

75. Ann Landers, *McLawsuit Plaintiffs Should Wake Up and Smell the Coffee*, FRESNO BEE, Oct. 6, 1995, at F2. Many editorialists also sketched in the "moving car" element. See, e.g., *Café au Loi*, TIMES (London), Aug. 20, 1994; *McDonald's Coffee; Sending the Wrong Message*, ARIZ. REPUBLIC, Aug. 22, 1994, at B4. As I read the published accounts, it appears that the spill occurred while the grandson's car was parked. See Steve Wilson, *Coffee-Spill Award No Grounds for Backing Props. 103, 301*, ARIZ. REPUBLIC, Oct. 27, 1994, at A2; Aric Press, *Are Lawyers Burning America?*, NEWSWEEK, Mar. 20, 1995, at 32.

specific assertions like: seventy percent of the world's lawyers practice in the United States, the annual cost of the U.S. legal system is \$300 billion, tort liability severely inhibits innovation, and our liability regime curtails U.S. foreign trade. These are in principle subject to empirical verification, and a number of critics have tried to put them to the test.⁷⁶

Let me note just two examples. The first is both trivial and telling. In August 1991, Vice President Dan Quayle ended a speech to the American Bar Association on the wrongs of our legal system with the rhetorical question, "Does America really need 70% of the world's lawyers?"⁷⁷ Quayle's seventy percent figure was an immediate media triumph, resonating with widespread animosity toward lawyers. Although it was presented without any indication of how it was derived,⁷⁸ it was not entirely without precedent. It was a retread of an item that surfaced almost a decade earlier, having no ascertainable terrestrial origin, that the United States had two-thirds of the world's lawyers.⁷⁹ The two-thirds item was retailed by Chief Justice Burger as part of his indictment of litigious America.⁸⁰ It was subsequently used by Justice O'Connor and others⁸¹ and became part of the

76. In addition to the items noted in the text below, these and other aggregate assertions have been tested and found wanting in various of the studies listed *supra* note 14.

77. Dan Quayle, *Address to the Annual Meeting of the American Bar Association*, in QUAYLE, *supra* note 41.

78. The Vice President was presenting proposals of the Council on Competitiveness, of which he was chair. The Council did not include the seventy percent figure in its Agenda. AGENDA, *supra* note 54. but apparently there had been some consideration of it in the preparation of the Vice President's August 13 speech. A week earlier a "Quayle spokesman" was reported as having "noted that the United States has 70 percent of the world's lawyers, and that the rising tide of litigation 'is a burden on our economy.'" Sandra Torrey, *BCCI Scandal a Windfall for Attorneys Unlike Any Other*, WASH. POST, Aug. 12, 1991, at F5.

79. Among the earliest sightings was a news magazine report that "[t]he U.S. has 610,000 lawyers, two thirds of the world's total.... [A]bout 70 percent are in private practice." *The Pervasive Influence of Lawyers*, U.S. NEWS & WORLD REP., Nov. 1, 1982, at 55. A few months earlier, James Spensley, a lecturer at the University of Denver Law School, was quoted as saying "The US has become the world's most litigious society, employing over two thirds of the world's lawyers." David F. Salisbury, *Colorado's Quality of Life Fades in a Changing West*, CHRISTIAN SCI. MONITOR, July 30, 1982, at 4. When I contacted Mr. Spensley on the telephone in January, 1992, he could not recall the source of this information.

80. Warren E. Burger, *Annual Message on the Administration of Justice* (American Bar Association), Feb. 12, 1984, at 2. ("It has been reported that about two-thirds of all the lawyers in the world are in the United States and of those, one-third have come into practice in the past five years.") A very similar item appeared a few months earlier in a contribution to LEGAL TIMES by New York lawyer Peter Megargee Brown ("Two-thirds of all lawyers in the world are in the United States. One-third of the lawyers in this country have been in practice less than five years.") Peter Megargee Brown, *Profession Endangered by Rush to Business Ethic*, LEGAL TIMES, Sep. 26, 1983, at 10.

81. Milly McLean, UPI, REGIONAL NEWS, Apr. 9, 1984. See also a law school dean's op-ed in *The Wall Street Journal* that "[t]wo-thirds of the world's lawyers now practice in this country, and one-third of these were graduated during the past five years." Ernest Gellhorn, *Too Much Law, Too Many Lawyers, Not Enough Justice*, WALL ST. J.,

speeches of Governor Lamm of Colorado about America's descent to doom.⁸² Ross Perot, blaming his lawyers for the terms of his ill-fated contract with General Motors, complained that, "[a]s long as two-thirds of the world's lawyers are in this country you can expect every clause that these people will dream up. I wish more of these lawyers would become engineers and make something."⁸³

The two-thirds item had never been challenged, but it never made a big splash. Quayle's reformulation projected it into national consciousness. Just where Quayle's handlers picked it up is unknown, but they certainly had reason to know that it was a tall tale.⁸⁴ If Quayle himself did not realize at the time that it was a phony figure, he surely knew by time he repeated it in his acceptance speech at the 1992 Republican convention.⁸⁵

Quayle's unwillingness to relinquish the seventy percent item is readily understandable: it was the rhetorical high point of his public life. Reflecting on it in his 1994 book, he recounts, "I knew the speech—especially its line about America's having 70 percent of the world's lawyers—would be controversial."⁸⁶ Unexpectedly, he reports, it led to "[s]omething completely new to my vice-presidency: an avalanche of good press, the best I would have in my four years in office."⁸⁷ Quayle continues:

My line about the United States having 70 percent of the world's lawyers was the sound bite of the day, and over the next week or so, editorial pages took up the question of legal reform.... [T]his was as good as anything that had come along in two and a half years. In

June 7, 1984, at 28.

82. John J. Sanko, *Governor Addresses Businessmen*, UPI, REGIONAL NEWS, Nov. 3, 1983. See also Richard W. Larsen, *Time to Restore Logic to Public Policies*, SEATTLE TIMES, Oct. 14, 1990, at A18.

83. Quoted in N.R. Kleinfeld, *Silence is Golden*, N.Y. TIMES MAG., Apr. 29, 1990, at 54.

84. The drafters of the Council's *Agenda* had reason to know that seventy percent was a falsehood. On the first page of the *Agenda* there is an approving reference to, but not a citation for, "a recent report by a Professor of Finance at the University of Texas...[that] estimated that the average lawyer takes \$1 million a year from the country's output of goods and services." *AGENDA*, *supra* note 54, at 1. The report referred to Chapter Eight of STEPHEN P. MAGEE ET AL., *BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY* (1989). That source contains an incomplete listing of the number of lawyers in some thirty-four countries as of 1983. *Id.* at 120-21. Even this inadequate enumeration showed American lawyers as just forty-five percent of the total. *Id.* One can conclude that the Council staff either did not examine the source they approvingly cite or that they were aware that there was good reason to believe the seventy percent figure was spurious.

