AN EMPIRICAL AND NORMATIVE ANALYSIS OF
TELEVISION'S CONTRIBUTION CONSUMER LITIGIOUSNESS

by

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Introduction

Any American who has picked up a newspaper or turned on a television in the last decade has heard how litigation against business has run amok.[1] Although empirical evidence suggests these claims lack basis,[2] "litigation anxiety," nonetheless, exerts a profound impact on the strategic and operational decisions of business,[3] particularly with regard to litigation management. Unfortunately, this undertaking which purports to be a rationally-based assessment of the possibilities and likely outcomes of litigation is held hostage by fear and hamstrung by ignorance of the propensities of consumer plaintiffs.

With regard to consumers, many things influence litigiousness, but the most constant wide-reaching factor in forecasting the propensity to dispute is the influence of cultural norms.[4] In terms of litigation, these socially-defined expectations tell us whether and under what circumstances society deems litigation appropriate. In short, whether and when to sue. Thus, the key to understanding whether an individual will identify an action as a legal wrong and formally dispute[5] is discerning that individual's social construction of litigious reality – to this person, what is law; what is it for; how or when should it be used?

In contemporary society, the media, specifically television, is our primary messenger of social norms.[6] Television's images show us how to act and what is normal. In the last decade, the syndicated television courtroom has assumed the role as cultural messenger with regard to the norms and ways of law. Consequently, it is important to ascertain what norms that syndi-court promotes, its influence, if any, on audiences, and how its stories may influence consumer-to-business litigation: Particularly, does syndi-court discourage litigation or encourage it? Does it promote litigation in society and under what circumstances?

This paper thus investigates and quantifies television's, specifically syndi-court's, function as a messenger of norms regarding litigation and litigiousness. After acknowledging the pervasiveness of litigation anxiety within the business world, its deleterious effect on litigation management is outlined. It is suggested that by restricting itself to traditional models of rational analysis – models that ignore the individual rationality of consumer plaintiffs – litigation management fails to achieve its goal of accurately assessing litigation risk.

Accordingly, this paper posits that a better understanding the normative rationality of consumer plaintiffs, i.e., their socially-influenced constructions of litigation, their motivations, and beliefs regarding litigation can remediate this short-coming. Indeed, a more sophisticated understanding of the factors that affect and the motivation propelling the decision to pursue disputing adds a valuable dimension to business decision making and designing responses to consumer disputants.

Research on civil litigation process, however, tends exclude the transformative process by which individuals choose to pursue litigation.[7] Few report empirical evidence of a putative plaintiff's likelihood for doing so. Consequently, this paper seeks to develop an empirical base by critically analyzing syndi-court's structure, normative messages, and its effect on the public. Ultimately, the findings are extrapolated to consumer-to-business disputing and proposals for modeling litigation management strategies to better account for normative understandings and subsequent behaviors toward litigation.

Litigation: Business's Monster Under the Bed

Litigation is the boogeyman that business fears.[8] Almost everyone has heard stories of unfair suits[9] that have put an organization out of business,[10] forced it into bankruptcy,[11] or caused their life-saving products to be removed from the shelves.[12] The moral of these stories is invariably that "[a]nyone can file a suit forcing a corporation to spend millions defending itself."[13] In fact, many of corporate America's biggest names, such as Phillip Morris, Ford, and DowCorning, have lived under the cloud of litigation for years.[14]

Increasingly, business finds itself plagued by litigious plaintiffs[15] spurred on by gold-digging attorneys[16] and pro-plaintiff juries eager to reach into the deep pockets of business.[17] In fact, one author

claims that legal costs now equal 5-10% of earnings for some of our nations largest corporations.[18] Another source estimates litigation costs at $100 - $300 billion annually.[19] Moreover, these costs are not confined to business, but are passed on to consumers[20] in the form of the infamous "tort tax,"[21] i.e., increased product prices to account for the costs of past or future tort judgments. And though many scholars suggest that this fear of litigation is irrational,[22] just as the monster under the bed paralyzes a child, so does the fear of litigation paralyze business.

Notwithstanding the veracity of these claims and business's own contribution to them,[23] litigation anxiety influences organizational decision-making. According to one study, 80% of corporate executives surveyed said that fear of suit impacted business decision-making more now than 10 years ago,[24] and another showed that 60% believed that civil litigation hampered their ability to compete globally.[25] For example, business leaders claim that the specter of litigation forces them to forgo all sorts of opportunities for growth and product development.[26] They can not pursue novel cost-saving technologies,[27] develop[28] or market new products, because novelty is associated with unknowns, and unknowns with tort verdicts.[29]

Litigation Management

As businesses's fear of lawsuits has increased, so has the importance of litigation management.[30] Even frivolous suits translate to expense.[31] They can spur copycat suits,[32] damage a business's reputation,[33] and require the involvement of counsel.[34] (Of course, as counsel communicates with plaintiffs, files motions, takes depositions, and negotiates settlements hours will be billed.)[35] Consequently, litigation is now a comprehensively managed, full-time enterprise as well as "a major expense item in annual budgets. . . ."[36] It requires the oversight of millions of dollars not to mention the companion costs of settlements, verdicts, and corporate reputation.[37] In fact, PricewaterhouseCoopers reports that US-based companies spend 3-10% of their yearly revenues on managing litigation.[38]

In its conventional form, litigation risk assessment mimics basic cost-benefit analysis,[39] assigning weights to and weighing factors deemed important to the parties.[40] These factors typically include[41] the cost of judgments, litigation costs and attorney's fees, ramifications of negative publicity on consumer spending,[42] the loss of market opportunities,[43] and uncertainty about the business that discourages investment.[44] The sum of this supposedly objective measurement[45] presumably represents the best interests of the parties[46] and with this calculation, business can decide whether to settle, litigate, pay through insurance, or ignore a claim.

Of course, for risk assessment to work, the calculation must include all relevant factors and weight them correctly. Unfortunately, evidence suggests that calculations are commonly flawed in this regard.[47] One study showed that lawyers's assessment capabilities[48] fall short when it comes to jury awards, as they overestimate both the proportion of verdicts for plaintiffs and the size of awards.[49] Business management fares even worse. Some managers are too distanced from the conflict and divested from its outcome[50] to make an accurate assessment. Others have such a dark view of the litigation liability situation[51] that they improperly overestimate risk.[52] In fact, a study showed that administrators perceived the threat of litigation as even *greater* than did legal counsel in the best position to assess potential problems.[53]

Moreover, not only are some factors ill-weighted, but those external to business and its ideas of rational action are ignored. Calculations irrationally assume that consumer litigants make risk-neutral outcome maximizing decisions,[54] studies demonstrate that this is not true.[55] Instead, consumers seldom know the legal rules underpinning their disputes, so cannot assess strength or likely gains, and are influenced by factors independent of the facts of the case[56] and economic rationality.[57] For instance, they are guided by emotions,[58] experience with,[59] and perceptions of law.[60] This does not mean that the behavior of putative plaintiffs is unpredictable or random, but that traditional models are too constricted to quantify it accurately.[61]

As a result, despite the millions of dollars annually devoted to this enterprise,[62] it suffers from an irrational fear of the litigation it seeks to manage[63] and an ignorance of the propensities, motivations, desires, and understandings about litigation held by consumer plaintiffs. Lacking a valid perspective and empirically-based assessments of the propensities of putative plaintiffs, business tends to overestimate the frequency of high-end litigation,[64] the number of judgments, and the amounts of verdicts.[65] The result is that business unnecessarily pays claims when shouldn't,[66] settles at dollar amounts that it needn't,[67] and relinquishes control to insurance carriers who prey on fear to maintain inflated insurance premiums.[68]

Call to Arms

It is time to turn on the lights and illuminate the propensities underlying and the process by which individuals decide to litigate. A more accurate understanding of when and under what circumstances consumers are prone to litigate and for what anticipated result can correct the quantification of factors, include those previously ignored. In this way, business can better understand litigation risk, its economic ramifications, and self-manage it more effectively by constructing more responsive consumer complaint systems and more rationally pricing out settlements, refunds, and litigation.

Acculturation to Litigation

A number of factors influence an individual's proclivity toward suit.[69] Some are structural. For instance, tort liabilities[70] and remedies[71] can expand or contract, procedural barriers can be erected or decimated,[72] and filing fees or the ease of obtaining counsel can wax and wane.[73] Other factors are cultural,[74] and are arguably the most important variables in pursuing litigation.[75] These set the stage for how a potential disputant constructs a litigious moment.[76]

The cultural environment of litigation[77] is comprised of norms.[78] Though there are many definitions,[79] generally, norms are social expectations of how one is to act.[80] They tell us what others deem right or wrong,[81] what behaviors are appropriate, and what reactions are "normal." Inasmuch as norms tell us they what should and should not be done, [82] they influence our choices[83] and behaviors.[84]

Just as norms influence a myriad of other attitudes and behaviors,[85] so do they influence attitudes and behaviors regarding litigation.[86] Norms socialize us into society's expectations regarding disputes[87] signaling what is an injury, what to do about it,[88] and what society's reaction to or perceptions about disputes and disputants will be.[89]

For example, before one files a suit or complains formally, she must identify what she believes to be a litigable claim.[90] This does not mean that the individual knows the legal rules[91] or that, if she does, she will follow them, but that she perceives that this type of thing is a legal wrong. This judgment can be based on actual knowledge of the law, awareness of urban myths,[92] or how she has seen others act under similar circumstances.

Once a litigious moment is identified, the aggrieved must decide whether to pursue it and to what remedy.[93] Again, this assessment is made with reference to norms, comparing our own situation with those of others, considering what they have done and how society has responded, negatively or positively, to those choices.[94] Of course norms also signal when litigation is inappropriate.[95] Where the public image of litigation implies that it is disagreeable,[96] demeaning,[97] or embarrassing,[98] and its plaintiffs "blameworthy"[99] or greedy[100] it imputes norms disfavoring litigation. For example, though the public now may be legally conscious that McDonald's could be liable should you spill coffee on yourself and are burned, society's reaction to Stella's coffee spill and tort recovery[101] was so negative that an injured spiller might forego litigation.

It is thus critical to understand what the social norms of litigation are, how they are shaped by our environment, and their force in contemporary society. With this knowledge, we can better understand when people will dispute as well as their motivation for doing so. The former is important in forecasting litigation and amortizing costs; The latter is important for intelligently managing litigation risks and developing the most cost effective methods for responding to consumer claims.

Norms on TV

Though a universally-accepted theory of how norms originate has yet to emerge,[102] two conditions are clearly necessary for their formation:[103] (1) an apparent consensus of belief or behavior and (2) publicity[104] of that consensus to the public.[105] In other words, popularity of action or belief is not enough; Rather, individuals must be aware that this consensus[106] exists so that they have a standard against which they can judge their behavior.[107] The media plays a critical role in ensuring that both of these pre-requisites are met. It shows us, accurately or not, what the consensus behavior is, and publicizes it to us with word sound, and image. It also does so with regard to of norms of disputing,[108] presenting stories about litigation that show us what is normal.

For instance, at the turn of the century, litigation was uncommon,[109] and this was paralleled by media coverage that either did not report litigation or described it as inappropriate.[110] When industrial accidents began skyrocketing,[111] coverage changed. Newspapers began publicizing accidents,[112] and spoke of suits by the innocent injured against big business.[113] The tone and content of these stories indicated that

litigation of this ilk was just, and helped support social norms favoring litigation.[114] Soon, society that had eschewed litigation, began to sue in greater numbers.[115]

More recently, the media has publicized beliefs that we are in the midst of a litigation explosion.[116] We have seen a torrent of stories about greedy plaintiffs and businesses victimized because of their deep pockets.[117] News publications and broadcasts over-represent sensational tort stories (distorting the realities of litigation),[118] and reference punitive damages in 21% of those reports, though they occur in only 4.6% of cases.[119] With this shift in coverage, again, has come another shift in public attitudes this time disfavoring lawsuits and those who use them.

Cultivation

Although the media includes newspapers, film, and radio, its primary mode of normative transmission is television. The public receives much of its information about the world from TV[120] and its images[121] inform the way people view and act upon the world.[122] Moreover, because virtually every American owns a television[123] and watches it regularly,[124] a huge audience[125] is privy to the behaviors and opinions of others[126] – at least as they are represented on the television screen. This makes television a profound normative messenger.[127]

A key factor explaining the force of television is the role of story-telling in human society.[128] A great degree of what we know, or believe to know, comes not from direct experience, but from forms of storytelling. We know about emergency room operating procedures, crime scene investigations, and mafia relations despite never having personally experienced them. And in contemporary society, it is television that tells us those stories. Moreover, as television transforms story-telling into a centralized system, TV also becomes the primary common source of cultural information:[129] Its images tell us how things work and what to do.[130]

Cultivation theory[131] investigates this relationship between television exposure[132] and particular beliefs about the world,[133] specifically, beliefs consistent with television imagery.[134] Although researchers have long asserted that television influences perceptions,[135] cultivation distinguishes itself from the theoretical models and theories of marketing or persuasion research.[136] Whereas those models those tend to conceptualize "effect" as a short-term, individual change, cultivation adopts a total immersion paradigm, looking at the long-term impacts of the stable, repetitive images of the medium on perceptions of social reality.[137] Cultivation thus posits that the more an audience sees a behavior on television, the more it believes those behaviors are normal or socially correct.[138] Conversely, the less an audience sees a behavior, or the more it sees a behavior criticized, the more it will believe that those behaviors are abnormal or socially disfavored.[139]

Essentially, television establishes a symbolic environment into which we are all born and with which we all interact.[140] Individuals learn from what they see on TV,[141] and, even if they forget its specific elements, retain general impressions that can influence their assessments of the world.[142] In turn, these views of reality, regardless of their accuracy, impact an individual's decisions.[143] The world as seen on TV, however, may bear little resemblance to reality[144] and, in fact, cultivate a distorted view of the world.[145]

For instance, cultivation initially focused on television violence, i.e., that heavy television viewing was associated with exaggerated beliefs of the amount of violence in society.[146] Others have shown that, despite declining crime rates in the United States, Americans continue to believe that crime is rampant.[147] Again, this can be partially explained by linking television imagery – which overrepresents crime – with television viewing. Thus, the more a person watches depictions of crime on television, they more likely they are to believe that crime could touch them.[148] A more recent study measured the cultivation effect of daytime television talk shows. Those international students who watched more daytime television talk shows than non-viewing international students exhibited a cultivation effect, where their beliefs of the reality of American culture mirrored what they had seen broadcast.[149]

Law on TV

Television also transmits an enormous amount of information about law.[150] Indeed, television has become not only society's most accessible window[151] into the courtroom,[152] but also its most powerful institutionalized messenger of law.[153] It teaches individuals about litigation[154] and how to behave when wronged.[155] And since most Americans do not have a great deal of personal experience to displace what they see on TV,[156] its impact is enhanced.

