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FROM LITIGATORS OF ORDINARY CASES TO LITIGATORS OF EXTRAORDINARY CASES: STRATIFICATION OF THE PLAINTIFFS' BAR IN THE TWENTY-FIRST CENTURY

*Herbert M. Kritzer**

INTRODUCTION

The legal profession is a popular icon in American and other western cultures. As such, it is often associated with what is wrong or problematic about society. Political leaders and commentators who draw on the profession's iconic value typically present the profession as a unitary body that stands in opposition to many of the interests of the broader society. So, for example, the profession is often attacked for simply defending the interests of lawyers at the cost of the larger society. In his 2000 campaign for the presidency of the United States, George W. Bush took aim at the profession as clearly stated in the Republican Party Platform:

Reform of the legal profession is an essential part of court reform. Today's litigation practices make a mockery of justice, hinder our country's competitiveness in the world market and, far worse, erode the public's trust in the entire judicial process. . . .

Avarice among many plaintiffs' lawyers has clogged our civil courts, drastically changed the practice of medicine, and costs American companies and consumers more than \$150 billion a year.

. . .

. . . We fully support the role of the courts in vindicating the rights of individuals and organizations, but we want to require higher standards for trial lawyers within federal jurisdiction, much as Governor Bush has already done in Texas — and as we encourage other States to do within their own legal codes. To achieve that goal, we will strengthen the federal rules of civil procedure to increase penalties

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for frivolous suits and impose a “Three Strikes, You’re Out” rule on attorneys who repeatedly file such suits. . . .

. . . .
 To protect clients against unscrupulous lawyers, we will enact a Clients’ Bill of Rights for all federal courts, requiring attorneys to disclose both the range of their fees and their ethical obligation to charge reasonable fees and allowing those fees to be challenged in federal courts. Because private lawyers should not unreasonably profit at public expense, we will prohibit federal agencies from paying contingency fees and encourage states to do so as well. Even more important, we will require attorneys to return to the people any excessive fees they gain under contract to States or municipalities.¹

While the target was often plaintiffs’ lawyers, these attacks typically referred to lawyers, rather than to “trial” lawyers.² Similarly, Marc Galanter’s analysis of lawyer jokes and humor often places lawyers in particular settings, but the jokes seldom recognize differences among lawyers.³

While the public does not typically draw a lot of distinctions among groups within the legal profession, other than occasional distinctions between “my” lawyer who is trying to help me versus the “other guy’s” lawyer who is trying to screw me,⁴ scholars have long recognized that the legal profession is far from a politically or economically united interest. Recognized lines of stratification include social class and ethnic origins, as well as clientele.

This essay suggests that it is time to recognize a new line of stratification, one that exists within what is traditionally labeled the “plaintiffs’ bar.” While there have always been important lines of differentiation among those lawyers who handle personal injury claims for injury victims, changes in the nature of some areas of personal injury

1. Republican Nat’l Comm., Republican Platform *available at* <http://www.rnc.org/GOPInfo/Platform/2000platform7> (last visited Sept. 3, 2001).

2. While campaigning for the presidency in 1992, George H.W. Bush singled out the plaintiffs’ bar:

You know I’m not anti-lawyer, but let me tell you something. We spend up to \$200 billion every year on direct costs to lawyers. Japan doesn’t spend this; Germany doesn’t. And I want to take on those ambulance chasers and reform our lawsuit-happy legal system. You see, when doctors are afraid to practice, when people are afraid to help somebody along the highway, when coaches are afraid to coach Little League, my message is this: As a nation, we must sue each other less and care for each other more.

George H.W. Bush, *Remarks to the Community in Holland, Michigan* (Oct. 12, 1992) *available at* <http://www.bushlibrary.tamu.edu/papers/1992/92101203.html> (last visited Aug. 31, 2001).

3. Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 830 (1998).

4. Some people are just plain “anti-lawyer”; see, for example, the website of the “Anti-Lawyer Party” at <http://wevote.com/pages/antilaw.html> (last visited Aug. 31, 2001).

litigation, epitomized by the spectacular success of litigation targeting tobacco companies, have created very significant lines of cleavage that either did not previously exist or that could be submerged within a broader common interest of the plaintiffs' bar. Thus, where in the past prominent lawyers such as Joe Jamail or Phil Corboy might be admired for their success in litigating high profile and high fee cases (Jamail received a reported \$300 million or so from his representation of Pennzoil in its suit against Texaco),⁵ today, lawyers such as Stanley Chesley, Joe Rice, Walter Gauthier, Robert Habush, Michael Ciresi, and John O'Quinn are becoming controversial figures within the plaintiffs' bar, as well as beyond it.