85. The question of accuracy was finessed a few weeks earlier in an *ad hominem* dismissal of those who sought to assess the accuracy of "litigation explosion" lore: "Only those who benefit from the squandering of litigation resources are attempting to calculate to the decimal the total costs of all lawsuits or to determine whether Japan's scribes should be counted in census of the world's lawyers." Dan Quayle, *Too Much Litigation: True Last Year*, *True Now*, NAT'L L.J., Aug. 10, 1992, at 17.

86. QUAYLE, *supra* note 41, at 284.

87. *Id.* at 284.

fact, for a politician it doesn't get any better than this: good press for doing something that he strongly believes in.⁸⁸

This item has shown a remarkable capacity to outlive its original rhetorical moment. Although most serious observers quickly concluded that it was meaningless or false,⁸⁹ editorialists, grievance-mongers, letters-to-the-editor writers, and media pundits have kept it alive. In the media and political worlds, it is served up without shame or challenge.⁹⁰

Not only has this item survived, but it has become a piece of genuine global folklore. In Britain, it is invoked as a marker to distinguish a Britain free of (but threatened by) litigation madness.⁹¹ *The Banker* refers to "the US, the country with three quarters of the world's lawyers...."⁹² Correspondents in Washington conveyed the seventy percent story to readers of *The Independent* twice within

88. *Id.* at 287.

89. Differences in the way that legal professions are defined from country to country make impossible any exact accounting. Clearly though, however the various definitional problems are resolved, seventy percent is very wide of the mark. If we take "lawyers" to refer to all those in jobs done by American lawyers (including judges, prosecutors, government lawyers, and in-house corporate counsel), American lawyers make up less than one-third, and probably something in the range of one-quarter, of the world's lawyers. See Galanter, *News from Nowhere*, *supra* note 14.

90. Columnist George Will noted as one of "the nation's most pressing problems...the suffocation of economic and social energies by regulations, and by litigation from the 70 per cent of the world's lawyers who are Americans." George F. Will, *Clinton: If He Succeeds, it Will be Despite Himself...* THE DAILY TELEGRAPH, Nov. 12, 1992, at 17. (Recall that five years earlier Will was the first mainstream journalist to report as fact the "problems in the schools" hoax. See *supra* text accompanying note 28.) News host Barbara Walters solemnly reported that "70 percent of all the lawyers in the entire world are in this country." *Nightline* (ABC television broadcast, Aug. 4, 1993). The President of Americans for Tax Reform concurred, see Grover G. Norquist, *A Winning Drive*, THE AMER. SPECTATOR, Mar. 1994, as did columnist Herb Jaffe, *Law Schools Crank Out Too Many Graduates*, NEWARK STAR LEDGER, Dec. 20, 1994, reprinted in N.J. LAW., Jan. 2, 1995, at 7; editorialist Bob Wiemer, NEWSDAY, Feb. 5, 1995, at A33; computer executive Charles Wang, see Suzanne Wintrob, *CA's Wang Pleads Case for Legent*, 11 COMPUTER DEALER NEWS, Aug. 9, 1995, at 12; *Really Stupid Lawyers' Tricks*, ROANOKE TIMES & WORLD NEWS, Nov. 27, 1995, at A4. Even its citation by the left-wing *Monthly Review* as an explanation of why "in the United States, class struggle is expressed in legal terms," see John Ehrenberg, *The United States Constitution*, 47 MONTHLY REV., Jan. 1996, at 43, has not diminished its appeal to the right. Thus Rep. Bill Archer, proudly announcing the creation of "28 new taxpayer rights, including the right to sue the IRS for damages caused by negligence," expresses astonishment that in a country with seventy percent of the world's lawyers "anybody can complain about [*sic*] this may be adding a little bit more litigation." Press Conference with Representative Bill Archer (R-TX), Chairman, Oct. 21, 1997 at 7, available in Lexis, Federal News Service.

91. A British commentator observes that "[i]n the US, the fountainhead of modern malaise, there are already 800,000 lawyers 70 percent of the world total.... [I]nvariably, the infestation has reached these shores, borne upon the same wind that blows American junk culture into our lives." Iain Murray, *Legal Eagles Swoop in for New Kill*, MARKETING WK., May 10, 1996, at 134.

92. *The Bottom Line*, THE BANKER, June, 1994, at 80.

days in March 1995.⁹³ It is equally welcome in up-market⁹⁴ and down-market publications.⁹⁵ It is accepted without question by the BBC's chief American correspondent, who views the United States as degraded and paralyzed by its overpopulation of lawyers.⁹⁶ In Japan, an American computer executive includes "three quarters of the world's total" lawyers in the United States as one of the reasons "Why Japanese Live Better than Americans."⁹⁷ The *Straits Times* tells Singapore readers that "[a]bout three-quarters of the world's lawyers live in the [US]."⁹⁸ A house magazine in a Spanish hotel room reports that "the United States has two-thirds of the two million lawyers in the world."⁹⁹

My second example of an assertion about aggregate patterns is the claim that product liability litigation impairs the economic well-being of the nation. Assertions that the tort system inhibits the creation of jobs and the economic health of the country are so commonplace as to pass without notice. However, proof of such effects is not easy to find. It seems inherently improbable that current liability arrangements represent a substantial economic detriment. For example, the cost of product liability in 1993 (measured by insurance premiums) was 13.5 cents per \$100 of retail sales—down from 25.9 cents in 1987.¹⁰⁰ A recent survey of United States corporations' total liability risk (not confined to product liability) found that total liability costs were equal to 0.255% of total revenue, or 25.5 cents for every \$100 of revenue.¹⁰¹ From 1993 to 1994 the overall cost of risk (including workers'

93. Rupert Cornwell, *Gingrich Targets Greedy Lawyers*, THE INDEP., Mar. 7, 1995, at 11; John Carlin, *Last Chance in America's Ludicrous Legal Lottery...*, THE INDEP., Mar. 10, 1995, at 17. A commentator in the same paper recently cited it in connection with dire warnings about the "litigation crazy" United States. Andrew Puddephatt, *Liberty, Equality and Even Dignity*, THE INDEP., May 18, 1997, at 25.