The Impact of Syndi-Court

Though television has long hosted some fictional legal fare,[157] it is now an environment rich in reality law.[158] In the last decade, the syndicated television courtroom has metastasized into the public consciousness: Deemed the "hottest trend in daytime television,"[159] television courtrooms like Judge Judy and Judge Mathis now reach more Americans than any other type of legal information.[160] Moreover, syndi-courts host up to 8.5 million viewers daily.[161] In light of this popularity, syndi-court's potential for influence is enormous.[162]

Syndi-court boasts other characteristic enhancing its ability to influence audiences. First, it is produced to be swift and interesting with simple,[163] accessible conflicts.[164] By contract, as one television critic observed, programming such as Court TV "stands out because of its tediousness."[165] As syndi-court is more interesting to viewers, it becomes more memorable[166] to them. Second, its editing[167]– where the camera constantly moves between the litigant narratives and the judge's reaction[168]– also increases viewer attention, and, thus, memory.[169] Third, unlike periodic reporting of trial or appellate decisions,[170] syndi-courts are stable and homogenous. The images and lessons of one syndi-court are the lessons and images of all. This unified body of information heightens the ability of the audience to identify consistent messages within the genre and to apply them to real life situations. These heighten syndi-court's potential for cultivating social norms.[171]

Therefore, the messages of syndi-court and their effect on litigants deserve careful scrutiny.[172] It is important to understand what signals syndi-court sends, what it tells us about litigation, and what potential influence on attitudes and behaviors it may exact. Unfortunately, there has been little empirical analysis by the legal community regarding the effects of such television programs on the public.[173]

This question does not have an a priori theoretical answer. In light of the litigation explosion rhetoric of the last decade, viewers might take syndi-court as proof positive that litigation is, indeed, out of control. Its many plaintiffs might be construed as unworthy, greedy people contributing to litigiousness in society. This would suggest norms discouraging litigation and stigmatizing those who litigate. As viewers compare themselves with these portraitures, they might seek to distinguish themselves from the type of people who go to court.[174] Consequently, they would shy away from litigation in order to avoid this stigma,[175] and be prone to lump it.[176]

This, however, is not the only possibility of syndi-court influence. Syndi-court might stoke the fires of litigiousness, encouraging litigation and public attitudes accepting it as normal. Though the public may not necessarily look at litigation as honorable, having heard about its commonality,[177] and now seeing thousands of syndi-court litigants yearly, the public may come away with the impression that, good or evil, litigation is nevertheless appropriate. Moreover, to the extent that syndi-court presents litigants who are of questionable intelligence or emotional maturity, viewers may think, "if they can do this, anyone can." Thus, syndi-court would communicate and construct norms encouraging litigation and litigiousness.

Empirical Analyses of Syndi-Court

Two studies were undertaken to ascertain the normative influence of syndi-court in promoting or discouraging norms of litigiousness. This empirical investigation had two main components. The first, a content analysis, identified and catalogued syndi-court content. This sought to identify trends and predominant messages in the genre.[178] The second translated this content to syndi-court inspired views and then surveyed individuals to determine whether viewers were more, less, or equally prone toward these views of litigation.

I. Content Analysis

The four highest rated syndi-courts[179] were systematically monitored for one hour each, every day for two weeks (totaling twenty hours per show).[180] Coders individually viewed and coded the content of shows.[181] One group of Coders, Law Coders, consisted of six individuals practicing law; the other group of Coders, Student Coders, consisted of eighteen students in a Contemporary Issues course. Each show was coded by one Law Coder and one Student Coder, and catalogued according to number of plaintiffs per show,[182] remedy sought, and type of case.[183]

The results of this coding showed that syndi-courts hosted an average of 19.7 plaintiffs per week. Thus, a daily viewer of only one syndi-court would see over 1,000 plaintiffs per year. Additionally, though the majority of cases fell into the property damage category, when separated by show, the most proliferate type of claim was a contract claim. Furthermore, the overwhelming majority of plaintiffs sought monetary remedies in the $100-$499 range. Some even explained that their primary motivation for litigating was to exact an apology or because the defendant had never apologized or expressed concern. The results are charted below.

	Judge Judy	Judge Joe Brown	Judge Mathis	People's Court	Weekly Mean[184]
PLAINTIFFS	73	76	79	87	19.7[185]
TYPE OF CASE					
Contract	13	15	20	37	5
Personal injury	20	19	17	18	4.6
Property damage	18	22	26	26	5.75
Family	22	20	16	6	4
REMEDY[186]					
$ > $100	2	15	8	11	2.25
$100 - $499	45	35	42	48	10.6
$500-$1,500	19	14	18	19	4.4
Over $1,500	7	12	11	9	2.4
Return of property[187]	6	8	3	9	1.6
Apology[188]	7	12	21	22	3.9

II. The Juror Protocol[189]

241 prospective jurors from Manhattan, the District of Columbia, and Hackensack, New Jersey completed a survey instrument.[190] This instrument measured, among other things, syndi-court viewing habits, expressed propensity toward pro se litigation,[191] and expressed propensity toward litigation.[192] After incomplete surveys and those demonstrating obvious English language barriers were discarded, the remaining 225 (93.3%) were analyzed.

To isolate any connection between syndi-court viewing and certain factors contemplated by the questionnaire, respondents were then identified as either frequent viewers [FV] or non-viewers [NV].[193] Of the 225 juror analyzed responses, 149 (66.2%) were FV and 76 (33.78%) NV.

As summarized below, statistically significant differences emerged between the frequent viewer and non-viewer responses to questions measuring propensities toward pro se representation ($P < .05$). Additionally, statistically significant differences ($P < .05$)[194] emerged between FV and NV responses to questions measuring propensities toward litigiousness.

Litigiousness and Pro Se Propensities

Sample	would consider appearing pro se		would appear pro se		would consider bringing claim		would bring claim	
	M	SD	M	SD	M	SD	M	SD
FV =149	.55	.50	.59	.49	.86	.35	.75	.44
NV =76	.16	.37	.184	.39	.76	.43	.50	.50
z value	6.65*		6.76*		1.77*		3.65*	

III. The Jury-Eligible [Eligibles] Protocol

A subsequent study sought to replicate these results as well as to explore whether the attitudes and propensities toward pro se representation were mediated by degree of risk/ jeopardy.

Over two semesters, a one-page survey instrument was distributed to 148 jury-eligible adults on the 1st or 2nd day of class in an introductory-level business law course.[195] The instrument included all of the questions from the Juror questionnaire as well as questions pertaining to law viewing habits and propensity toward self-representation in various civil and criminal contexts.[196] Researchers later translated these self-representation scenarios into "high risk" and "low risk" categories as shown below.[197]

After incomplete or internally inconsistent surveys were discarded, the remaining 142 (96%) were analyzed. 91 (64%) were FV; 41 (36%) were NV.

As summarized below, statistically significant differences again emerged between the frequent and non-frequent viewers ($P<.05$).[198] This time, however, those differences were apparent only at the low risk/ jeopardy levels. No difference was found when respondents contemplated high risk/ jeopardy situations.

Rather, it appeared that, where respondents were faced with high levels of risk/ jeopardy, they rejected the potential of pro se representation, notwithstanding viewing profiles.

Litigiousness and Pro Se Propensities

Sample	would consider bringing claim		would bring claim		would consider appearing pro se		would appear pro se	
	M	SD	M	SD	M	SD	M	SD
FV = 91	.85	.40	.82	.42	.64	.50	.62	.50
NV = 51	.69	.47	.63	.49	.31	.47	.28	.45

Pro Se Propensity as per Risk/ Jeopardy (Eligibles)

Level of Risk/ Jeopardy	FV (n=91)		NV (n=51)	
	M	SD	M	SD
civil low	.63	.49	.30	.46
criminal low	.58	.50	.24	.43
civil high	.07	.25	.08	.27
criminal high	.04	.75	.08	.27

IV. Meta-analysis

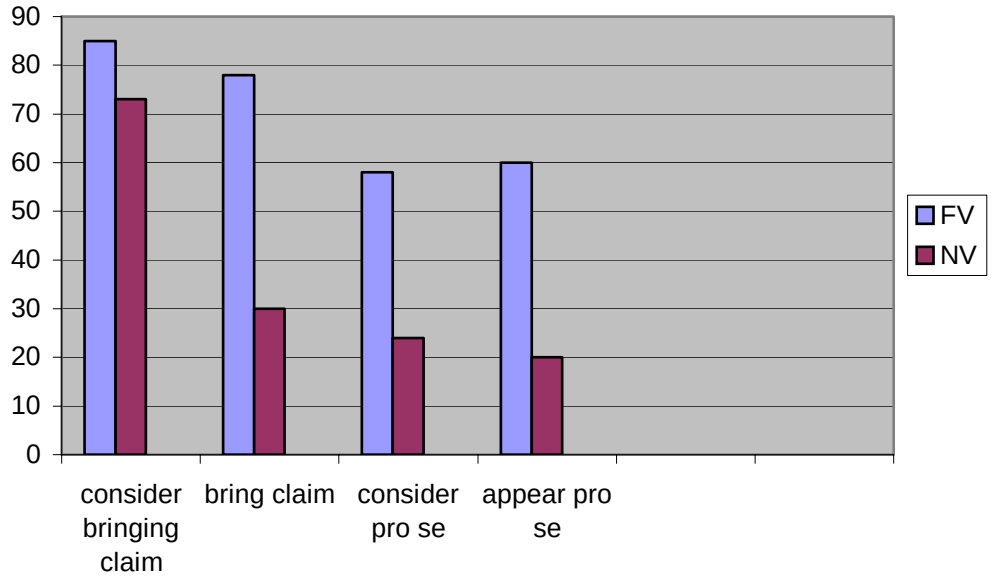
A meta-analysis of the analyzed responses of the Eligibles and Jurors was conducted on the questions posed in both investigations, i.e., those pertaining to contemplation of litigation, likelihood of pursuing litigation, and doing so pro se. This meta-analysis yielded a total of 367 responses of which 240 (65%) were FV and 127 (35%) were NV.

These results conformed to those of the Juror and Eligibles studies. Once again, there was a striking similarity in response based on viewing:

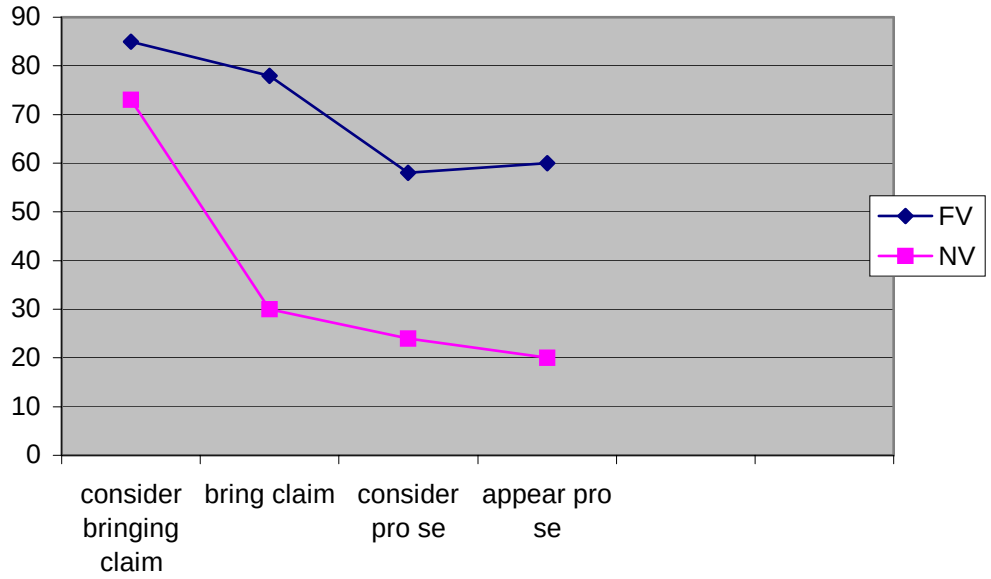
Litigiousness and Pro Se Propensities

Sample	would consider bringing claim		would bring claim		would consider appearing pro se		would appear pro se	
	M	SD	M	SD	M	SD	M	SD
FV = 240	.85	.35	.78	.41	.58	.50	.60	.49
NV = 127	.73	.44	.30	.46	.24	.43	.20	.40

Meta-Analysis Proportions



Meta-Analysis Proportions



Discussion: Norms of Litigiousness

The data demonstrate that frequent viewers of syndi-court hold a number of views regarding litigation that not only differ from those held by non-viewers, but also conform to the predominant imagery of the syndi-court genre. Moreover, these are expressed as propensities toward action. First, the Juror and Eligibles Studies demonstrate that frequent viewers express a propensity toward pro se representation, whereas non-viewers do not. As clarified by the Eligibles Study, this difference is evident only in the "low risk/ jeopardy" categories,[199] the situations most resembling those of syndi-court as well as those reflected in the mythology of litigiousness. Notably, no difference is apparent in "high risk/ jeopardy" situations. Second, both studies show that frequent viewers are more disposed toward considering and pursuing litigation than are non-viewers.[200] The Eligibles expressed this in even greater proportions than did the Jurors.[201] This suggests that syndi-court is a normative messenger of litigation. Its effect, however, is not to discourage litigious tendencies, but, rather, to encourage them. Specifically, syndi-court publicizes as norms

(accurate or not) a cultural acceptance of suit, commonality of pro se representation, and the courtroom as a forum for all manner of disputes.