II. CLEAVAGE AND STRATIFICATION WITHIN THE LEGAL PROFESSION

As noted above, while much of the public may view the legal profession as a unitary group, thoughtful observers and scholars have long recognized that the profession is highly fractured. In fact, the legal profession as a single entity is a relatively recent development. Within England, there is still a formal distinction between solicitors and barristers.⁶ Those two branches of the profession emerged through an evolutionary process of merger among a wide variety of specialized groups, including attorneys, scriviners, conveyancers, King's Counsel, sergeants-at-law, and proctors, as well as barristers and solicitors.⁷ While merger and evolution within the English legal profession left only the two branches at the beginning of the nineteenth century,⁸ solicitors and barristers remained highly distinct in terms of both class origins and training. The solicitor's branch was a means of attaining professional status for the sons of the merchant and middle class, largely through a system of apprenticeship. In contrast, the barrister's branch was an occupational outlet for the sons of the gentry (particularly second and later sons who would not inherit the family estate). Such preparation typically involved first obtaining a classical education through "public" schools and degrees from elite universities, followed by a period of gentlemanly association at the Inns of Court where the barristers-to-be attended dinners to listen to

5. See Andrew Blum, *The \$400 Million Man?*, NAT'L L.J., Sept. 26, 1988, at 2.

6. BRIAN ABEL-SMITH & ROBERT STEVENS, *LAWYERS AND THE COURTS: A SOCIOLOGICAL STUDY OF THE ENGLISH LEGAL SYSTEM 1750-1965* 14-17 (1967).

7. *Id.*

8. Actually, there is a small, relatively unique third profession, scrivener-notaries. See Gisela Shaw, *Notaries in England and Wales: Modernising a Profession Frozen in Time*, 7 INT'L J. OF LEGAL PROFESSION 141, 142-43 (2000).

barristers tell them about the art of advocacy. While today, entry into both branches is typically through a university education in law,⁹ elements of these distinctions, particularly the class-related aspects, remain.

A. *Traditional Approaches*

In the United States, class and ethnicity have been a central line of cleavage within the profession at least since the latter part of the nineteenth century. In the first fifty to seventy-five years after independence from England, the legal profession was represented by the image of lawyers like Abraham Lincoln who learned the law through personal study and apprenticeship.¹⁰ By the latter part of the century, the growth of the corporation and the demands for legal services it created led to growing distinctions between lawyers who served the corporate interests and those who worked on behalf of individuals and small businesses. This coincided with the growth of university-based legal education, the organization of the American Bar Association, and pressures to regularize legal training and control entry into the profession. During this period, one saw developments such as the case-method of legal education and the beginnings of the "Cravath" system for corporate law firms.¹¹ In some ways, the growing rift within the profession between those lawyers who championed the interests of workers and the common man and those who derived their income from corporations was epitomized by the controversy over Louis Brandeis's nomination to become the first Jewish person to sit on the United States Supreme Court. Brandeis represented the rise of the immigrant class, although, in fact, Brandeis was from a German-Jewish family that immigrated to the United States before the Civil War.¹² Until well after World War II, it was common to explicitly exclude Jews (and other undesirables) from the "white shoe" corporate firms.¹³ Even in the late twentieth century and the beginning of the

9. RICHARD L. ABEL, *THE LEGAL PROFESSION IN ENGLAND AND WALES* 263-66 (1988); see also Herbert M. Kritzer, *Abel and the Professional Project: The Institutional Analysis of the Legal Profession*, 16 *LAW & SOC. INQ.* 529, 547-48 (1991).

10. This is not to say that the public perception of lawyers was necessarily positive. One aspect of the Jacksonian period was strong opposition to a legal profession as contrary to democratic principles as envisioned by the Jacksonians. See JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 251 (1950); ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES: WITH PARTICULAR REFERENCE TO THE DEVELOPMENT OF BAR ASSOCIATIONS IN THE UNITED STATES* 236-39 (1953).

11. *Id.* at 306-08.