94. Ruaridh Nicoll, *LA Pleads Insanity to O.J. Trial Overkill*, THE OBSERVER, Sept. 17, 1995, at 22; Luke Johnson, *The Lawyers Will Kill Us*, SUNDAY TELEGRAPH, March 29, 1998, at City section 6 (reviewing the movie *The Devil's Advocate*).

95. Ann Leslie & George Gordon, *For OJ, an Open Prison Called LA*, DAILY MAIL, Dec. 6, 1997, at 16; Vernon Coleman, *Just What's Going on in Britain with the Long Harm of the Law?*, THE PEOPLE, Mar. 2, 1997, at 36.

96. GAVIN ESLER, *THE UNITED STATES OF ANGER: THE PEOPLE AND THE AMERICAN DREAM* 90 (1997). The author's diatribe about America's legal morass, *id.* at 86–99, relies heavily on WALTER OLSON, *THE LITIGATION EXPLOSION* (1991). ESLER, *supra*, at 325.

97. Bill Totten, *Why Japanese Live Better Than Americans*, THE DAILY YOMIURI, June 25, 1994, at 6.

98. Richard Lim, *Power and Prosperity are the Rewards*, STRAITS TIMES, Nov. 6, 1994, at 1.

99. Pedro De Alvarado, *Hable con mi abogado*, MADRID & COMPANIA, Jan. 1995, at 24. I am indebted to Lawrence Friedman for this reference.

100. J. ROBERT HUNTER, *PRODUCT LIABILITY INSURANCE EXPERIENCE 1984-1993: A REPORT OF THE INSURANCE GROUP OF THE CONSUMER FEDERATION OF AMERICA*, exhibit A, col. N (Mar. 1995). This figure has to be adjusted to account for self-insurance.

101. TILLINGHAST-TOWERS PERRIN RISK MANAGEMENT PUBLICATIONS & RISK AND INSURANCE MANAGEMENT SOC'Y, *1995 COST OF RISK SURVEY 2* (1995). The survey included 650 U.S.-based organizations with an average of approximately two billion dollars in annual revenue.

compensation and property risks as well as risk management) fell by 5%, while the cost of liability fell by 22%.¹⁰²

Not surprisingly, serious investigation has so far found little evidence of any significant effect on America's prosperity or competitiveness. Reviewing the available data on the relation of liability to trade performance, Robert Litan identified two major lines of argument: (1) liability adds to the cost of doing business, and (2) "these costs, coupled with uncertainty over outcomes of tort litigation...[deter introduction of] new products or cost-saving technologies."¹⁰³

Litan concluded that it is difficult to know the magnitude of the net cost of liability but estimates "[a]t most...that [cost] on average could be as high as 2 percent of the cost of all products and services sold in the United States. The effects on individual products could be much greater."¹⁰⁴ Although "it could affect the *composition* of U.S. trade," he reported that "[i]t is highly unlikely that the 'liability tax,' however large it is, materially or permanently affects the overall U.S. trade balance."¹⁰⁵

Litan himself assembled data on the total "share of revenues [spent by particular industries] devoted to paying for and avoiding 'risk.'"¹⁰⁶ These risk costs fluctuate widely from industry to industry and vary over time. Notably, the overall expenditure on risk costs as a share of revenues declined from a total of 0.58% of total revenues for the whole set of industries in 1978 to 0.50% of total revenues in 1984.¹⁰⁷

To determine whether differences in risk cost can account for "any of the crossindustry variation in export performance," Litan tested the correlation for "the seven industries for which both export and risk cost data are available" and found no statistically significant relationship.¹⁰⁸ Litan observed that "[i]t is not surprising

102. *Id.* at 2, 4. Total risk cost and its composition fluctuate considerably from year to year. *See id.* at 47.

103. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in *TORT LAW AND THE PUBLIC INTEREST*, *supra* note 9, at 127, 128. Studies of the impact of liability in five industries are reprinted in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991).

104. Litan, *supra* note 103, at 128-29.

105. *Id.* at 128 (emphasis in original).

106. *Id.* at 140.

107. *Id.* at 141 tbl. 3. The data in the table is misreported in the first full sentence of Litan's article at page 142. *Id.* at 142.

108. *Id.* at 143. Litan found:

Among the seven industries...there is a small, but statistically insignificant, positive correlation between the change in exports between 1978 and 1984 (either in absolute dollars or in percentage terms) and the change in the risk cost as a percentage of sales in these industries during this period. In other words, increases in risk costs tend to be associated with an *improvement* in export performance, although again this effect is not statistically significant.

Id. (emphasis in original).

that there is little connection between liability costs and export performance by industry" because differences in risk costs are "rather minor" and easily can be swamped by other effects, such as changing energy costs.¹⁰⁹ He also noted that "foreigners may be willing to pay for the added safety that may be built into U.S.-produced goods as a result of the deterrence features of our tort system."¹¹⁰

Litan suggested that the effects on innovation "are potentially much larger, but much more uncertain than the direct [cost] effects."¹¹¹ An analysis by W. Kip Viscusi and Michael J. Moore found that product liability actually had a positive net effect on innovation.¹¹²

This effect is not uniform and may reverse once the liability costs become too great. At low product liability cost levels, increases in liability costs foster innovation. Extremely high liability costs depress innovation once the disincentive effect on new product introductions becomes dominant. For industries with extremely large liability costs...the net effect of product liability is to depress innovation, whereas for the great majority of firms with lower liability costs, it has a positive effect.¹¹³

Litan examined the relation of research and development expenditures as a percentage of sales (a surrogate for innovation) for all United States industries and for the four industries that were the target of the largest number of federal product liability suits from 1974 to 1986. He reported that the results do not support the alleged innovation-liability link. Litan stated that "R&D-to-sales ratios for all industries increased rather substantially during the 1980s...significantly, that ratio more than doubled in the drug industry, where product liability suits have been especially prevalent. Both the industry-wide and pharmaceutical-specific trends are inconsistent with claims that liability fears have dampened innovative activities."¹¹⁴

Competitiveness stories were much in vogue in the late 1980s and early 1990s when experts declared Japan "number one," and the virtues of its few lawyers and sparse litigation seemed overwhelmingly obvious. By 1997, a Senate Committee, noting the critical demolition of several of the aggregate assertions that underlay these stories, concluded that "there is absolutely no evidence that product liability hinders the competitiveness of American businesses."¹¹⁵ Although the cascade of scholarly criticism has diminished acceptance of the jaundiced view among academic and practicing lawyers, and among some judges and legislators,¹¹⁶

109. *Id.*

110. *Id.*

111. *Id.* at 129.

112. See W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 9, at 105.

113. *Id.* at 123.