It is hard to turn on daytime television without seeing syndi-court litigants and their "causes." It seems that anyone can sue, and that everyone does. With this vivid, educative normative backdrop, it is hardly surprising that viewers hold attitudes favoring litigation. After all, syndi-court shows that litigation is engaged in by many regular folk: It is neither reserved for the rich, nor practiced by the deviant.[202] Rather, it is a common and it is appropriate behavior.[203]

The disputes common to these shows also enhance, if not develop, litigious tendencies. As demonstrated by the content analysis,[204] on syndi-court, every dispute and every middling amount of money justifies a day in court. In fact, a majority of disputants sued for less than $500. Moreover, the plaintiffs and stories provide to viewers a "short-cut" cost-benefit analysis of pursuing litigation, albeit a truncated one. They can see that, apparently, the benefits to litigation outweigh its costs. Though the public would ideally need to compare the disputes litigated with those not, where syndi-litigants sue over $11 or the thickness of a slice of pizza, what cold possibly qualify as a non-litigable situation? One can only conclude that there is no situation in which litigation is not the answer. Consequently, when comparing their own disputes to those of syndi-court, viewers will be inclined to complain formally.[205]

The character of disputes broadcast may even communicate that litigation about moral issues or "because of the principle" is socially appropriate. The courtroom, then, is transformed from an adversarial tribunal of last resort to a therapeutic mechanism.[206] "Therapeutic justice is the study of the role of law as a 'therapeutic agent."[207] Thus, the act of litigating is what the person wants – litigation is the primary remedy that they seek – and through this public expression in the way of claiming, the plaintiff seeks to feel better or be made whole. If lucky, the plaintiff will get her pound of flesh, but, if not, at least she will have engaged in the socially-endorsed process for closure.

The promotion of pro se litigation also has ramifications on litigation generally. In both studies, a substantial portion of frequent viewers stated that they would consider and pursue pro se litigation, despite this being tempered by the type of situation involved.[208] While showcasing litigants operating without counsel certainly encourages this model, it also enables litigation overall.

Since the rise of syndi-court, several employees of the justice system have noted an increase in pro se litigants.[209] Though exact numbers are hard to come by,[210] it appears that the rise on self-representation is significant. [211] In fact, judges have commented that syndi-courts appear to embolden pro se litigation,[212] because people now see what occurs inside the courtroom, they believe that they are capable of litigating on their own behalf.[213] One assistant court executive even related an exchange with a pro se litigant who explained that he and his wife obtained all of their information about the courts from watching Judge Judy.[214]

Where aggrieved individuals cannot afford an attorney, they may forgo assertion of their rights.[215] Pro se representation, however, provides a way around this hurdle of expense. It transforms into litigants individuals who would otherwise be economically-barred from the courtroom.[216] Indeed, some have asserted that the recent increase in pro se litigation is due to the lack of affordable legal services for the poor and middle class.[217] For example, a New York State Bar Association survey concluded that the cost of legal services[218] persuades middle income New Yorkers to represent themselves pro se.[219] Syndi-court thus demonstrates that pro se representation is both a reasonable alternative to representation by paid counsel and something that virtually anyone can handle.[220]

Similarly, the promotion of pro se litigation encourages litigiousness by eliminating another hurdle into the courtroom: a weak legal claim. Usually, an individual cannot litigate unless a lawyer accepts her case. A lawyer, however, will often refuse representation where a claim is specious and/ or the likelihood of success and monetary recovery is low.[221] Therefore, much as the expense of counsel may prevent people from suing, so may an attorney refusal.[222] Yet, where a person chooses to bring her claim pro se, she circumvents the effect of attorney refusal, and can initiate litigation.[223]

Ironically, business's promotion of the mythology of litigiousness and rampant overclaiming may have laid the groundwork for syndi-court-inspired litigious to take root, and encourage playing the litigation lottery.[224] The imagery reinforces the sense that the system is so routinely abused that one would be a fool not to play the game,[225] and makes people believe that "if anything goes wrong they can get significant compensation.[226] It, thereby, creates a self-fulfilling prophecy, encouraging individuals to bring claims.[227]

Significance

The key to understanding whether an individual will formally dispute[228] is discerning that individual's social construction of litigious reality – to this person, what is a legal wrong, what is law for, and how or when is it appropriate to use? Consequently, when we seek to quantify litigious decisions via individual rationality,[229] we must reference these norms and understandings of litigation.[230] In fact, to the degree that people appear to behave irrationally[231] as calculated by traditional litigation management, it can be explained by reference to norms:[232] Once we incorporate into accounts of litigious choices acting in accord or inconsistently with social norms,[233] the anomalies of rational choice become explainable.[234] As syndi-court influences the construction of that normative firmament,[235] it influences the litigious tendencies and choices of the public.

There are several implications for the results.[236] The litigious propensities and norms favoring (or at least not disfavoring), disputing, low-end disputing, and pro se representation may be expressed in the consumer-business context in a number of ways. First, they may prompt an increase in formal complaining by consumers. This does not necessarily mean that consumers will suddenly buy a product and then file suit for every warranted failure or psychic injury, but that they may be more inclined to complain "officially" and seek some remediation. This remediation may be in the form of a refund, de minimus settlement, or an apology or admission. Of course, the more formal complaints that exist, the more complaints that can mutate into legal disputes. Nevertheless, again, these reflect a continuum of disputing, i.e., filing in small claims, filing in state civil court, or seeking class certification. In the end, more plaintiffs and more people even considering the preliminary steps toward suit, means greater expense at the low-end of disputing.

Second, the litigious propensities imply a particular character to complaints, specifically, those involving low monetary sums, seeking low monetary settlements[237] and/ or some type of moral redress. This might yield consumer litigants increasingly prone to pursue relatively minor – at least in terms of rational economic assessments – litigation, either because they believe that it is warranted or because they see the courtroom as a venue of last resort where a business defendant fails to respond, i.e., apologize. Hence, business may notice an increase in pocket change or small claims cases, cases previously unheard of.

Third, the inclination toward litigation[238] could encourage putative plaintiffs to pursue novel claims. Indeed, there has been a spate of novel litigation of late. For instance, this past Fall, Rhode Island became the first state to sue lead paint manufacturers on the theory that they had created a public nuisance;[239] Over the last year, cities in Massachusetts, California, and New Jersey have sued gun manufacturers, asserting that they systematically ignore evidence that firearms shops illegally sell firearms to individuals with criminal records, make unsafe weapons, and fail to make such dangers known to the public;[240] and last year, attorneys began to press claims for slavery reparations from both the government and corporate America.[241] It seems as though more and more litigants and attorneys are pushing the legal envelope or constructing claims without direct precedent. Though novel claims are exciting for legal theorists, they are frightening for business decision-makers, as they smack of not merely unforeseen but unforeseeable risk. Hopefully, relying on statistical support for propositions on which they rely and by taking pains to integrate into risk calculations these understandings of litigious propensities can help business mitigate the biases that infect its litigation assessments.

As noted, verdicts,[242] let alone large ones, are highly unusual.[243] Studies show that jurors are actually biased *against* plaintiffs[244]and distrustful of their motives.[245] (Perhaps the litigation rhetoric has had some of its pro-business desired effect). Therefore, the real threat for business is not that plaintiffs will suddenly start winning huge judgments at trial,[246] thus rendering business economic paraplegics, but that people who would have never otherwise have considered disputing will now do so. Consequently, rather than anchoring cost benefit analysis to the fear of multi-million dollar judgments, it should focus on increases in low-end or introductory disputing, and integrate into litigation assessments the motivation behind litigation, such as its normative propulsion (expectations) and its therapeutic and apology-extraction use.

Since, short of changing products[247] or the legal landscape[248] the data indicate that disputing is not likely to decrease, business should concentrate on methods to prevent disputes from mutating into full-blown litigation, be it in small claims or civil court. Resolving disputes at lower levels is usually more cost-effective and less disruptive to business practices than litigation.[249] In fact, some lawyers have also redesigned the way that small-dollar-amount disputes are handled so as to provide for early settlement.[250]

The results here underscore the importance of responding to low-end consumer disputes. It appears that where a consumer complainant does not get her pound of flesh upon direct contact with the business or where she wishes to extract an apology, she is prone to seek her day in court. It seems that an increasing number of individuals balance on this precipice of litigation, and can easily be swayed to sue. Therefore, although business or its customer service may have previously employed a strategy of initial response that

declines or deflects all responsibility, it may wish to rethink that. Regardless of the objectively sound sources of refusal, lack of acknowledgement will not make a complainant feel that her complaints have been seriously considered.[251] And the perception of fairness is critical. In fact, being treated fairly has been shown to be as important, if not more so,[252] to litigants as the ultimate outcome.[253] Some people are even willing to harm themselves just to punish those that they believe are acting unfairly.[254] And, litigants have long memories for feelings of unfair treatment.[255]

Hence, refusal will not amount to finality for the consumer, but as a signal that the consumer need go further to obtain the rightful admission or remedy. As shown here, it may prompt a plaintiff to formalize the action or to take the next step into the courtroom. (This is less a function of a difference regarding what the correct outcome should objectively be than a belief of one's concerns having been rejected out of hand if not totally ignored). Additionally, this quantification of justice/fairness is tenuous. For example, the language of principle sometimes overshadows what appears to be a simple, concrete dispute[256] thus causing the substantive issue to change.[257] In such instances, normative issues may dominate the dispute.[258] In fact, one unit of a company adopted such a "tough guy" culture with regard to complaints that it tended to *generate* disputes and prompt litigation![259] Similarly, another company counsel noted that its business people so often insisted that they were right, that disputes grew to litigation naming them as a defendant.[260]

Although calibration of the exact response system will be unique to the business, the nature of complaints, and costing out claims, a response strategy should also offer at least a few ounces of flesh. People want apologies and minor sums, so business should seriously consider giving them exactly that. Ultimately, the cost of the olive branch,[261] i.e., appeasing the complainant or doing the right thing, could be far less than that of prolonging a dispute. A truly minor sum or even the coveted "we are sorry," might go a long way toward settling a dispute. For instance, business could replace refusal letters with "We're sorry letter/ Here's the check letter/ Waiver letter." Hence, business would send a letter expressing regret but not guilt, and add a minimal check (for a minimal claim) whose endorsement waives any future claim. This gives the consumer an apology and where priced out with reference to product costs, ends any incentive to dispute further as the consumer has gone through therapy, obtained what she perceives to be normal.

Moreover, though paying in this way may seem radical, provided payments per year represent only a portion of insurance and legal costs devoted to this class of complaints, it could ultimately reduce costs. In particular, this type of self-insurance might cause insurance rates to decrease.[262] One of the purported ramifications of litigiousness is that it increases insurance costs.[263] Yet, Saks asserts that it is not so much actual litigation costs but the irrational fear of lawsuits that causes increased costs; Because insurers insist on excessive reserves and products are not produced,[264] rates increase and market opportunities are lost. Furthermore, insurance companies control pricing to their benefit, and, when addressing claims, engage in tactics that increase animosity and delay settlement. These also increase litigation and insurance costs. Self-managing litigation risk, however, much like opting for a higher deductible to obtain a lower insurance rate, can save money and more accurately place money on risk; It allows dollars to be devoted to low-end claims and maintaining good will.[265]

Moreover, making an initial offer permits business to exploit anchoring biases held by plaintiffs. Psychological research has shown that people tend to make numerical judgments based on an initial value, whether this value is irrational or arbitrary. This is known as anchoring or anchoring bias.[266] Once a monetary sum is mentioned, all other assessments or negotiations are anchored or made with reference to this sum.[267]

Empirical Concerns

Although the propositions here are supported by both common sense and the data presented, it cannot be ascertained whether syndi-court does, indeed, cultivate attitudes toward litigation or whether such attitudes exist independent of syndi-court viewing. Cultivation investigations, like many social science investigations, simply cannot distinguish causation from correlation. Therefore, it is possible that the propensities favoring litigation and pro se representation catalog individual predispositions toward the litigiousness "plaguing" society, rather than proving that syndi-court is a mechanism of normative cultivation. Personality type might also explain the apparent correlations: The type of person who opts for self-representation or litigation might also be the type of person who is inherently interested in syndi-court. These individuals may also be more contentious by nature, and, therefore, seek out the types of television programs that are consistent with those tendencies, rather than the programming contributing toward the tendencies.[268]

The little empirical evidence that exists, however, does not support that syndi-court viewers are any different from television viewers generally.[269] Cultivation researchers have noted that most people who watch more of any particular type of program, such as syndi-court, "watch more types of programs" overall.[270] Hence, frequent viewers of syndi-court are likely frequent viewers of television as a whole.[271] Moreover, this paper does not argue that syndi-court is the sole explanatory factor of social litigiousness. Rather, it suggests that syndi-court plays a role in developing litigious attitudes in some individuals and reinforces pre-existing attitudes in others.[272]

Conclusion

Whether an individual is prone toward litigious action is a function of her perceptions of litigation and the social norms that support or encourage those perceptions. In contemporary society, these norms of legal behavior are brought to us compliments of syndi-court. It tells us when to sue, under what circumstances to sue, and, in fact, implies that there are few instances in which we wouldn't sue. Moreover, the results here suggest that the public is finally taking this message to heart, if not to the courtroom: Data demonstrate that viewers of syndi-court are more inclined than non-viewers to consider disputing and even representing themselves pro se. Though it is unlikely that business will look forward to this brewing storm of litigiousness, a more accurate conception of litigious choice that reflects the propensities, motivation, and norms that guide consumer plaintiffs, business can base its litigation management strategies on fact rather than fiction. The results provide a template for such action.

Footnotes

1 THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 2 (2002); *see infra* notes 9-12 and accompanying text.

2 *See generally* VALERIE P. HANS, BUSINESS ON TRIAL 9, 56-58 (2000) [hereinafter BUSINESS]; THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW (2001) (contesting rhetoric of social litigiousness); Bruce A. Finzen & Brooke B. Tassoni, *Editor's Letter: Regulation of Consumer Products: Myth, Reality, and the Media*, 11 KAN. J. L. & PUB. POL'Y 523 (2002) (business claims lack empirical evidence); Michael J. Saks, *Do We Really Know Anything About The Behavior Of The Tort Litigation System – And Why Not?* 140 U. PENN. L. REV. 1147, 1147-1292 (1998) (claims of litigation explosion overblown); Marc S. 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) [herinafter Landscape] (discrediting claims of litigation crisis).

3 Katherine E. Giddings & J. Stephen Zielezienski, *Insurance Defense in the Twenty-First Century: The Florida Bar's Proposed Statement of Insured Client's Rights – A Unique Approach to the Tripartite Relationship*, 28 FLA. ST. U. L. REV. 855, 868 (2001); Joseph F. Speelman, 69 DEF. COUNSEL J., Jan. 2002, at 35; Jeffery Rothfelder, *Living With Litigation*, 173 CHIEF EXECUTIVE 20 (2001).

4 Julie MacFarlane, *Why Do People Settle?* 46 MCGILL L.J. 663 (2001).

5 Stephen Daniels & Joanne Martin, *"The Impact That It Has Had is Between People's Ears": Tort Reform, Mass Culture, and Plaintiffs Lawyers*, 50 DEPAUL L. REV. 453 (2000) (environment of civil litigation includes what is an injury, whom to blame, and how to respond to others).

6 *See infra* pp. 24-25 and accompanying notes.