114. Litan, *supra* note 103, at 145-46.

115. PRODUCT LIABILITY REFORM ACT OF 1997, S. REP. NO. 105-32, at 79, 82 (1997).

116. For example, the research reports of the Rand Corporation's Institute for

the major bastions of the jaundiced view remain intact, and the legends associated with it continue to circulate.

III. KNOWING IN A WORLD OF SHADOWS

Stephen Daniels and Joanne Martin have documented how important sectors of corporate America have for more than a decade been investing heavily in broadcasting images of irksome and destructive liability and frequent and excessive punitive awards.¹¹⁷ Lobbyists, lawyers, pundits, and writers in corporate-sponsored think tanks have poured out the bad news about various disorders of the civil justice system, and their message has resounded loudly through the trade press and popular media.¹¹⁸ Daniels and Martin analyze the story lines and rhetorical strategies by which these groups have succeeded in "gaining a place on the policy agenda for their favored solutions and ensuring that their characterization of punitive damages and civil justice became 'accepted wisdom.'"¹¹⁹ In their account, proponents of tort reform emerge as calculating rational actors who make "tactical use of passion" while other political actors are beguiled by myths and morality plays.¹²⁰ Surely there is an abundance of the calculating instrumentalism that Daniels and Martin portray, but I would argue that, in an important sense, the proponents of the jaundiced view are creatures of the discourse rather than its authors. Their calculating instrumentalism is set within a complex stew of factors that confound reading of the legal landscape. Let me review a few of these:

A. *The Derelict Knowledge Base*

Even though we have accumulated a great deal of data and insight during the past twenty years, we do not have a fund of systematic social knowledge about the working of the civil justice system.¹²¹ Court statistics are rudimentary: for example, they do not record the detailed subject matter of cases, the characteristics of the parties, or the events in the case; information about settlements is not

Civil Justice have gained wide credibility as guides to patterns (e.g., of jury awards) in the civil justice system. Concerned legislators and staffers were influenced by an empirical study of jury awards in South Carolina, even though it did not register on broader elite groups. Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 SO. CAR. L. REV. 585, 603 (1988).

117. See DANIELS & MARTIN, *supra* note 14, at ch. 1,2,7; Stephen Daniels & Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems*, 1998 WIS. L. REV. 71; Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric, and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989).

118. This is exemplified in the influential writing of Peter Huber, whose research and backers are discussed in Kenneth Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637 (1993).

119. Daniels & Martin, *supra* note 117, at 99.

120. *Id.*

121. Marc Galanter, *News from Nowhere*, *supra* note 14, at 99-102; Marc Galanter et al., *How to Improve Civil Justice Policy*, 77 JUDICATURE 185 (1994).

officially collected and is often shrouded in secrecy, with the support of courts. Even actors that are repeatedly involved in litigation may not be in a position to give an analytic account of their experience. Herbert Kritzer and Frances Kahn Zemans' aborted attempt to survey corporations on their punitive damages experience suggests either that they are unwilling to share such information or that they are simply in the dark themselves.¹²² No one has seen fit to invest in the continuous collection of the basic information. Lawyers, typically uninterested in aggregates and empirical verification,¹²³ have tolerated a situation in which anecdotes and surmises have filled the void of genuine inquiry.¹²⁴

The vagaries of knowledge about liability within the corporate world were illuminated a decade ago by the appearance in rapid succession of two Conference Board surveys on product liability. The first of these (the Weber report) was a survey of "the risk managers of 232 major U.S. corporations...each having a minimum annual sales revenue of \$100 million."¹²⁵ Written in November 1986—at the very height of the great furor about insurance coverage and cost¹²⁶—the report took a cool, detached view, totally rejecting the notion that there was a major liability crisis. It reported its "most striking finding is that the impact of the liability issue seems far more related to rhetoric than to reality."¹²⁷

122. Herbert M. Kritzer & Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View*, 1998 WIS. L. REV. 157. Stephen Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, discussed *infra*, heightens the suspicion that the "in the dark" hypothesis cannot be dismissed.

123. The same indifference to verified factual patterns pervades legal scholarship. As Philip Shuchman observed twenty years ago, "a persuasively stated argument by a well-known law teacher published in a prestigious law journal, though it be based largely on anecdote, will be uncritically accepted as though it contained true statements about the effects of the legal system on society and business firms." PHILIP SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP A-12 (1979).

124. If fables about law circulate so readily among lawyers and legal academics, it is not surprising that even normally scrupulous sources can stumble when it comes to writing about law. Perhaps the high water mark of scientific respectability attained by the jaundiced view was the appearance in *Science* in late 1989 of a standard recitation of punitive damages lore. R. Mahoney & S. Littlejohn, *Innovation on Trial: Punitive Damages Versus New Products*, 246 SCI. 1395 (1989). An extended analysis of the substance and rhetoric of this article is found in DANIELS & MARTIN, *supra* note 14, at 206–10.

125. NATHAN WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE REPORT No. 893 v (1987).

126. Robert Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, 11 STUD. L. POL. & SOC'Y 95 (1991).

127. Weber, *supra* note 125, at 2.

For the major corporations surveyed, the pressures of product liability have hardly affected larger economic issues, such as revenues, market share, or employee retention. Liability lawsuits, which are indeed numerous, are overwhelmingly settled out of court, and usually for sums that are considered modest by corporate standards. As a management function, product liability remains a part-time responsibility in most of

Surprise at the sanguine response of the Weber respondents (and of Weber) led the Conference Board to undertake "a broader look at the effect of product liability on overall company operations" by surveying the chief executive officers of the 2000 largest manufacturing companies and a sample of smaller manufacturers.¹²⁸ The resulting report (the McGuire report) was issued in 1988. In contrast to the risk managers, the CEOs had a very dark view of the liability situation. Forty-two percent reported that the product liability system had a major impact on their firms;¹²⁹ forty-seven percent reported that they had discontinued product lines; thirty-nine percent reported that they had decided against introducing new products;¹³⁰ and forty-nine percent reported a major impact on international competitiveness.¹³¹

Perhaps the startling discrepancy in perceptions revealed by these two surveys can be accounted for by the details of the two surveys.¹³² Another possibility is that they exercised contrasting selective effects, attracting sanguine risk managers and distressed CEOs. Or perhaps they accurately reflected the perspectives generated at different locations in the corporation.¹³³ The CEOs may know things risk managers do not, but it could also be the other way around. In any event, the CEOs' views are less likely to be based on first-hand experience. Are they more likely to be based on analysis of reliable data? Is it believable that they have sources of reliable data not available to risk managers? Examination of the

the responding firms. Where product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.

....

The findings of the present survey also refute the general contention of a severe and deepening crisis in tort liability and insurance availability, at least for the nation's large corporations. The impact on the general economy, likewise, is believed to have been minor.

Id.

128. E. PATRICK MCGUIRE, THE IMPACT OF PRODUCT LIABILITY REPORT NO. 908, v (1988).

129. *Id.* at 6.

130. *Id.* at 20.

131. *Id.* at 8.

132. The range of corporations was slightly different: the risk manager survey included some service corporations as well as manufacturers; the CEO survey included small as well as large corporations. Yet these do not seem to be the crucial factors. Both surveys had very low response rates. The McGuire study received 270 usable responses from a mailing to the 2000 largest U.S. manufacturing companies and 280 responses from a separate mailing to 2000 smaller manufacturers, for an overall rate of 13.8%. *Id.* at ix-x. The Weber study does not report its response rate. E. Patrick McGuire, who supervised the Weber study, recalled that the response rate was about 20%. Telephone interview of E. Patrick McGuire by the author, Jan. 28, 1988.

133. The CEO survey seems representative of sentiments that are widespread among American business executives. See Lande, *supra* note 13.

pronouncements on liability by corporate executives and by sympathetic outsiders fails to disclose any traces of such information generated within the corporation.¹³⁴

In a recent study of municipal liability in six midwestern cities, Charles Epp found a similar relationship between perceptions of threat and distance from the front lines of litigation: "professionals working in city legal departments and risk management departments more commonly characterize lawsuits and the threat of legal liability, with some exceptions, as infrequent, minor "nuisances," whereas administrators working in other areas of city government have a greater tendency to perceive the threat of litigation to be great."¹³⁵ As we shall see, the experiential gap is filled not by systematic data, but by gleanings from the media.

B. Cognitive Bias

The literature of cognitive psychology catalogs a number of factors that lead to biased inferences and judgments about uncertain events.¹³⁶ For example, decision-makers often ignore relevant information about baseline frequencies, misattributing representativeness to data. The frequency of easily remembered events is exaggerated, leading to overestimation of risk from publicized hazards relative to less visible ones.¹³⁷ "Vivid information, that is, concrete, sensory and personally relevant information, may have disproportionate impact on beliefs and inferences."¹³⁸ Furthermore, biased receptiveness to confirming evidence makes

134. See, e.g., Robert Malott, *America's Liability Explosion: Can We Afford the Cost*, 52 VITAL SPEECHES OF THE DAY 180 (1986); William McCormack, *The American Tort System: A Time to Rebalance the Scales of Justice*, 52 VITAL SPEECHES OF THE DAY 267 (1986). Nor are such traces to be found in PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988) or in AGENDA, *supra* note 54. The latter cites *Forbes*, which in turn cites Huber, who in turn relies largely on press reports. *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations* (1986), prepared for 140 corporations, trade and professional groups by the law firm of Sidley & Austin, relies heavily on newspapers and news weeklies, including no less than 12 citations to a single article in *Time Magazine* (in footnotes 47, 81, 82, 85, 88, 97, 102, 107).

135. Charles R. Epp, *Litigation Against Local Governments: Expenditures on Legal Services, 1960-1995*, 5-6 (paper prepared for presentation at the 1997 annual meeting of the American Political Science Association, Wash., D.C., Aug. 28-Sept. 1, 1997).

136. ROBERT E. NISBET & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971); Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972); Daniel Kahneman & Amos Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973). Much of this literature is usefully assessed in Elizabeth Loftus & Lee Roy Beach, *Human Inference and Judgment: Is the Glass Half Empty or Half Full?*, 34 STAN. L. REV. 938 (1982).

137. Loftus & Beach, *supra* note 136, at 944-45.

138. NISBETT & ROSS, *supra* note 136, at 190.

people excessively confident in the accuracy of their knowledge.¹³⁹ In other words, the way our minds are built inclines us to think that we know more than we do.

Although many professionals are confident in their judgments about the incidence and impact of litigation, such estimates are often faulty. In contrast to the widespread perception of "numerous successful constitutional tort cases imposing massive monetary costs on state and local governments," Theodore Eisenberg and Stewart Schwab find "relatively fewer cases, meeting with poor success and having a modest fiscal impact."¹⁴⁰ They credit the disparity to observers generalizing from the small number of cases visible through published opinions to the universe of unobserved cases. "The cases for which information is most readily available thereby dominate and inflate the real world observer's estimate of constitutional tort litigation's success throughout the system."¹⁴¹

Assessing liability risks is a complex interpretive undertaking ideally suited for the appearance of the kinds of flawed intuitive judgment described in the cognitive psychology literature. Even those in possession of a great deal of accurate information may make spurious inferences about the representativeness of what they know and about the robustness of their inferences from it. Reporting on a study of automobile manufacturers, Steven Garber finds that "[w]idely known controversies—and the passion and attention they generate—tend to make company decision-makers overestimate the prevalence and future likelihood of events like those fueling the controversies."¹⁴² Corporate decisionmakers entertain a picture of ubiquitous high awards and exposure to heavy risks that derives in part from cognitive biases "deeply rooted in human psychology."¹⁴³

C. Media Distortion

Daniel Bailis and Rob MacCoun conducted a study of coverage of tort issues in five national magazines from 1980 to 1990. During that period, product liability and medical malpractice cases, taken together, were some 11% of tort filings and led to 13% of tort trials, but they were 74% of the suits reported on in the five magazines.¹⁴⁴ A series of earlier studies showed the rate of verdicts in favor of the plaintiff is about 50% for all torts and somewhat less for medical and product liability cases; reports in the five national magazines portrayed 85%

139. Loftus & Beach, *supra* note 136, at 946.

140. Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 530 (1989) [hereinafter Eisenberg & Schwab, *What Shapes Perceptions*]. The underlying analysis of patterns of constitutional court litigation is found in Theodore Eisenberg & Stewart J. Schwab, *The Reality of Constitutional Tort Litigation*, 72 CORNELL L. REV. 641 (1987).

141. Eisenberg & Schwab, *What Shapes Perceptions*, *supra* note 140, at 534.

142. Garber, *supra* note 122, at 262.

143. *Id.* at 283.