7 *See* MacFarlane, *supra* note 4, at 668 (civil justice reform scholarship focuses on adjudicative system and its agents rather than claimants).

8 Daniels & Martin, *supra* note 5, at 454 (business's "extreme fear of litigation"). One author states that large companies typically are juggling 450 suits at any given time. THOMAS A. SCHWEICH, PROTECT YOURSELF FROM BUSINESS LAWSUITS AND LAWYERS LIKE ME 17 (1998).

It is claimed that in the last 30 years, American business and their insurers have witnessed an unprecedented increase in litigation. Giddings & Zielezienski, *supra* note 3, at 867; WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1992) (increased litigation since 1940's); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' And Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 26 (1998) (94% of executives surveyed believed

there had been a litigation explosion); HANS [BUSINESS], *supra* note 2, at 56 (public believes litigation crisis exists; noting increases in court filings).

[9] Speelman, *supra* note 3, at 35 (lawsuits extort massive settlements from corporations and small business "without ever resolving the validity of the claims on the merits"); Daniels & Martin, *supra* note 5, at 454 (frivolous and extortionist suits); Mark N. Vamos, *The Verdict From The Corner Office*, BUS. WEEK, April 3, 1992, at 66 (referencing Business Week/ Harris Executive Poll, unfair lawsuits against business defendants).

[10] Carlos Conde, *Lawsuit Mania*, 11 HISPANIC, Dec. 1998, at 34 (survival of small business is easily be threatened by suit; suits force small businesses and entrepreneurs out of business); Finzen, *supra* note 2, at 538 (large scale litigation efforts threatened livelihood of business).

[11] Conde, *supra* note 10 (litigation can bankrupt business); Rothfelder, *supra* note 3, at 20-21 (litigation has forced some companies into bankruptcy; Finzen, *supra* note 2, at 524 (business claims litigation forces them into bankruptcy); Paul Sweeney, *Keeping Legal Costs Down*, FIN. EXECUTIVE, Dec. 2001, at 47 (after $500 million judgment, Lowen Group "began inexorable slide toward bankruptcy"); PR NEWS, *America's Love Affair With Litigation Means News For Law for PR*, June 26, 2000, at 1-2 (DowCorning's bankruptcy due to breast implant litigation).

[12] Rothfelder, *supra* note 3, at 21; Finzen, *supra* note 2, at 524 (recounting claims that litigation explosion denies world of life-saving products).

Ford, Firestone, and Dow Corning, for instance, have faced with an onslaught of products liability litigation of late. Rothfelder, *supra* note 3, at 21.

[13] Mark Sauer, *Taming Trouble Torts: Some Wonder Whether Reports of Litigation Explosion Were Overblown*, SAN DIEGO UNION TRIB., April 21, 2002, at H-1 (quoting Adrienne Kotner); Conde, *supra* note 10 (citing National Federation of Independent Business's estimate that the average lawsuit costs business $100,000).

A recent Rand study, however, showed that 43% percent of federal lawsuits involve corporations suing each other, and only 10% involved personal injury or products liability claims. Robert Reno, *Taking the Teeth Out of Watchdogs*, NEWSDAY, July 1, 2001, at F08; *see also* Conde, *supra* note 10 ("lawsuits are being used as a tool against the competition").

[14] Rothfelder, *supra* note 3, at 21.

[15] Mark A. Hoffman, *Common Good Fights Against Litigious Culture*, BUS. INSUR., April 29, 2002, at 40 ("culture of litigiousness" is fundamental problem in society); Burke, *supra* note 1, at 2 (recounting claims that Americans are litigious and greedy); Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 664 (2000) (Americans believe there is too much litigation); Maurice Rosenberger, *Civil Justice and Civil Justice Reform*, 15 L. & SOC'Y REV. 473 (1980-81) (litigation explosion); Rosenberg, *supra*, note 3 at 1349; John Leo, *The World's Most Litigious Nation*, 118 U.S. NEWS & WORLD REP., May 22, 1995, at 24 (noting litigation explosion); William Mullen, *US Seeks Cure For Legal Dilemma*, CHI. TRIB., July 26, 1991, at 1; Suzanne Oliver, *Let The Loser Pay*, 147 FORBES, March 18, 1991, at 96 (litigation explosion).

[16] Finzen, *supra* note 2, at 524, 529 (greedy lawyers); Sarah Scalet, *See You in Court*, CIO, Nov. 1, 2001, at 62 (lawyers chase deep pockets and juries like to give deep pocket money).

[17] Some businesses claim they are victimized by civil juries who rule against them due to their perceived deep pockets rather than on the evidence. Hans [BUSINESS], *supra* note 2, at 13 (public and business perception that juries operate on deep pocket rationale); Valerie P. Hans, *The Illusions And Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328-29 (1998) [hereinafter Illusions]. Others claim that jurors are simply anti-business. Hans [Illusions] at 328-29; *but see* Hans [BUSINESS], *supra* note 2, at 131 (civil juries pre-disposed toward defendants); SAN DIEGO UNION-TRIB., *supra* note 20, at A-6 (comprehensive study of 8,724 trials shows that juries are not overly prone to punitive damages, reporting Eisenberg & Wells study).

[18] Schweich, *supra* note 8, at 17; KOENIG & RUSTAD, *supra* note 2, at 20 (some blame damage awards cause businesses to cancel insurance). The Insurance Information Institute estimates that the legal tab of court costs, attorney's fees, insurance premiums, and payouts amount to $161 billion or 2% of the US GDP. Sweeney, *supra* note 11, at 47.

[19] This figure includes legal fees, jury awards, copying, and organization costs, but not include costs, such as damages to corporate reputation and increased day-to-day business costs. Michael Netzley, *Alternative Dispute Resolution: A Business (and) Communication Strategy*, 64 BUS. COMM. Q. 83 (2001).

[20] Sauer, *supra* note 13, at H-1; Timothy R. Brown, *Group Puts Price Tag on Legal System*, COMMERCIAL APPEAL (TENN.), April 17, 2002, at DS1. One author claims that "tort taxes" or the litigation-related costs passed on to consumers, increase the cost of an $80 ladder to $100 and a $15,000 pacemaker to $18,000. Leo, *supra* note 13, at 24-25.

21 Brown, *supra* note 20, at DS1 (litigation causes consumers to pay more for products).
This so-called "tort tax" has been estimated as $300 billion per year. Leo, *supra* note 15, at 24-25; PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988); *cf.* 43 NAT'L REVIEW, Sept. 9, 1991, at 14 (limiting tort claims would save economy $300 billion).

[21] Conde, *supra* note 10 (referencing tort tax); HUBER, *supra* note 18; Daniels & Martin, *supra* note 5, at 454.

[22] Some researchers accuse the claims of American litigiousness as sloppy legal scholarship or propaganda. KOENIG & RUSTAD, *supra* note 2 (disputing claims of litigiousness and runaway juries); Marc S. Galanter, *The Day After The Litigation Explosion*, 46 MD. L. REV. 3 (1986); Galanter, [Landscape Of Disputes], *supra* note 2, at 4 (debunking litigation crisis and suggesting that caseload increases merely tracked population growth and a defined category of product liability cases); Saks, *supra* note 2, 1147-1292 (claims of litigation explosion overblown); Sauer, *supra* note 13, at H-1 (statistics do not support claims of societal litigiousness); *cf.* Tom Ramstack, *Lawsuits Few So Far in States with Patients' Bill of Rights, Officials Say*, WASH. TIMES, July 11, 2001 (several states report that "crippling wave of litigation" forecast by business due to patients' bill of rights has not occurred).

Indeed, a number of empirically-based, rather than anecdotally-based, studies demonstrate that litigation is either declining or remaining stable. Generally, scholars have found a low ratio of claims to lawsuits, showing that most Americans entitled to bring legal claims do not do so. HANS [BUSINESS], *supra* note 2, at 56, 58; Michael Rustad, *In Defense Of Punitive Damages In Products Liability: Testing Tort Anecdotes With Empirical Data*, 78 IOWA L. REV. 1, 2 and notes 1-5 therein (1992); Saks, *supra* note 2, at 1183 (very plaintiffs in tort system) *and* at 1185 (victims do not complain); *see also* Ted Rohrlich, *We Aren't Seeing You In Court; Americans Aren't Suing Each Other As Often As They Did A Decade Ago. California, In Particular, Has Seen A Steep Decline In High-Stakes Personal Injury Suits*, LOS ANGELES TIMES [HOME EDITION], Feb. 1, 2001, at A1 (legal scholars and survey by Rand Corporation's "Institute for Civil Justice" suggest that only small percentage of injured Americans litigate claims).

For example, a study sponsored by the Georgia Civil Justice Foundation and the Georgia State Bar Association found that when adjusted for population growth tort lawsuits had declined from 1994-97. It thus concluded that the "litigation explosion" was merely "popular and political rhetoric." Bill Rankin, ATLANTA CONST., Feb. 9, 2000, at C3. Another study commissioned by the National Center for State Courts found that in 16 states, the number of tort suits had declined. *National Council for State Courts, Litigation Dimensions: Tort and Contract in Large Urban Areas* (1995); *Bureau of Justice Statistics, Civil Jury Cases and Verdicts in Large Counties* (July 1995). Researchers saw similar trends with regard to malpractice claims. Koenig & Rustad, *supra* note 2 (using statistics to dispute claim that medical malpractice suits are increasing); Abbot S. Brown, *The Med-Mal Suit Explosion That Isn't*, N.J. LAW., April 1, 2002, at 1 (though malpractice insurance industry claims a litigation explosion, number of malpractice suits in New Jersey declined more than 25% since 1994); Sauer, *supra* note 13, at H-1 (Judicial Council of California found 50% drop in personal-injury suits over last 15 years).

[23] Valerie Hans posits that the "litigation explosion" rhetoric has been promulgated by business seeking to influence public consciousness. HANS [BUSINESS], *supra* note 2, at 50. Finzen concurs that business conducted its own public relations campaign to convince the media, the public, and Congress that a litigation explosion was undermining corporate America. Finzen, *supra* note 2, at 524-25.

[24] Hofmann, *supra* note 5 at 40 (fear of claims "paralyze[s]" business); Rothfelder, *supra* note 3, at 20 (decisions regarding litigation are among the most critical for CEOs).

[25] Vamos, *supra* note 9; *cf.* 43 NAT'L REV., *supra* note 20, at 14 (litigation explosion reduces international competitiveness of US business and costs economy $300 billion in litigation costs).

[26] Many business executives believe that the potential of litigation inhibits them from engaging in the entrepreneurial activities that would benefit their businesses. Lande, *supra* note 8, at 18.

[27] Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 738 (1998) [hereinafter Oil Strike].

[28] Hans [BUSINESS], *supra* note 2, at 14 (unpredictability of civil juries blamed for preventing innovation of U.S. businesses); s*ee also* Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 556

(1991) (manufacturers uncertain on how to limit risks will be discouraged from creating new products for fear that new products will result in legal liability); *cf.* Browning-Ferris Indus. of Vermont v. Kelco Disposal Co., 492 U.S. 257 (1989) (O'Connor dissenting) (excessive punitive damage awards chill creation of new products).

[29] Galanter [Oil Strike in Hell], *supra* note 27, at 738.

Galanter, however, has questioned the correlation between liability costs and export performance by industry. *Id.* at 738-39. In fact, "there is absolutely no evidence that product liability hinders the competitiveness of American businesses." Product Liability Reform Act of 1997, S. Rep. No. 105-32, at 79, 82 (1997).

[30] Giddings & Zielezienski, *supra* note 3, at 867.

[31] Speelman, *supra* note 3, at 35 (asserting that tort suits "extort major corporations and small businesses into massive settlements without ever resolving the validity of the claims on the merits"); Sauer, *supra* note 13, at H-6 ("a company can spend millions defending itself against [] frivolous suits").

[32] Brian D. Beglin & David M. Cohen, *Tiptoeing Through Mass Tort Litigation*, 48 RISK MGMT., April 2001, at 63 (describing how, within days, a "trickle of legal complaints" can evolve into a flood of complaints); Oliver, *supra* note 15, at 97 (recounting suits by bystander defendants); [Editorial] *Big Punitive Award Threatens Justice*, SEATTLE POST – INTELLIGENCER, February 13, 1999, at A11 (large damage awards encourage "flood of copycat suits motivated by fantasies of a big payday").

Even a novel suit with questionable future of success can encourage other suits. Lauren Chambliss, *Cases Against US Market Analysts Not Likely To Hurt Investment Banks*, Evening Standard (UK), August 6, 2001.

[33] Speelman, *supra* note 3, at 44 (companies cast into the role of tort defendants are commonly forced to defend products in the media); PR NEWS, *supra* note 11, at 1; Hans [BUSINESS], *supra* note 2, at 4-5 (Benlate litigation against DuPont harmed company's image).

[34] Indeed, lawyers have also been blamed for the litigation explosion, since more litigation means more business for them. *See e.g.*, Sweeney, *supra* note 11, at 48 (describing "litigation machine" created by lawyers to pool resources and increase business litigation) *and* (litigation "driven by plaintiff's attorneys who seek out claims on behalf of consumers"); Michael Kirsch, *Lawyers, Heal Thyselves*, 85 A.B.A. J., May 1999, at 96 (lawyers contribute to "litogomania"); Leo, *supra*, note 13, at 24 (trial lawyers promote "litigation lottery"); OLSON, *supra* note 8 (accusing lawyers of prompting plaintiffs to sue and churning out "junk litigation").

[35] Andrew Wood, *Legal Costs Too High?*, 160 CHEMICAL WEEK, Nov. 4, 1998, at 33, 34 (PricewaterhouseCoopers estimates legal spending for chemical companies as 0.42% of yearly revenue); David M. Katz, Employment Bias: Should You Settle or Risk a Jury Trial, CFO.com, May 24, 2001, http://www.cfo.com/article visited May 9, 2002.

[36] Giddings & Zielezienski, *supra* note 3, at 868 (litigation no longer a matter of only occasional concern, but "a major expense item in annual budgets, necessitating comprehensive management controls"); Matthew T. Miklave, *Why "Jury" Is A Four Letter Word*, 77 WORKFORCE, March 1998, at 56, 56-58.

[37] Giddings & Zielezienski, *supra* note 3, at 868. PricewaterhouseCoopers, however, cautioned that counsel and financial officers do not fully comprehend legal and risk avoidance expenses. Sweeney, *supra* note 11, at 48.

In fact, litigation management guidelines are commonly incorporated into retention contracts between insurers and defense attorneys. Giddings & Zielezienski, *supra* note 3, at 868. Typical guidelines include who will be and must be consulted and which actions require prior approval. *Id.* at 868-69.