144. Donald S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUMAN BEHAV. 419, 424 (1996). The five magazines were *Time*, *Newsweek*, *Fortune*, *Forbes*, and *Business Week*. *Id.* at 422.

plaintiff victories.¹⁴⁵ Bailis and MacCoun report that their "media sample includes 43 distinct reports of specific jury awards, with a mean of \$5,861,097 and a median of \$1,750,000, about four and five times the size of the largest mean and median [actual] court estimates, respectively, and 14 and 34 times the size of the smallest estimates."¹⁴⁶

Oscar Chase, comparing newspaper coverage of personal injury awards in New York with actual awards, discovered even larger discrepancies.¹⁴⁷ Stories of jury awards to plaintiffs in two metropolitan dailies (the *New York Times* and *New York Newsday*) were compared with awards to plaintiffs recorded in the *New York Jury Verdict Reporter* for the six year period from 1986 through 1992.¹⁴⁸ Data for the (not unrepresentative) year 1992 are presented in Table 1:

Table 1

Reports of jury awards for personal injuries in New York, 1992

	n	Avg. Award (\$m)	Median Award (\$m)
New York Times	19	15.9	4.3
N.Y. Newsday	8	6.2	2.4
Verdicts: State	417	0.964	0.250
Verdicts: Metro	294	1.034	0.274
Verdicts: upstate	123	0.637	0.125

Table 1 shows that the average jury award reported in the *New York Times* was some 16.5 times as large as the average award recorded in the *New York Jury Verdict Reports* for all of New York State and 15.4 times as large as awards recorded in the New York metropolitan area. The disparity in median verdicts was slightly greater: the *Times* reports were 17.2 times as high as median verdicts throughout the state and 15.7 times as high as those in the metropolitan area. In *Newsday's* reports, the average award reported was about 6 times as high as those throughout the state, and the median award reported was about 9 times as high. Again, one relying on the press for a picture of the civil justice system would be seriously misled as to the size of jury awards.¹⁴⁹

145. *Id.* at 425-26.

146. *Id.* at 426.

147. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995).

148. *Id.* at 771-73. This survey included only cases in which defendant was found liable, in which plaintiff was awarded damages for personal injuries, and "in which pain and suffering damages could have been awarded...." *Id.* at 772 n.32, 773 n.33.

149. These disparities are probably somewhat understated here, since the New York Jury Verdict Reporter collects only 90% of the cases tried to verdict in the metropolitan New York area and 75% of those in the remainder of the state. *Id.* at 782 n.77. There is every reason to think that the cases that escape the net involve smaller awards on

Steven Garber reports the results of a study of newspaper coverage of verdicts in 351 product liability cases against automobile manufacturers, decided from 1985 to 1996.¹⁵⁰ Two hundred fifty-nine (73.8%) of these verdicts were in favor of the defendant; only 92 (26.2%) were in favor of the plaintiff.¹⁵¹ Newspapers reported nine (3.5%) of the defense verdicts and 38 (41.3%) of the plaintiff's verdicts.¹⁵² Consequently, a conscientious and omnivorous newspaper-reader would have been exposed to 47 reports, of which some 80.9% were verdicts in favor of the plaintiff—over three times as great as the actual percentage.

In other words, a verdict for the plaintiff is twelve times more likely to be reported than is a defense verdict. An award of punitive damages ratchets up the coverage disparity even further. Punitive damages were awarded in only 4.6% of the verdicts; they appeared in 21.3% of all *reports* of verdicts.¹⁵³ Similarly, although "verdicts appear to trigger very little television coverage...virtually all of the television coverage...[the researchers] found was triggered by verdicts that included unusually large punitive damage awards."¹⁵⁴

One possible source of this bias is the eagerness of plaintiffs' lawyers to broadcast news of their victories thereby promoting coverage. Whatever the mechanism that generates this skewed coverage, it would not be surprising if the audience received the reassuring (or disturbing) message that David generally manages to best Goliath.

Garber suggests that the skewed picture of liability provided by the media combines with psychological factors to generate the considerable overestimate of the frequency and magnitude of punitive damages by "company decision makers."¹⁵⁵ He recognizes that reliance on media lore may vary within the corporate hierarchy: Engineers "are likely to rely much more heavily on mass media reports and overestimate the incidence of punitive damages to a greater extent [than attorneys]," who "may monitor verdicts around the country and have relatively good information about the incidence of punitive damages...."¹⁵⁶

We should be wary of attributing to lawyers (or executives) perspectives that are more reflective of systematic inquiry than of media-fed popular lore. Generally, lawyers' aggregate perceptions about litigation and liability are wide of the mark.¹⁵⁷ In a study comparing South Carolina lawyers', doctors', and legislators' assessments of tort litigation patterns, lawyers overestimated the

the whole than those that are reported.

150. Garber, *supra* note 122, at 275-76. See *id.* at 275 for a description of the study. See *id.* at 277 for the results of the study.

151. *Id.* at 277.

152. *Id.*

153. Derived from *id.*

154. *Id.* at 283.

155. *Id.*

156. *Id.* at 383.

157. Songer, *supra* note 116. See Marc Galanter, *The Regulatory Function of the Civil Jury*, in VERDICT: ASSESSING THE CIVIL JURY SYSTEM 80-86 (Robert E. Litan, ed., 1993). For the account of credulity about rates of EPA litigation, see *supra* text accompanying notes 22-25.

portion of awards for plaintiffs and the size of awards and were only marginally more accurate than other elite respondents.¹⁵⁸ After publication of accurate information about the level of litigation and size of awards, lawyers' responses (along with those of doctors and legislators) did not become appreciably more accurate.¹⁵⁹ The experience of Kritzer and Zemans' survey suggests that many or most attorneys lack systematic information even about their own clients.¹⁶⁰ In a study of litigation against governmental units in various cities in Kansas, Missouri, and Nebraska, Charles Epp found "little significant increases and, in some jurisdictions, actual decreases in expenditures on legal services...[but that] administrators *believe* their governments to be the subject of much litigation that imposes heavy costs."¹⁶¹

Corporate actors are not just the passive recipients of biased information, but as we have seen, major disseminators of it. Corporate investment in projecting an image of unrestrained litigiousness and rampant overclaiming may have the paradoxical effect of increasing the level of claiming. Researchers studying contingency fee law practice found that:

One of the impacts of the now twenty-year campaign of corporate America and the insurance industry to convince the American populace that we are in the midst of a litigation explosion is to increase the calls that lawyers receive. This is probably most evident in the medical malpractice area.... The effect of this rhetoric is to make people think that if anything goes wrong they can get significant compensation. The result is that lawyers spend many hours explaining to potential clients that this is simply not true.¹⁶²

Furthermore, the incessant projection of these images of runaway litigation may induce corporate functionaries to overestimate the threat and to make settlement and business decisions that cannot be accounted for in terms of the actual propensities of juries and judges. As in the case of chemical weapons, it is hard for those who launch media distortions to keep them away from their own troops.