[38] Sweeney, *supra* note 11, at 47. This figure includes insurance premium payments. *Id.*

[39] MacFarlane, *supra* note 4, at 705 (rational risk assessment is straightforward cost-benefit analysis).

[40] *Id.* at 704-05 (cost-benefit analysis in litigation weights factors that are known and perceived as fact).

[41] Risk assessment should also consider: (1) what damages might be awarded; (2) is it likely that the judge will side with the other party; (3) how long will it take to go to trial; and (4) what will the costs expended on this dispute be in comparison to the costs to achieve the "best outcome." MacFarlane, *supra* note 4, at 706.

[42] PR NEWS, *supra* note 11, at p 1 ("Your reputation is only as good as the last negative allegation").

[43] MacFarlane, *supra* note 14, at 705. Some tangible commercial consequences include the "loss of future contracts, and workplace morale problems. . . ." *Id.*; Richard Birke & Craig R. Fox, *Psychological*

Principles in Negotiating Civil Settlements, 4 HARV. NEGOTIATION L. REV. 1, 4 (1999) (valuations include how much the case is worth and likelihood of prevailing).

[44] MacFarlane, *supra* note 4, at 706; PR NEWS, *supra* note 11, at p 1 (litigation can damage stock prices).

Claims that punitive damages anxiety deters investment, a statistical analysis of tort lawsuits against publicly-traded businesses found no statistically significant abnormal stock returns and concluded that data did not support the hypothesis that settlements shaped by punitive damages comprise the main effect of punitive damages. Jonathan M. Karpoff & John R. Lott, Jr., *On The Determinants and Importance of Punitive Damage Awards*, 42 J. L. & ECON. 527, 534-35 (1999) (studying suits from 1986-1996).

[45] This measurement contemplates the likely outcome of litigation. Indeed, a prominent view of litigious *behavior* likens it to an economic model, wherein potential litigants base their decisions to settle, litigate, or lump it based on a desire to maximize the value of litigation. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 170-71 (2000).

[46] MacFarlane, *supra* note 4, at 704-05 ("such accounting represents the best interests of the [disputants]."

[47] 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, 597 (1988).

For further observations regarding the failures of economic analysis in contemplating an individual's choice to dispute, *see* Chrisine Jolls, et al., *A Behavioral Approach to Law and Economics, in* BEHAVIORAL LAW AND ECONOMICS 16-19 (Cass Sunstein, ed., 2000).

[48] Counsel, however, may not only be ineffective in accurately quantifying litigation risk, but also have an interest in magnifying the menace of litigation. Galanter, *supra* note 27, at 747-48.

[49] Songer, *supra* note 47, at 597; *see also* Lande, *supra* note 8, at 15-16 (outside counsel compared with inside counsel and executives had most favorable view of litigation).

These mistaken beliefs were also unusually resistant to change. Even after lawyer respondents were made aware of accurate statistics regarding litigation, they continued to overestimate its frequency. *Id.* at 600; *see also* Thomas Koenig, *Measuring the Shadow of Punitive Damages: Their Effect on Behavior: Article: The Shadow Effect of Punitive Damages on Settlements*, 1998 WIS. L. REV. 169, 174-75 (difficulty of predicting punitive damages result in unnecessary trials).

[50] MacFarlane, *supra* note 4, at 707; *but see id.* at 707 (in competitive culture of corporate governance, purely objective risk appraisal is rare).

[51] Many claimed that the risk of product liability litigation caused them to discontinue products or forgo introduction of new products. Galanter [Oil Strike in Hell], *supra* note 27, at 742. These beliefs though common are generally not based on first-hand experience. *Id.* at 742-43.

[52] But Galanter reports that more recent studies show that a corporation's total liability risk equaled $0.25.5 (cents) for every $100 dollars in revenue, whereas in 1987 it was $0.25.9 (cents) per $100 in revenue. Galanter [Oil Strike in Hell], *supra* note 27, at 737-38 (citing to J. Robert Hunter, *Product Liability Insurance Experience 1984-1993* (March 1995)).

[53] *Id.* at 743 (reporting study by Charles Epp); Oliver, *supra* note 15 (interview with Walter Olson) (business will do almost anything to avoid suit).

[54] Guthrie, *supra* note 45, at 165; MacFarlane, *supra* note 4, at 668.

[55] Guthrie, *supra* note 45, at 175-76; Cass Sunstein, *Introduction, in* BEHAVIORAL LAW AND ECONOMICS, *supra* note 47, at 1 (social science research on decision-making).

[56] MacFarlane, *supra* note 4, at 669 (disputant's settlement appraisals influenced by factors other than advice from attorney).

[57] Even where consumer perceptions of the ease, cost, and benefits of litigation are objectively faulty, their exclusion from calculation hamstrings rational assessment. *Cf. id.* at 709. In settlement negotiations, discussions should go beyond the factual confines of the legal case to encompass a disputant's expectations and ideas of fairness. *Id.*

[58] *Id.* at 668 (studies do not consider how litigants are feeling about the conflict and how it affects orientation toward pursuing and construing it).

[59] *Id.* at 705 (definition of risk is narrow and suffers from "tendency to exclude the experience of the disputants themselves").

[60] *Id.* at 705 (other factors besides likely legal outcome are important for litigants, and "deserve fuller consideration than they commonly receive").

[61] Sunstein, *supra* note 55, at 1.

[62] Giddings & Zielezienski, *supra* note 3, at 868-69.

[63] Fear impacts how legal claims are handled, and whether, when, and with whom to settle. Indeed, "[m]ost businesses will do anything to avoid being sued." Oliver, *supra* note 15; *see also* ROBERT L. KIDDER, CONNECTING LAW & SOCIETY 47-48 (1983) (describing strategies and decision-making in identifying with whom to settle and when to pay more for claims than the law requires).

[64] Theodore Eisenberg, et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745-46 (2002) (misperceptions about jury decision-making, level, and frequency of damage awards are strong).

[65] *Id.* at 745 (incorrect perceptions about cost and likelihood of punitive damages), and at 763 (businesses tend to focus on jury's propensity to award punitive damages).

[66] Galanter, *supra* note 27, at 747 (may induce corporate functionaries to overestimate threat and make settlement and business decisions that cannot be accounted for in terms of actual propensities of juries).

[67] Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 ARIZ. L. REV. 849, 880 (1998) (noting studies suggesting that less serious injuries are overcompensated); Eisenberg, et al., *supra* note 64, at 768 (the ways in which business presumes settlement behaviors based on incorrect presumptions).

Indeed, plaintiff's-side attorneys have said that the specter of punitive damages provides leverage in settlement negotiations with business. Koenig, *supra* note 49, at 176 (acknowledgment that punitive damages claims provide important leverage for clients); William Glaberson, *When The Verdict Is Just Fantasy*, N.Y. TIMES, June 6, 1999, at a25 (reporting study by National Center for State Courts that found only 0.047% of cases end in punitive damages).

Less than 5% of all civil suits filed result in a verdict, but of the remainder, 90% settle. Marc S. Galanter, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1340, n.2 (1994).

[68] One advocacy organization has argued that business's irrational fear of suit has had the effect of increasing the number of defense wins of product liability trials, because business settles all but the most easily winnable cases. Koenig, *supra* note 49, at 173.

[69] HANS [BUSINESS], *supra* note 2, at 5-8.

[70] Miklave, *supra* note 36, at 56-57 (in past decade, Congress and state legislatures expanded legal protections for employees); HANS [BUSINESS], *supra* note 2, at 6-7 (significant legal developments have been strict products liability, substitution of comparative negligence for contributory negligence, and class actions).

[71] Galanter, [Oil Strike in Hell], *supra* note 27, at 60 (enlargement of remedy accompanied by cultural shift in expanded notion of rights).

[72] Among those developments: the Supreme Court interpreted law to make summary judgment on behalf of tort defendants more readily available, *see e.g.*, Celotex Corporation v. Catrett, 477 U.S. 317, 323-24 (1986); Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 247-48 (1986); Matsushita Electric Company v. Zenith Radio Corporation, 475 U.S. 574, 586 (1986), state courts tightened sanctions for frivolous lawsuits, and The Advisory Committee on the Federal Rules of Civil Procedure amended Rule 11, Guthrie, *supra* note 450, at 164.

[73] *Cf.* Michele Taruffo, *Some Remarks on Groups Litigation, A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 405-08 (2001) (describing how class action permits the harms of more individuals to be grieved) and at 409 (noting procedural elements of class action litigation).

[74] MacFarlane, *supra* note 4, at 669 (cultural, cognitive, psychological, and affective orientations of disputants impact decision-making regarding disputes).

[75] *Id.* at 669 (how disputant's make sense of conflict most important variable).

[76] *Id.* at 670-71 (culture of conflict includes values and beliefs that influence an individual's construction of conflict and experience with disputes); *see* Sunstein, *supra* note 55, at 1 (human preferences are constructed by social situations).

[77] Daniels & Martin, *supra* note 5, at 453 (cultural environment of litigation defining what is an injury, whom to blame, and what to do about it).

[78] Tom R. Tyler & John M. Darley, *Is Justice Just Us?*, 28 HOFSTRA L. REV. 707, 719 (2000) (social values underlie social behavior); Dan Coates and Steven Penrod, *Social Psychology and the Emergence of*

Disputes, 15 L. & SOC'Y REV. 655, 666-67 (1980-81) (social comparisons influence "naming and blaming" stages of legal disputing).

[79] Richard H. McAdams, *The Origin, Development, and Regulation of Nor*ms, 96 MICH. L. REV. 338, 351 (1997) ("considerable effort has gone into defining exactly what constitutes a norm" and "[t]he economics literature continues to struggle over the issue") (internal citations omitted); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (social norms understood in many different ways).

[80] Sunstein, *supra* note 79, at 914.

[81] JOEL CHARON, THE MEANINGS OF SOCIOLOGY 61-62, 107 (4th ed., 1993) (norms signal society's rules or expectations).

[82] According to Sunstein, norms are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." Sunstein, *supra* note 79, at 914.

[83] *Id.* at 939.

[84] CHARON, *supra* note 81, at 108; McAdams, *supra* note 79, at 339; Sunstein, *supra* note 77, at 907 (behavior "pervasively a function of norms"); *see also* Tyler & Darley, *supra* note 78, at 719 (social values underlie social behavior).

[85] MacFarlane, *supra* note 4, at 671 (cultural factors influencing norms of disputing are broader than gender, race, or ethnicity, and should encompass values and beliefs).

[86] Just as culture shapes our beliefs and actions in response to our social world, so does it shape our understanding of conflict, its resolution, and outcomes. W. BARNETT PEARCE & S.W. LITTLEJOHN, MORAL CONFLICT: WHEN SOCIAL WORDS COLLIDE 50 (1997); Daniels & Martin, *supra* note 5, at 457 (culture of litigation deals with people's ideas about the world around them).

[87] Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 L. & SOC'Y REV. 157 (2000); *see also* CHARON, *supra* note 81, at 167 (noting importance of socialization in following society's rules of law).

[88] Daniels & Martin, *supra* note 5, at 543-45, 560; Sunstein, *supra* note 77, at 914 (norms define what actions to be taken).

[89] Rohrlich, *supra* note 22, at A1 (litigation-oriented decisions are made with reference to social norms of suit and plaintiffs); *see* MacFarlane, *supra* note 4, at 674 (discussing construction of meaning in dispute analysis and processing).

[90] For a grievance to mature into a legal dispute, the victim must perceive a wrong as qualifying for redress. MacFarlane, *supra* note 4, at 633. Not all aggrieved, however, engage in this "naming," and, therefore, do not recognize a legally-cognizable injury. *Id.*

The many victims who do not realize that they have viable legal claims, never bother to sue. Saks, *supra* note 2, at 1188-89. Of course, one may appropriately identify a valid legal claim, may think that they have a cause of action, but be incorrect, or identify a colorable, but very weak claim, but overestimate its value

[91] A common but unsupported assumption in [rational assessment] is that individual actors know the law. Pauline T. Kim, *Norms, Learning, and Law: Exploring Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 448 (1999).

[92] For a recount of popular legal legends, *see* Galanter [*Conniving Claimant*], *supra* note 15.

[93] MacFarlane, *supra* note 4, at 635 (transformation of grievance upon voicing it and requesting remedy),

[94] Rohrlich, *supra* note 22, at A1.

If she has seen litigants of similar claims treated positively, she may consult an attorney or file a claim in Small Claims or State Civil Court. If she has heard about their type of complaint being mediated, she might complain to a company's customer service department, draft a letter, or turn to the local Better Business Bureau for intervention.

[95] This will discourage suit. Consequently, norms not only discourage or encourage litigious behaviors, but also become the gatekeepers of litigation: They dissuade people from litigation, when the collective consciousness deems lawsuits wrong, and invite potential litigants, when it deems litigation acceptable.

[96] Julie Pacquin, *Avengers, Avoiders, and Lumpers: The Incidence of Disputing Style On Litigiousness*, 19 WINDSOR Y.B. ACCESS JUST. 3, 17 (2001). ("Many people think of litigation as a disagreeable experience"); Lande, *supra* note 8, at 3 (media's image of litigation is largely negative).

[97] Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POL'Y & L. 645, 649-50, 655-56 (1997) (shame influences creation and enforcement of norms).

[98] Saks, *supra* note 2, at 1189 (potential plaintiffs avoid suit because of stigma associated with litigation).

[99] Hans [Illusions], *supra* note 17, at 334-35 (research demonstrates that victims are often blamed for fate).

[100] Daniels & Martin, *supra* note 5, at 454 (significant portion of public believes plaintiffs bring unjustified lawsuits); Galanter, *Conniving Claimant*, *supra* note 15, at 664 (litigants portrayed as "petty, oversensitive, obsessive, exploitative, and sociopathic").

[101] This refers to Stella Liebeck's tort suit against McDonald's for coffee burns and related medical expenses. *See* Burke, *supra* note 1, at 26.

[102] McAdams, *supra* note 79, at 391. Indeed, much literature discusses how law might change norms, but ignores theories of their origin. *Id.* at 352; Massaro, *supra* note 98, at 674 (sociologists disagree about which cultural variables exert most influence on norms).

[103] McAdams, *supra* note 79, at 391.

[104] *Id.* at 400. This publicity condition is difficult to satisfy and is "[t]he determinative obstacle to societal norm formation." *Id.* at 400-01.

[105] *Id.* at 360 (esteem-based norms require publicized consensus).

[106] *Id.* at 362 (ignorance of consensus cannot produce norm).

[107] Charon, *supra* note 81, at 98; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997) (individuals draw inferences from the popularity of behavior of others).

[108] *Cf.* Edward Sankowski, *Film, Crime, and States Legitimacy: Political Education or Mis-Education?*, 36 J. OF AESTHETIC EDU. 1 (2002) (film and related media are important sources of visually centered narratives in contemporary culture); Mira Sotirovic, *Effects Of Media Use On Complexity And Extremity Of Attitudes Toward The Death Penalty And Prisoners' Rehabilitation*, 3 MEDIAPSYCHOLOGY 1, 4 (2001) ("What we learn about social issues generally comes to us through some type of media, broadcast or print"); s*ee* Carol P. Getty, *Corrections – Media Wise?* 63 CORRECTIONS TODAY 126, 127-28 (2001) (media both shapes and transmits norms).

[109] Hans [Illusions], *supra* note 17, at 7; Burke, *supra* note 1, at 2-3 (culture kept Americans out of court).

Litigation was inconsistent with the belief systems of fatalistic Americans who accepted injuries and adversity. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW [hereinafter HISTORY] 185-87 (2nd Ed., 1985); *cf.* Pacquin, *supra* note 97, at 30 (people who hold fatalistic beliefs may lack motivation to sue); Hans [Illusions], *supra* note 17, at 331 (societal desires to stimulate economy led to generous treatment of business corporations) and at 7 (legal doctrine favored business).

[110] HANS [BUSINESS], *supra* note 109, at 4-8.

[111] FRIEDMAN [HISTORY], *supra* note 108, at 468-70; LAWRENCE M. FRIEDMAN, LAW IN AMERICA 43 (2002). ("Nothing does a better job of mangling human bodies than machines").

[112] FREIDMAN, *supra* note 109, at 545 (newspapers sensationalized high profile trials and accidents).

[113] Most of that coverage focused on citizens suing business. McAdams, *supra* note 79, at 391-92; HANS [BUSINESS], *supra* note 2; *see also* Miklave, *supra* note 36, at 57 (publicity of trials and monetary awards encourages individuals to sue). It also covered protests against unsafe working conditions. HANS [BUSINESS], *supra* note 2, at 8.

[114] Most of that coverage focused on citizens suing business. McAdams, *supra* note 79, at 391-92; HANS [BUSINESS], *supra* note 2, at 7-8; *see also* Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire Of 1911: Social Change, Industrial Accidents, And The Evolution Of Common Sense Causality*, 20 L. & SOC. INQUIRY 621, 637-38 (1995) (describing how the publicity related to the fire influenced public opinion regarding business responsibility for accidents).

[115] Hans [Illusions], *supra* note 17, at 548-49 (cultural values began to change); Marc S. Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1154 (1996) (media culture stories about out of control jurors and the litigation explosion have influenced public opinions but are incorrect).

[116] Daniels & Martin, *supra* note 15, at 462-63 (business and insurance industry sponsored public relations campaigns asserting there was a litigation explosion).

A law professor at New York University found that, while the average verdict in the New York area was $1.1 million, the average verdict as reported by The New York Times was $20.5 million. Glaberson,

supra note 67, at a25 (reporting findings of NYU study); *cf.* Vidmar, *supra* note 67, at 875-76 (media's skewed coverage of plaintiff wins and large damage awards influences public).

[117] Business conjured the litigation crisis for its own ends. Burke, *supra* note 1, at 3.

[118] Lande, *supra* note 8, at 6-7.

Television and news papers also overrepresent incidents of violence. Sarah Eschholz, *The Media And Fear Of Crime: A Survey Of The Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 37-38 (1997). Viewers share this exaggeration, and tend to overestimate the amount of violence in society. *Id.* at 39-51 (describing literature review of 25 studies on television viewing and anxiety about crime).

[119] Galanter, *supra* note 77 (reporting study of newspaper coverage from 1985-96).

Indeed, the media paid a great deal of attention to the "Contract With America" tort reform component. Lisa L. Posey, *The Impact Of Fee-Shifting Tort Reform on Out-of-Court Settlements*, 23 J. INSURANCE ISSUES 124, 125 (2000); Miklave, *supra* note 36, at 56 (litigation explosion).

[120] George Gerbner, et al., *Growing Up With Television: Cultivation Processes, in* MEDIA EFFECTS, ADVANCES IN THEORY AND RESEARCH 43 (Jennings Bryant & Dolf Zillmann, ed., 2nd ed., 2002) (television is the source of the most broadly shared images and messages in history); Angelique M. Paul, *Note: Turning The Camera On Court TV: Does Televising Trials Teach Us Anything About The Real Law*? 58 OHIO CT. L.J. 655, 656 (1997) (Americans get the majority of their information from television); Brian Lowry, *In The King Trial We Wake, News Media Will Be The Message*, DAILY VARIETY, April 7, 1993, at 1 (Roper study found that "69% of Americans. . . view television as their primary source of news an information).

[121] Moreover, the influence of these images is enhanced by television's auditory and visual stimuli. Gary R. Edgerton & Michael T. Marsden, *The Teacher-Scholar in Film and Televisions, Introduction: Media Literacy and Education*, J. POPULAR FILM & TELEVISION 2, 3 (2002) (in past century, priorities shifted away from the printed word and toward the image). Print media describes, but it cannot add moving pictures, speech, tone, lighting, camera angles, music, and interspersion of shots. Television's news includes pictures with its narrative, but its narratives are a metered vocal tone, accompanied by stolid sets and largely static images. It is the difference between reading a screenplay and seeing the completed, scored movie. Sankowski, *supra* note 108, at 1 (film and related media are important sources of visually centered media);

[122] Daniels & Martin, *supra* note 5, at 458 (describing law as popular culture that informs views of world and decision-making in response to law).

[123] 98% of Americans have at least 1 television. Todd Picus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1085 n.172 (citation omitted)

[124] Since 1983, the average household has tuned in 7 hours per day. TODD GITLIN, MEDIA UNLIMITED 15-16 (2003); Edgerton & Marsden, *supra*, note 121, at 3. The average adult watches over 4 hours of television each day, GITLIN at 16, and his or her children will watch even more. *Id.*; L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewers' Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUD. F. 257 (1998) (more than 4 hours per day for individuals; 7 hours per day for households). Adults over 55 years of age watch the most television, approximately 5 ½ hours daily. Edgerton & Marsden, *supra* note 121, at 4.

[125] Paul, *supra* note 120, at 656 (Americans get majority of information from television); Lowry, *supra* note 120, at 1.

[126] Kahan, *supra* note 107, at 351 (we draw inferences from the behavior of others).

[127] Scott L. Althaus & David Tewksbury, *Agenda Setting and the "New" News, Patterns of Issue Importance Among Readers of the Paper and On-line Versions of the New York Times*, 29 COMM. RES. 180, 181 (2002) (television is dominant mechanism for disseminating information).

[128] Gerbner, et al., *supra* note 120, at 44. A basic difference between humans and other animals is that humans live in a world that is created by the stories we tell. *Id.*

[129] *Id.* at 44; *see generally* Jonathan Cohen & Gabriel Weimann, *Cultivation Revisited: Some Genres Have Some Effects On Some Viewers*, 13 COMM. REP. 99, 101-02, 107-08 (2000).

[130] JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS, CULTIVATION THEORY AND RESEARCH ix-x (Gerbner introduction) (1999).

[131] Edgerton & Marsden, *supra* note 121, at 4.

Although cultivation began as a more limited concept, its emphasis shifted "from individual short-term effects to the long-term cultural-ideological socialization role of repetitive messages found in television

programming." John L. Sherry, *Media Saturation and Entertainment-Education*, 12 COMM. THEORY 206, 211 (2002).

[132] Cohen & Weimann, *supra* note 129, 212 (cultivation accounts for effects of the dominant messages on television).

[133] SHANAHAN & MORGAN, supra note 130, at 72.

Cultivation analysis is the theoretical approach and research strategy that grew out of The Cultural Indicators project. This project, which began in 1967, studies television policies, programs, and impacts. Gerbner, et al., *supra* note 130, at 43, 45-47.

[134] Thomas C. O'Guinn & C.J. Shrun, *The Role Of Television In The Construction Of Consumer Reality*, 23 J. CONSUMER RES. 278, 280 (1996). Cultivation analysis quantifies and tracks it most recurrent images in television content (*i.e.*, message system analysis), and investigates whether and how television contributes to viewers's conceptions of social reality. MEDIA EFFECTS: ADVANCES IN THEORY & RESEARCH, *supra* note 121.

[135] Sotirovic, *supra* note 108, at 750.

[136] Gerbner, et al., *supra* note 120, at 47.

[137] *Id.* at 43-44 (medium's contribution to perceptions of social reality) and at 47 (total immersion outlook).

[138] Cohen & Weimann, *supra* note 129, at 99.

[139] *Id.* at 99; SHANAHAN & MORGAN, *supra* note 130, at 72 (watching a significant amount of television will lead viewers to hold beliefs consistent with the stories depicted by this medium).

[140] Gerbner, et al., *supra* note 120, at 48-49 (people are born into symbolic environment with television as its mainstream).

Importantly, cultivation is not a unidirectional process, but a gravitational one. Television creates one stream of information, but that stream of information will influence viewers in different ways. *Id.* at 48-49.

[141] Paul, *supra* note 120, at 656 (Americans get majority of information from television).

[142] *Id.* This hearkens to cultivation's "mainstreaming" process, where viewers learn facts about the world and are socialized by observing them on the TV screen. Cohen & Weimann, *supra* note 129, at 102.

[143] Sotirovic, *supra* note 108 (these perceptions of reality "are consequential for individuals' judgments and decisions").

In fact, significant exposure to television can lead to perceptions of reality that differ from those held by nonviewers. Cohen & Weimann, *supra* note 129, at 108.

George Gerbner asserts that television does not merely reflect beliefs, but that cumulative exposure to it generates a unique set of beliefs in viewers. George Gerbner, *Growing Up With Television: The Cultivation Perspective, in* MEDIA EFFECTS: ADVANCES IN THEORY & RESEARCH 17, 23-25 (Jennings Bryant & Dolf Zillman ed., 1994, 2nd ed.).

[144] L.J. Shrum, *supra* note 125, at 261.

[145] See generally, Gerbner, *supra* note 143, at 23-25.

[146] Gerbner, *supra* note 143. This was due to the belief that television's programs represented the world a violent place; Gerbner, et al., *supra* note 120, at 52-53 (outlining "mean world" syndrome).

[147] Eschholz, *supra* note 118, at 37-38 (outlining "violence in society" syndrome).

[148] *Id.* at 38-39 (television greatly exaggerates the incidence of crime in society).

[149] Hyung-Jin Woo and Joseph R. Dominick, *Daytime Television Talk Shows and the Cultivation Effect Among U.S. and International Students*, 45 J. BROAD. & ELEC. MEDIA 598, 610 (2001).

[150] Getty, *supra* note at 120 (television, and to lesser extent, newspapers and movies, influence how Americans view justice); Joseph & Gayle Mertez, *Law and Pop Culture: Teaching and Learning About Law Using Images From Popular Culture*, 64 SOC. EDUC. 206 (2000) (for many, "primary source of knowledge about . . . the legal system" comes through television and movies); Kelly L. Cripe, *Comment: Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System*, 6 U.C.L.A ENT. L. REV. 235, 245-46 (1999) (televising criminal trials provides audience with great deal of information); Leah Ward Sears, *Those Low-Brow TV Court Shows*, CHRISTIAN SCI. MONITOR July 10, 2001, at 11 (Americans get lasting impression of the courts from television).

[151] Some do not perceive television as a neutral window into the courtroom, but as a lens that shapes and sometimes distorts its subjects. Edwin Yoder, *Television in Courtroom Reshapes the Reality It Covers*, ST. LOUIS POST – DISPATCH, Sep. 30, 1994, at 13D.

[152] *See e.g.*, Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndi-Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L. J. 1 (2001); Austin Sarat, *Exploring The Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" In Popular Culture*, 50 DEPAUL L. REV. 425, 450 (2000) (law lives in the media images that saturate our culture); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, And Public Understanding Of The Criminal Justice System*, 35 ARIZ. L. REV. 785, 786, 798 (1993).

[153] Stephan Landsman, *Symposium: Civil Litigation and Popular Culture Sixth Annual Clifford Symposium on Tort Law and Social Policy Article: Introduction*, 50 DEPAUL L. REV. 421 (2000); Mertez, *supra* note 150, at 206 (pop culture is "constantly sending messages about how the world 'is' . . . and may help shape the public's view of law").

[154] Cripe, *supra* note 150, at 240 (television provides public with insight into trial system).

A recent American Bar Association report found concluded that the media impacts people's knowledge about the law and justice system. As reprinted in, Symposium*: American Bar Association Report on Perceptions of the U.S. Justice System*, 62 ALB. L. REV. 1307, 1315 (1999), reprinted report, "Perceptions of the US Justice System."

[155] Of course, those television representations may be distorted. Birke & Fox, *supra* note 43, at 9.

[156] Elliot E. Slotnik, *Television News And The Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (television provides majority of public with its only information about law); *see also* Bruce M. Selya, *The Confidence Games: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 913 (1996) ("few individuals have direct experience with the justice system"); Joseph & Mertez, *supra* note 150, at 206 (primary knowledge about law comes from pop culture sources, including television; television shapes public's perception of law) (this material has become too pervasive to ignore); Cripe, *supra* note 150, at 240 (public relies on media's portrayal of justice system).

[157] *See* Michael M. Epstein, *Judge Judy, Mablean, and Mills*, TELEVISION QUARTERLY 2001 (http://www.emmyonline.org/tvq/articles, visited May 7, 2002).

Popular legal television shows include "Perry Mason," "L.A. Law," "The Practice," and "Ally McBeal." *See* Diane Klein, *Ally McBeal and Her Sisters: A Quantitative and Qualitative Analysis of Representation of Women Lawyers on Prime-Time Television*, 18 LOY. L.A. ENT. L.J. 259 (1998). Everywhere one looks, stories are being told about civil litigation. Landsman, *supra* note 153, at 421; Neal R. Feigenson, *Symposium Law/ Media/ Culture: Legal Meaning in the Age of Images: Accidents as Melodrama,* 43 N.Y.U. SCH. L. REV. 741, 742 (1999/ 2000) (televised legal events, both fictional and real, show pop culture visions of the justice system).

[158] Lisa Scottoline, *Law and Popular Culture*: *Get Off The Screen* (speech at Nova Southwestern University's Goodwin Alumni Banquet, March 2000), 24 NOVA L. REV. 655, 656 (2000) (television shows like Judge Judy represent new breed of televised law).