D. Professional Aggrandizement and Careerism

Business people concerned about liability are surrounded by retainers and entrepreneurs with strong incentives to intensify that concern. For example, Edelman, Abraham, and Erlanger found that "personnel professionals and

158. Songer, *supra* note 116, at 597.

159. *Id.* at 600.

160. Kritzer & Zemans, *supra* note 122.

161. Charles R. Epp, *Litigation Stories: Official Perceptions of Lawsuits Against Local Governments 1* (June 1-7, 1998) (unpublished paper presented at the 1998 Annual Meeting of the Law & Society Association, Aspen, CO) (on file with author) (emphasis in original).

162. Herbert M. Kritzer & J. Mitchell Pickerill, *Contingent Fee Lawyers as Gatekeepers in the American Civil Justice System*, Working Paper DPRP 12-3, Institute for Legal Studies, University of Wisconsin-Madison, Jan. 1997, at 21.

practicing lawyers have a shared interest in constructing the threat of wrongful discharge in such a way that employers perceive the law as a threat and rely upon those professions to curb the threat."¹⁶³ A host of professionals, consultants, and publicists thrive by magnifying the sense of crisis and touting their ability to exorcize the menace of enhanced liability.

These messages are amplified by a small industry of corporately-supported think tanks, lobbyists, consultants, and "grass roots" groups that attempt to generate political support for "reforms" of the civil justice system.¹⁶⁴ Politicians and organizational entrepreneurs, in turn, echo the jaundiced view in order to cultivate financial support and garner votes. As one conservative Republican political operative advised his charges:

Unlike most complex issues, the problems in our civil justice system come with a ready made villain: the lawyer. Few classes of Americans are more reviled by the general public than attorneys, and you should tap into people's anger and frustration with practitioners of the law.

It's almost impossible to go too far when it comes to demonizing lawyers....

Make the lawyer your villain by contrasting him with the "little guy," the innocent, hard-working American who he takes to the cleaners. Describe the plight of the poor accident victim exploited by the ambulance-chasers and the charlatans—individuals who live off the misfortunes of others.

Talk about the hidden costs of our out-of-control civil justice system. Do not get bogged down with a numbers-laden economic argument; rather, put the impact of lawsuits on the economy in human terms by telling stories about how individual consumers end up paying far too much for everyday household products, medicines, car insurance...all because of unreasonable lawsuits.¹⁶⁵

163. Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 L. & Soc'y REV. 47, 77 (1992).

164. Neal Cohen, of Apco Associates, a specialist in creating spurious "grass-roots" tort reform organizations, gained notoriety when it was disclosed that he exhorted fellow lobbyists about "the importance of keeping the public in the dark about who the clients really are." Jane Fritsch, *Sometimes, Lobbyists Strive to Keep Public in the Dark*, N.Y. TIMES, Mar. 19, 1996, at A1; *Grassroots "Weeds" Need To Be Clipped, Say Angry Activists*, O'DWYER'S PR SERVICES REP., June 1996, at 1. On these campaigns more broadly, see DANIELS & MARTIN, *supra* note 14; Daniels, *supra* note 117; Cheseboro, *supra* note 118.

165. The Luntz Research Companies, *Language of the 21st Century* 128 (1997) (emphasis in original). According to a report in *Roll Call*, "[H]ouse Republicans and like-minded interest groups are listening." Juliet Eilperin and Jam Vande Hei, *Trial Lawyers are New GOP Villain for 1998 Elections*, ROLL CALL, Dec. 11, 1997. One "GOP source" was quoted as saying "We'll unleash an attack on the trial lawyers never seen before.... The time is right to move from kicking the unions to hitting the lawyers." *Id.*

In the same spirit, the new president of the United States Chamber of Commerce launched a campaign against "class action suits and ambulance chasing trial lawyers, who suck billions of dollars out of consumers and companies...."¹⁶⁶ The choice of a target, he explained, was that "the single, universal thing I get a positive response on—from small companies and big companies, from individual proprietors and multinationals—is that something has gone seriously wrong with our legal system, that we've become a society where there always must be someone who's wrong and there always must be someone to sue."¹⁶⁷

E. Indeterminacy of Outcome

All of this biased information is circulating in an arena in which actual litigation risks are difficult to ascertain. In part, this reflects the inherent difficulty of discovering the facts. However, it also derives from the limitations of announced standards in signaling what the result will be. As the system of rules becomes more complex, the discretion of those who combine and apply them is increased. The judicial hierarchy is not a bureaucracy.¹⁶⁸ In its lower reaches, judges have broad, unreviewed (and perhaps unreviewable) discretion.¹⁶⁹ Judges develop the law by

166. Thomas J. Donohue, *American Business: The Next Agenda*, VITAL SPEECHES OF THE DAY, Dec. 1, 1997 (Address to National Press Club, Wash., D.C., Oct. 1, 1997).

167. William H. Miller, *The Chamber Comes to Life*, INDUSTRY WEEK, Oct. 20, 1997, at 105. As it emerged, the anti-lawyer campaign generated some misgivings, leading Donohue to specify that his problem was only with one half of one percent of the nation's lawyers. Terry Carter, *A Lesson Learned*, A.B.A. J., May 1998, at 70, 72.

168. Courts are, of course, bureaucracies in the loose sense of an organization with division of labor, some hierarchic direction and standardized work routines for serving clients according to specified formulae. However, judicial hierarchies lack many of the salient features of bureaucratic control:

Appellate courts are usually not true hierarchic superiors to trial courts.... [T]hey may overrule trial court decisions [but t]heir review...is initiated by litigants. It is not motivated by a policy focus of the higher courts, nor does it constitute a systematic quality control of the work of the trial courts.... Supreme Courts often promulgate procedural rules that govern trial courts, but they exercise no continuous supervision over day-to-day trial work and almost none over the flow of cases that trial courts process. They almost never hire, transfer, or fire trial judges or other trial courtroom personnel. They have little or no influence over trial court budgets.

Herbert Jacob, *Courts as Organizations*, in EMPIRICAL THEORIES ABOUT COURTS 193 (K. Boyum & L. Mather, eds. 1983). As Forrest Dill put it, "courts are loosely connected units enjoying substantial autonomy from each other and from units at higher levels of the system." Forrest Dill, *Contradictions in Judicial Structure: Law and Bureaucracy in American Criminal Courts* (paper presented at the Conference on Social Science Research in the Courts, Denver Co, Jan. 20, 1977) (on file with author). See also the observation of Mirjan Damaska that the judges who preside in the decentralized American courts systems that these observers have in mind are invested with personal authority emanating from their offices, not by delegation from the top. Mirjan Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 YALE L.J. 480, 515.

169. Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

applying it as common sense commends, but common sense is unstable and irresolute.¹⁷⁰ For both judges and lawyers, the system is full of incentives for innovation and stretching the envelope by destabilizing the rules.¹⁷¹

F. The Ambivalence of Public Opinion

Finally, the great source of common sense—popular opinion—is itself ambivalent about these matters, embracing the enlarged possibilities of remedy and protection but scorning others' overeager recourse to them.¹⁷² People want a downsized, frugal, and unobtrusive government that will provide flawless highways, promote cures for dread diseases, root out child abuse, and keep our apples free of Alar. As one lawyer wryly observed, "although Americans respond to the rhetoric of individual ruggedness, they vote with an ever more legalistic fervor. Especially since the 1960s, this lawyer-hating nation of individualists has supported—demanded, even—measure after measure enacting new rights that can be enforced only through lawyers and courts."¹⁷³

IV. THE DISCOURSE ON CIVIL JUSTICE

Strengthening the law's deficient knowledge base is rendered even more difficult by the presence of the jaundiced view.¹⁷⁴ The deformity of the discourse about civil justice was brought home for me in the career of a conference on punitive damages that my colleagues and I organized at the University of Wisconsin. The original vision of the conference was to bring research scholars into a sustained exchange with concerned practitioners. It was our hope that the university setting would provide a non-confrontational forum in which the proponents of various views could engage in a serious weighing of the facts and dispassionate examination of their implications for policy, remote from the imperatives of partisan advocacy and the distortions of special interest pleading.

170. Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303 (1991-92); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990); Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992).

171. Anthony D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983).

172. On the elevation of public expectations of remedy, see FRIEDMAN, *supra* note 3, at 45-76. On public uneasiness about liability, see Hans & Lofquist, *supra* note 11.

173. WALT BACHMAN, LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION 92 (1995).

174. Curiously, the jaundiced view flowered just as the empirical examination of legal institutions was becoming institutionalized, for example, in the Law and Society movement, see Marc Galanter, *The Legal Malaise; or, Justice Observed*, 19 L. & SOC'Y REV. 537 (1985), in the Civil Litigation Research Project, see DAVID TRUBEK, ET AL., FINAL REPORT OF THE CIVIL LITIGATION RESEARCH PROJECT (1983); KRITZER, *supra* note 14, and in the work of the Rand Corporation's Institute for Civil Justice. The emerging cumulative picture of the working of the legal system that has been produced by "law and society" researchers has been seldom welcomed, occasionally resisted, and usually ignored by proponents of the jaundiced view.

The prime criterion in deciding who to invite was whether we could anticipate a high quality research product that was relevant. We tried to include all the substantial research of which we learned.

Because most of the empirical research tends on its face to deflate claims put forth by "reformers" of the civil justice system, we were particularly desirous of insuring that this emphasis was countered by subjecting such research to the most vigorous and searching criticism. Hence, in addition to academic discussants who could be counted on to scrutinize researchers' methods and question their claims about the implications of their data, we included as discussants a number of advocates who were prominent critics of the present regime of punitive damages. We were shocked when a representative of a group that had given us support, protesting that the program was unbalanced, tried to induce our co-sponsor, the Tort and Insurance Section of the ABA to repudiate the conference and, failing that, attempted to instigate a boycott of the conference, an effort that led a number of registrants to stay away and four speakers to withdraw at the last moment.¹⁷⁵

We were disappointed that our aspiration to foster dialogue among researchers and practitioners was subjected to a campaign of misrepresentation. The Conference was proposed and organized in a spirit of inquiry, not advocacy. Participants were invited with the expectation that they would speak for themselves and not as representatives of interest groups. We were dismayed that a set of prominent practitioners seemed to take their marching orders from corporate operatives (and we were gratified that such subservience was foreign to the several academics who were also solicited to withdraw). Apparently these absentees could not envision an intellectual forum that was more than an arena for partisan advocacy. I do not believe that there is any shortage of such arenas, but fewer opportunities for reasoned critical exchange can be found. Am I off the mark in suspecting that twenty years of obfuscating the difference between legends and social inquiry is deeply implicated with this kind of toxic partisanship? Like post-modernist academics, many combatants in the civil justice wars seem to have lost sight of the notion that the knowledge produced by disciplined inquiry is not reducible to partisan advocacy. Many of them seem to be following the course of:

A Texas oilman [who] died and went to heaven, only to find the gallery reserved for oilmen so crowded that he could barely squeeze inside the door. After some thought, he took a scrap of paper and a pencil from his pocket and scribbled a note, "oil discovered in Hell," and dropped it on the floor. A fellow soon picked it up and, after reading it, whispered to a few others, and quietly slipped away. His confidants in turn whispered to a few

175. Reports of these events are found in *Corporate-Backed Tort Reform Group gives \$50,000 To Fund Conference on Punitive Damages, Then Urges Participants Not To Attend*, 10 CORPORATE CRIME REP., Nov. 4, 1996, at 1; Susan Hansen, *Tort Reform Activists' \$50,000 Gift to Plaintiffs*, AM. LAW., Dec. 1996, at 15; *The ABA and Business*, [Federalist Society] ABA WATCH, Feb. 1997, at 1; Mark Thompson, *Applying the Brakes to Punitives: But Is There Anything to Slow Down?* 83 A.B.A. J., Sept. 1997, at 68. The papers that emerged from the meeting make up a special issue of the *Wisconsin Law Review*, Vol. 1998, No. 1.

others and quickly followed him. Soon there was a stream of oilmen moving in the direction of the reported strike. Watching the procession, the man who started the rumor grew more and more restive. At length he could stand it no longer and bolted for the door, saying "There may be something in this thing—I guess I'd better look it over."¹⁷⁶

This "persuaded by his own story" joke, which is told about many kinds of protagonists, including mullahs, gold miners, prospectors, advertising men, and Wall Street underwriters in addition to oilmen, has never been told about lawyers. At least so far!

176. My version of this very old story is adapted from Charles F. Arrowood, *There's a Geography of Humorous Anecdotes*, in *IN THE SHADOW OF HISTORY* 79–80 (J. Frank Dobie, et al. eds., 1939). See also the following thousand-year old Arabic version: "Ash'ab once said to the children: 'Amr b. 'Uthman here distributes money.' They went. When they remained away for a long time, he followed them, thinking that what he had said had actually become true." FRANZ ROSENTHAL, *HUMOR IN EARLY ISLAM* 63 (1956). Ash'ab was a singer and entertainer to whom is attributed a cycle of stories that were "fully developed...around the year 800." *Id.* at 19.