[159] Mark Jurkowitz, *Hour of Judgment*, BOSTON GLOBE, December 3, 2000, at 9; EBONY, [Judicial] *Here Come The Judges*, May 2002, at 96 ("[s]yndicated courtroom shows are increasing in popularity").

[160] Marc Gunther, *The Little Judge Who Kicked Oprah's Butt; Daytime Television's Hottest* Property, FORTUNE, May 1999, at 32 (in 1997, "Judge Judy" was the number-one ranked syndicated program); Joe Schlosser, *Another Benchmark for 'Judge Judy,'* BROADCASTING & CABLE, Mar. 29, 1999, at 15.

[161] USA TODAY, March 25, 1999, at D; Schlosser, *supra* note 160, at 15. The week of January 21-27, 2002, "Judge Judy" had 8.4 million viewers, and "Judge Joe Brown" 4.4 million. ENT. WKLY., Feb. 22, 2002, at 133; *see also* Bill Keveny, *Syndicated Goldies Are Oldies: New Shows Are No Match*, USA TODAY, Nov. 26, 2001, at 4D ("Judge Judy" garners 7,061,000 viewers).

Its closest competitor, Court TV, *once* had 6% of that audience. Harris, *supra* note 5, at 803. Court TV reached its largest audience ever, 557,000 viewers, by changing its programming to include a non-courtroom show, "Forensic Files" and syndicated dramas. Ed., *Court TV Has Highest Quarterly Rating in Network's History*, BUS. WIRE, April 2, 2002, at 1.

[162] Although some in the legal system discount the effect of these shows on public opinion, others insist that these shows can alter viewers's perception of the courts. *See* Mike Saewitz, *Many Judge US Justice System By The TV Courtroom Shows*, VIRGINIAN – PILOT, Oct. 3, 2001, at E1. In fact, speaking at a symposium at Albany Law School, New York State's Chief Judge asserted that what the public sees on television, such as Judge Judy," "play[s] a huge role in public perceptions of the justice system." Judith S. Kaye, Symposium, *Rethinking Traditional Approaches*, 62 ALBANY L. REV. 1491, 1493 (1999).

[163] Epstein, *supra* note 157, at (syndi-court is rarely dull or hard to understand).

[164] Scottoline, *supra*, note 158, at 657.

[165] Harris, *supra* note 153, at 803.

[166] Itzhak Yanovitzky, *Effects of News Coverage on Policy Attention and Actions*, 29 COMM. RES. at 424 ("media effects are contingent on a person's motivation to attend to the message . . . [m]otivation, in turn, is a function of . . . message attributes").

[167] Studies have demonstrated that increasing the number of edits in a television "message" increases viewers's attention as well as their ability to remember the message. Annie Lang, et al., *The Effects of Edit on Arousal, Attention, and Memory For Television Images: When an Edit is an Edit Can an Edit Be Too Much?* 44 J. BROAD. & ELEC. MEDIA 94, 105 (2000).

[168] Reaction shots, such as those common of the syndi-court bench, are among the "most commonly used editing devices used to capture and manipulate" viewer perceptions. Stacy Davis, *The Effects of Audience Reaction Shots on Attitudes Towards Controversial Issues*, 43 J. BROAD. & ELEC. MEDIA 476, 477 (1999); *see also* Podlas, *supra* note 152, at 18-20 (empirical analysis demonstrating that jurors interpret judge reactions and use them to guide evidentiary determinations).

[169] These elicit an "orienting response" that directs the viewer's attention to particular information presented. Lang et al., *supra* note 167, at 96.

The availability heuristic further enhances the influence of these comparisons. People infer the prevalence of something from the ease with which they can conjure an example of it. Shrum, *supra* note 125, at 262. Of course, the more popular something seems to be, the easier it is to remember. *Id.* at 262. Thus, with syndi-court's Nielsen popularity and imagery, frequent litigation and numerous pro se litigants are easy to recall. Unfortunately, research indicates that people are often unaware of the source of their information and unable or unwilling to determine the source of their memories. *Id.* at 264. Therefore, it is unlikely that people will first reflect and then discount information, because it was gleaned from syndi-court. D. Lawrence Kincaid, *Drama, Emotion, and Cultural Convergence*, 2 COMM. THEORY 136 (2002) (elements increase the "active participation and involvement of the audience").

[170] Christo Lassiter, *TV or Not TV — That Is The Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 934-35 (1996) (trial broadcasts temporarily excite interest, but tend to fixate on sensational aspects). *Id.* at 973.

[171] SHANAHAN & MORGAN, *supra* note 130, at 2-3, 5.

Considering the influence and messages of syndi-court independent of those of television or even court shows generally is quite valid. Gunter has suggested that the cultivation effect is not medium-general, but genre-specific. Barie Gunter, *The Question of Media Violence, in* MEDIA EFFECTS 163, *supra* note 121; Cohen & Weimann, *supra* note 129, at 101-02, and 102, 108 (cultivation process varies across genres).

[172] Landsman, *supra* note 153, at 421 (television and movie narratives about litigation deserve special scrutiny due to their profound ability to influence litigants).

[173] Ralph E. Roberts, Jr.**,** *An Empirical And Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. Rev. 621 (1998) (little if any research has quantified the impact of televised court proceedings on the public).

[174] Sauer, *supra* note 13, at H-1 (injured people with valid claims avoid court so that they are not perceived as "the kind who goes to court").

[175] Saks, *supra* note 2, at 1189 (stigma deters suit); KIDDER, *supra* note 65, at 4.

Some believe that business has promoted litigation as shameful. *Americans Aren't Suing Each Other As Often As They Did A Decade Ago. California, In Particular, Has Seen A Steep Decline In High-Stakes Personal Injury Suits*, LOS ANGELES TIMES [HOME EDITION] A1, Feb. 1, 2001 ("[c]orporations have created a stigma for people [who sue]").

[176] People are inclined to give up rather than fight. Rohrlich, *supra* note 22, at A1.

[177] *See supra* pp.4-5 and accompanying notes 22-24.

[178] *See* Gerbner, et al., *supra* note 120, at 49-50 (explaining use of message system analysis to identify recurrent, stable patterns of television content).

[179] Shows were chosen based on Nielsen ratings. Nielsen Media Research estimates that as many as 31 million people daily see at least 1 TV judge. Jurkowitz, *supra* note 159.

[180] This yielded a total of 333 segments.

[181] This is consistent with the "message system analysis" of cultivation analysis. *See infra* pp. 27-28 and accompanying notes.

[182] This was later calculated to determine the average number of plaintiffs per week.

[183] Cataloguing between the Student and Law Coders was then compared. Because the key was to discern the messages that the audience would take away from syndi-court, rather than technical, legal accuracy, syndi-court episodes that were coded differently (18 or 5%) by the Law and Student Coders were excluded from the final tally.

[184] The per week mean of the total sample = 21. Thus, a viewer of one show would see approximately 1092 plaintiffs per year.

The mean for the full sample of syndi-court plaintiffs = 83.25. (The number of plaintiffs per week after filtering in the coding process = 78.75; the raw number of plaintiffs per year = 1092).

[185] This would amount to 1024 plaintiffs per year.

[186] This looks at only damages sought, not damages awarded.

[187] That is, the plaintiff sought the return of property in addition to monetary damages or as an alternate to monetary damages.

[188] That is, during the presentation of her case, the plaintiff requested an apology or explained their motivation for suit was to obtain an apology.

[189] Data from this study pertaining to how syndi-court representations affect juror opinions about judge behavior, appear in Podlas, *supra* note 153.

[190] Prior to entering the courthouse (and, in some instances, during breaks), individuals were approached, identified as appearing for jury duty, and asked to complete a questionnaire. (No individual believed to be a juror was excluded). In exchange for their participation, jurors received candy bars and the elite pens used to complete the questionnaires and candy bars.

[191] I
___ would consider representing myself in court without the aid of an attorney
___ would NOT consider representing myself in court without the aid of an attorney

If I was unable to afford an attorney, I
___ would appear in court without the aid of an attorney
___ would NOT appear in court without the aid of an attorney

[192] I
___ would consider bringing a claim in court
___ would NOT consider bringing a claim in court

I
___ would bring a claim in court
___ would NOT bring a claim in court

[193] A "frequent viewer" watched syndi-court between two to three times and more than five times per week (and checked the corresponding response on the descriptive scale of viewing). Non-viewers did not watch syndi-courts or did so, at most, once per week (and checked the appropriate response on the corresponding descriptive scale).

This denomination is also consistent with Gerbner's division of society into "heavy viewers" and non-viewers.

[194] While statistically significant, these differences were not quite as pronounced.

[195] These respondents ranged in age from 18-21 and were either second-semester freshmen or sophomores.

[196] Because this study was originally contemplated to be independent of and sequential to the Juror Study, its questions were broader.

[197] Risk/ Jeopardy was assessed as follows:

Civil, low:	$0-$1,500
high:	above $1,500
Criminal, low:	fines up to $1,500
	Probation
	Up to 3 days in jail
high:	fines above $1,500
	weeks, months in jail
	1 yr. or more imprisonment

[198] Additionally, an earlier study sampled 88 college students who had either completed or were presently enrolled in an introductory-level business course. Of the 88 questionnaires completed, 22 were excluded from analysis (25%). Of the remaining 64, 45 (70.3%) were FV and 19 (29.69%) NV (as defined by the Juror Study). *See* Kimberlianne Podlas, *Is Syndi-Court Creating a Nation of Pro Se Litigants?*, __J. LAW & BUS. __ (2002).

Although statistically significant results were found, due to the high number of respondents excluded, the subsequent study of Juror Eligible adults described herein was undertaken. Nevertheless, the results of the initial study are shown below.

Expressed Propensity For Self-Representation

Level of Risk/ Jeopardy	FV (n=45)		NV (n=19)		
	X	SD	X	SD	z value
civil low	.62	.49	.26	.452	2.625*
criminal low	.64	.484	.32	.478	5.13*
civil high	.20	.405	.105	.315	1.11
criminal high	.022	.149	.05	.229	.642

[199] Although frequent viewers opt for self-representation at a level beyond that of non-viewers, the type of case or degree of risk involved might temper this desire. The pro se response appears where jeopardy (either punitive or economic) to the pro se litigant is low but dissipates when jeopardy increases.

[200] Moreover, where responses of frequent viewers and non-viewers are closest proportionally, it does not appear that both groups begin to move toward a center, but that non-viewers begin to look more like those of frequent viewers.

[201] The Eligibles were younger than the Jurors and had at least one year of college education.

[202] That is, litigation is not practiced by *only* the deviant.

[203] This also supports the heuristic processing model of cultivation effects. L.J. Shrum, *Media Consumption and Perceptions of Reality: Effects and Underlying Processes, in* MEDIA EFFECTS, ADVANCES IN THEORY AND RESEARCH, *supra* note 120, at 78. In short, television viewing enhances construct accessibility, and, because particular televised concepts are accessible to viewers, viewers tend to overestimate the frequency or likelihood of those events. *Id.* at 78-79.

[204] *See infra* pp. 37.

[205] This litigious empowerment could also encourage litigants to push their issue more vehemently and for higher monetary awards than previously seen.

[206] For a discussion of the role of therapeutic justice in dispute settlement, *see* Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying The Lens of Therapeutic Jurisprudence*, 82 MARQ. L. REV. 155, 158-60 (1998) [herinafter Therapeutic Jurisprudence]; Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS. L. J. 703, 705-06, 714-16 (1997).

[207] Waldman [Therapeutic Jurisprudence], *supra* note 206, at 158. Hence, law and litigating produces therapeutic (or anti-therapeutic) consequences.

Though therapeutic justice originated within the mental health filed, it has more recently been extended to how existing law can be interpreted or applied in a therapeutic manner. *Id.* at 158-59.

[208] Another national survey, 58% of respondents agreed or strongly agreed with the statement, "It would be possible for me to represent myself in court. . . ." Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 37 (2002).

[209] Russell Engler, *And Justice For All – Including The Underrepresented Poor: Revisiting The Roles Of The Judges, Mediators, and Clerks*, 67 FORD. L. REV. 1987 (1999) (pro se litigants "flooding the courts"); L. Karl Branting, *An Advisory System For Pro Se Protection Order Applicants*, 14 INT'L REV. L., COMPS., & TECH. 357 (2000) (increasing numbers of litigants represent themselves in court); Alan Feuer, *More Litigants Are Taking a Do-It-Yourself Tack*, N.Y. TIMES [LATE ED., EAST COAST], Jan. 22, 2001, at B1 (pro se litigants increasing, quoting New York State Deputy Chief Administrative Judge, Juanita Bing Newton); Chris Mahoney, *Verdict: Litigants Without Attorneys Are On The Rise*, 20 B. BUS. J., Sep. 01, 2000, at 13 (recounting claims of court officials); Daisy Whitney, *Well-Documented "People" Company Helps Do-It-*

Yourselfers With Legal Tasks, DENVER POST, August 3, 1999, at C-01 (increase in pro se litigation over past 5 years, quoting spokesperson for Colorado Judicial Department).

[210] Raul V. Esquivel, III, *The Ability Of The Indigent To Access The Legal Process In Family Law Matters*, 1 LOY. J. PUB. INT. L. 79, 90 (2000); Mahoney, *supra*, note 209, at 13 (overall figures of pro se litigants are hard to come by).

[211] JONA GOLDSCHMIDT, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 49 (1998); Goldschmidt (Struggle for Access), *supra* note 208, 36-38.

The last decade has witnessed a dramatic increase in the number of pro se litigants in divorce cases, Mahoney, *supra* note 209 (in 75% of divorce cases, at least 1 spouse is pro se), domestic relations disputes, Branting, *supra* note 212, bankruptcy cases, Terry Carter, *Self-Help Speeds Up*, 87 A.B.A. J., July 2001, at 34 ("Growing pro se representation problem in bankruptcy courts"), and federal criminal appeals, Peter J. Ausili, *Outside Counsel: Federal Court Statistics For Fiscal Year 1997*, N.Y. L.J. April 28, 1998, at 1 (reporting that filings have increased slightly each year since 1993); *cf.* Feuer, *supra* note 209, at B.1 (courtwatchers attribute increase in pro se litigation, in part, to abundance of court programs on television).

[212] Goldschmidt, [*Struggle for Access*], *supra* note 208, at 37-38.

Those judges also fear that syndi-court sends the wrong signal to those litigants creating unreasonable expectations about the ease of interaction with the court system, *id.* ("Judges Wapner, Mills, and Judy have created unreasonable expectation about the ease of interaction with the court system."), and expecting the judge to assist them as ersatz counsel, *id.* (self-represented parties expect court to represent them; that court will be the pro se defender).

[213] Marie Higgins Williams, *Comment: The Pro Se Criminal Defendant, Standby Counsel, And The Judge: A Proposal For Better-Defined Roles*, 71 U. COLO. L. REV. 789, 816 (2000).

"On television, it looks simple enough: You go to court. You make your case. . . [a]fter a few moments – and a commercial break – the judge renders a decision." Dante Chinni, *More American Want to be Their Own Perry Mason*, CHRISTIAN SCI. MONITOR, August 20, 2001.

[214] *Id.*

Another pro se plaintiff considered his watching the Simpson trial a sufficient legal education. Feuer, *supra* note 209, at B.1

[215] *But see* Pacquin, *supra* note 96, at 30 (in empirical study of litigious personalities, few respondents mentioned cost as barrier to litigation or reason underlying decision to sue or not to sue).

[216] Chinni, *supra* note 213 (some litigants go pro se because hiring a lawyer is cost-prohibitive).

This paper considers only whether syndi-court may heighten potential for suit, thus, increasing litigation risk to business. It attempts to avoid any value judgment as to whether there exist benefits to syndi-courts.

[217] Engler, *supra* note 213 at 1987; Goldschmidt, *supra* note 208, at 36 (cost of lawyers has contributed to increase in pro se litigation); Janet Reno, *Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School*, 63 FORD. L. REV. 5, 8 (1994) (at least 80% of poor and "working poor" have no access to legal services).

[218] Or least their perceived cost. Gary Spencer, *Middle-Income Consumers Seen Handling Legal Matters Pro Se*, N.Y. L.J. May 29, 1996, at 1.

[219] *Id.* "Middle income" was defined as $25,000 - $95,000. *Id.*

[220] Goldschmidt, [*Struggle for Access*], *supra* note 208 (increased literacy and sense of rugged individualism contribute to pro se litigation); Chinni, *supra* note 213 (television makes self-representation look simple enough; reporting 1999 survey from National Center for the State courts finding that 58% of American believe that they could represent themselves, if necessary).

[221] Saks, *supra* note 2, at 1190-92; Daniels & Martin, *supra* note 5, at 484 (in light of court costs and strength of cases, 57% of average lawyers are signing up a smaller percentage of clients than 5 years ago). "As a result, the client with a small, but legitimate claim may not be able to find a competent attorney, or have his or her claim successfully settled." Daniels & Martin, *supra* note 5, at 485.

[222] Lawyers state that they now screen cases and litigants much more harshly. Daniels & Martin, *supra* note 5, at 486. One Houston litigator explained, "We look for a client with no prior problems. It makes a good impression. . . ." *Id*.

[223] Although this is not equivalent to recovering a large cash settlement, as explained above, it will create an expense.

[224] Galanter, *supra* note 27, at 747 ("c]orporate investment in projecting an image of unrestrained litigiousness and rampant overclaiming may have the paradoxical effect of increasing the level of claiming"); *see also* Daniels & Martin, *supra* note 5, at 461-74 (business and industry allies created and marketed vision of rampant litigation).

Publicity about the litigation explosion may increase calls to lawyers, as perceived plaintiffs believe that any misstep will amount to some amount of monetary compensation. Galanter, *supra* note 27, at 747 (litigation rhetoric makes people believe that if anything goes wrong they can get significant compensation).

[225] *Id.*

[226] *Id.*

[227] Galanter [Conniving Claiminat], *supra* note 15, at 647, 662.

[228] Daniels & Martin, *supra* note 4, at 453 (environment of civil litigation includes what is an injury, whom to blame, and how to respond to others).

[229] *Id.* Hence, there is normative rationality. JULES COLEMAN, RISK AND REASON 46-47 (1992) (conceptions of morality are influenced by cultural norms; rationality linked to norms).

[230] *Id.*

For instance, plaintiffs may believe that litigation is easy an inexpensive. Legal expertise and concrete reality become largely irrelevant. Putative plaintiffs may harbor what Birke and Fox have called "positive illusions," essentially unrealistic optimism regarding outcomes. Birke & Fox, *supra* note 43, at 15.

[231] Or deviate from economic predictions of action.

[232] Sunstein, *supra* note 79, at 909, 940.

[233] *Id.*

[234] *Id.* at 941.

[235] Sunstein [Behavioral Law & Economics], *supra* note 47, at 7 (normative judgments are both predictive and non-arbitrary).

To some degree, syndi-court episodes resemble Galanter's legal legends, i.e., that "set of legends that is resilient and that resonate with many of the basic themes of our legal culture. . . ." Galanter, *supra* note 27, at 722. Generally, these accounts are not based on personal contact, but on something one has heard about. *Id*. These legendary accounts obtain even greater distinction as the media distributes them to diverse audiences. *Id.* at 722-23 (legal legends widely disseminated and media plays major role in disseminating them).

[236] This article does not consider whether increased consumer litigation is good or bad, but merely notes that it may increase due to the confluence of factors noted above, and the ways in which this might be reflected in consumer-to-business disputing.

[237] This might be an expression of "litigotiation." As coined by Marc Galanter, litigotiation is a combination of negotiation and litigation, or the strategic pursuit of settlement by mobilizing the court process. Marc Galanter, *Worlds of Deals: Using the Legal Process to Teach Negotiation*, 34 J. LEGAL EDUC. 268, 268 (1984).

[238] Such litigiousness might reflect or interact with one's "claims consciousness." Vidmar and Schuller have identified personal "claims consciousness" that is affected by a range of factors such as personality and socio-economic status. Neil Vidmar & Regina Schuller, *Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry*, 11 L. & HUMAN BEHAV. 299, 300-02 (1987).

[239] Peter B. Lord, *Jury Deadlock in Rhode Island Forces Mistrial in Suit Against Paint Firms*, PROVIDENCE J., October 30, 2002 ("Rhode Island took novel approach of accusing [lead paint] companies of creating a public nuisance").

[240] David Abel, *Gun Control Forces Say Suits to Go On, Despite Boston's Choice to End Effort*, BOSTON GLOBE, March 29, 2002 (33 cities suing gun manufacturers); Tom Schoenberg, *D.C. Judge Holds Fire: Still No Ruling in City's Novel Suit Over Gun Violence*, LEGAL TIMES, May 20, 2002, at P. 1 (D.C. suit against 25 gun manufacturers fro violating district's Assault Weapons Strict Liability Act of 1990); Joseph W. Cleary, *Comment: Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. BALT. L. REV. 273, 283 (suing gun manufacturers under public nuisance theory is novel) (2002). A number of "novel legal theories underpin[]" these cases. *Id*.

In June of 2001, shareholders sued WorldCom executives accusing them of a scheme to keep earnings and WorldCom's stock price high. Beatrice E. Garcia, *Many WorldCom Executives Knew Score, Lawsuit Says*, MIAMI HERALD, August 5, 2002. Two class action suits were also filed against investment banks Morgan Stanley and Credit Suisse First Boston, brought by investors against analysts. Lauren

Chambliss, *Cases Against US Market Analysts Not Likely To Hurt Investment Banks*, EVENING STANDARD (UK), August 6, 2001 ("There are novel legal problems associated with these suits").

[241] James E. Watson, *Lawyers Plan to Sue U.S. Government, Business For Slavery Reparations*, LEGAL TIMES, April 13, 2001; *see also* WALTER K. OLSON, THE RULE OF LAWYERS 13-20 (2003) (recounting variety of recent, novel legal claims).

[242] *Id.* at 665 (most cases filed do not result in trial).

[243] Vidmar, *supra* note 67, at 875-76 (damages fuel public debates about tort reform, but trend of large damage awards is not supported empirically).

[244] Some mock juror studies indicate that those who support tort reform are more likely to be negatively disposed toward plaintiffs, Shari Seidman Diamond , et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways To Increase Consistency*, 48 DEPAUL L. REV. 301, 307 (1998); Hans [BUSINESS], *supra* note 2 at 74-75, or at least approach toward interpreting evidence will favor defendants, Hans [BUSINESS] *supra* note 2, at 76.

[245] Empirical evidence does not support claims that juries favor seriously injured plaintiffs at the expense of business, Vidmar, *supra* note 67, at 868-70 (relying on studies by Viscusi, Daniels & Martin, and Hans), though juries may hold business to a "reasonable corporation standard," *id.* at 870. For a more complete discussion of this theory, *see* Valerie Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242, 246-47 (1996) and HANS [BUSINESS], *supra* note 2, at 9.

[246] MacFarlane, *supra* note 4, at 665 (most cases filed do not result in trial).

[247] George Priest has argued that, where business does not purchase insurance, it is less prone to engage in risky behavior. 96 YALE L. J. 1521 (1987). Simply if business knows that its costs are covered, it does no t have an adequate incentive to keep those costs down, via improved, safer products. *Id.*

[248] Virtually every state has considered punitive damages caps. Glaberson, *supra* note 67, at a25 (since 1980's, virtually every state has considered tort reform, including in punitive damages limits). Most have passed legislation intended in some way to limit tort lawsuits. *Id.* (most states have passed laws to limits suits); Eisenberg, *supra* note 64, at 768-69 (several states have statutory caps on punitive damages);

[249] Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. DISPUTE RESOLUTION 1, 17 (1998) (describing ADR: "If you fix it earlier and lower, you keep the dollars"); Caroline Harris Crowne, *Note: The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768, 1771 (2001) (describing benefits of using ADR to resolve disputes with business without going to court).

As is dispute avoidance altogether. Ann L. MacNaughton & Gary A. Munneke, *Practising Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 707 (2001) (advocating that business implement dispute system design projects to avoid and manage disputes)

[250] *Id.* at 19.

[251] MacFarlane, *supra* note 4, at 697. This feeling of fair treatment is critical, for if the litigant believes the process has been unfair, she may not opt for voluntary resolution of the dispute. *Id.* at 697. Fairness may include recognition by the defendant of the putative plaintiff's complaint and/or desired remedy, as well as simply not being ignored. *Id.*

[252] Birke & Fox, *supra* note 43, at 38 (some litigants are more sensitive to how they've been treated than to how they have fared objectively).

[253] *See* MacFarlane, *supra* note 4, at 681 (with regard to claiming, "individual expectations are reflected in how each party understands a fair and appropriate outcome" for the dispute at hand).

[254] *Id.*; Jolls, et al., *supra* note 47**,** at 21-22 (studies demonstrate that people are willing to punish unfair behavior even at cost to themselves).

[255] MacFarlane, *supra* note 4, at 703. These persistent and detailed recollections of an earlier affront can derail settlement or final resolution. *Id*. at 703.

[256] MacFarlane describes the situation where "a straightforward claim on an unpaid account develops into an argument over the treatment of this particular client or customer, or assertions of discourtesy or rudeness. . . ." *Id.* at 692.

[257] *Id.* (as the conflict develops over a p[period of time, the importance of the original issue may be replaced by subsequent issues of treatment).

[258] *Id.* at 693.

[259] McEwen, *supra* note 250, at 9-10.

[260] *Id.* at 10 ("We're the defendant almost all of the time. Our business people think they're [always] right. . . .").

[261] PR NEWS, *supra* note 11, at 1(quoting crisis litigation consultant, "The check you write today is the smallest check you're ever going to write").

[262] *Cf.* Timothy R. Brown, *Group Puts Price Tag on Legal System*, THE COMMERCIAL APPEAL (TENN.), April 17, 2002, at DS1 (consumer litigation causes insurance rates to increase). (consumer litigation leads to "increase[d] insurance rates"); Saks, *supra* note 2, at 1184-85 (insurers insist on excessive monetary reserves to protect against possibility of lawsuit); *but see* Joey Bunch, *Mississippi Lawyer Says Medical Malpractice Problem Lies in Insurance Industry*, SUN HERALD, July 3, 2002 (stating that caps do not lower insurance rates, quoting Melvin Cooper, President of Magnolia Bar Association).

[263] Third party insurance is to protect oneself against liability for judgments. COLEMAN, *supra* note 229, at 205.

[264] In other words, business has fallen prey to its own rhetoric. Saks, *supra* note 1, at 1184-85; Brown, *supra* note 14, at DS1 (consumer litigation leads to "increase[d] insurance rates").

[265] "As a rule, it's cheaper for companies to make confidential settlements than to defend themselves." Scalet, *supra* note 16, at 64.

[266] Sunstein, *supra* note 47, at 5.

[267] Birke & Fox, *supra* note 43, at 40. Of course, as argued *supra* pp. 9-13, business commonly anchors its estimates of likely jury awards in high figures.

[268] Data has also been collected from the Eligibles sample regarding the influence of gender, if any, on disputing behaviors, to wit: propensities toward litigation and pro se representation. This will be addressed in futire publications.

[269] Freidman, *supra* note 29, at 555.

Also, and unfortunately, neither study reported herein obtained data on respondents's television viewing as a whole. Thus, it cannot be determined whether frequent viewers are also frequent *television* viewers and/ or whether non-viewers are also non-viewers of television.

[270] Gerbner, et al., *supra* note 120, at 45.

[271] Nevertheless, even as cultivation researchers debate genre effects, there is some agreement that a particular type of program may exert a heightened or "focused" effect on viewers. *Id.*

[272] Furthermore, education level may provide an alternate explanation for the data. *See* Podlas, *supra* note 153, at 14, 22 (prior experience with justice system did not appear to explain views about judicial behaviors and implications of judicial silence). Some authors have positively correlated claims consciousness with education level, though others have suggested litigious individuals represent lower socio-economic status. Sotirovic, *supra* note 108, at 9. Though education level per se was not analyzed here, the results of the Eligibles Study offer some indication of the potential impact of education on litigious attitudes. Unlike the Juror respondents whose education level was unknown, but reasonably certain to include several individuals without college experience, respondents in the Eligibles group all had completed at least 1 semester of college education. Therefore, when contemplating education as a potential explanatory factor, these respondents may be used for some degree of comparison. At least with regard to viewership and propensity toward pro se representation, frequent and non-viewer student respondents expressed views in line those of frequent and non-viewer juror respondents, but did so in higher proportions. In other words, it seemed that individuals with some college experience were more inclined to dispute or consider disputing. Other research has suggested a positive correlation between education and/ or experience with the legal system and propensity to dispute. *See* Miller & Sarat, *supra* note at 551. Additionally, the reason for the likelihood toward disputing has, itself, been disputed. Some believe it represents power, others intelligence, and still other access. MacFarlane, *supra* note 4, 686 (access to legal system along with personal knowledge).