12. PHILLIPA STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 1-4 (1984).

13. See ERWIN O. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 44 (1964); Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in

twenty-first century, these firms are much more likely to draw from the ranks of white Anglo-Saxon Protestants than is the profession as a whole.¹⁴

The most extensive research on stratification in the American legal profession is the work of John Heinz, Edward Laumann, and Robert Nelson. Heinz, Laumann, and Nelson's seminal study of the Chicago bar as of 1975 showed that among lawyers one could identify two distinct "hemispheres," one oriented toward serving large corporate clients (and their wealthy owners and executives) and one oriented to "personal services" (or "personal plight"), including the needs of small family businesses.¹⁵ Lawyers in the corporate-services hemisphere were more likely to come from "establishment" backgrounds, while those in the personal services sector came more from ethnic, working class, and lower middle class backgrounds. The former were likely to have attended elite or near elite law schools, while the latter were likely to have attended state university law schools or law schools associated with other local universities. A replication of the 1975 study, twenty years later, showed that the basic cleavage persisted.¹⁶ Perhaps the most important change was that the corporate hemisphere is consuming an increasing share of legal effort. Where corporate services comprised just over half of legal effort in 1975;¹⁷ by 1995, it consumed about two-thirds of legal effort.¹⁸

A second change noted by Heinz and his colleagues relates to another line of distinction among lawyers, fields of specialization. The Cravath system marked the beginning of specialization within the American bar as we have come to know it today. Heinz and his colleagues report that substantive fields were more distinct in the 1990s than they were in the 1970s, an indicator of ever increasing substan-

LAWYERS' IDEAL/LAWYERS' PRACTICES: TRANSFORMATIONS IN THE AMERICAN LEGAL PROFESSION 31, 39 (Robert Nelson et al. eds., 1992).

14. JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* 136 (2d ed., 1994) (1982). Heinz and his colleagues report that the amount of cleavage along "ethnoreligious" lines declined between 1975 and 1995 within the Chicago bar, but "a considerable amount of ethnoreligious difference . . . remains"; American Bar Foundation, *Taking Stock: Structural Transformations in the Legal Profession and Legal Practice*, 12 RESEARCHING L.: AN ABF UPDATE 1, 2 (2001).

15. HEINZ & LAUMANN, *supra* note 14, at 127-39. Observers of the profession had noted this cleavage early in the twentieth century. See ALFRED Z. REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 237-39 (1921).

16. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 L. & SOC'Y REV. 751, 770-74 (1998).

17. HEINZ & LAUMANN, *supra* note 14, at 24.

18. Heinz et al., *supra* note 16, at 765.

tive specialization among lawyers.¹⁹ There is a fairly clear pecking order among specializations with fields most closely linked to work for large corporations (securities, tax, anti-trust, patents) at the top and fields like divorce and landlord-tenant at the bottom.²⁰

In an analysis of the 1995 Chicago data, Sandefur and Heinz suggest that the market for legal services is becoming more competitive and may be moving toward a "winner-take-all" market.²¹ Winner-take-all markets have two distinguishing characteristics: high rewards are highly concentrated in the hands of a relatively small group of top performers, and those rewards are distributed on the basis of relative, as well as absolute performance.²² Sandefur and Heinz presented evidence showing a huge difference in incomes between the top 10% of performers²³ and the middle 10%.²⁴ Drawing on national census data to compare 1970 and 1990, they reported that the skew (measured as the ratio of the mean to the median) is increasing, going from 1.13 to 1.28;²⁵ for their own Chicago bar data, the corresponding ratio for 1995 is 1.56.²⁶ Sandefur and Heinz also reported that the impact of income on lawyers' satisfaction with their income is linked to market position with those lawyers working in settings with clear pathways of advancement, such as partnership in a corporate law firm, less affected by current income than those in less predictable settings (i.e., practices focused largely on personal services). Using logistic regression, the authors found that the odds of being satisfied or very satisfied with income is multiplied by 1.11 for lawyers in "high business fields" for each additional \$10,000 of income, 1.13 for lawyers in "middle business fields," and 1.20 for lawyers in "low business fields."²⁷

19. For lawyers with substantial practice in some areas, the substantive area is the primary basis of distinction rather than client base. In those areas, it is common for lawyers to have both business and nonbusiness clients, although the business clients may be of the family business variety.

20. HEINZ & LAUMANN, *supra* note 14, at 91; see Rebecca Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor*, 66 AM. SOC. REV. 382, 386-87 (2001).

21. REBECCA L. SANDEFUR & JOHN P. HEINZ, WINNER-TAKE-ALL MARKETS FOR LEGAL SERVICES AND LAWYERS' JOB SATISFACTION (1999) (Am. B. Found., Working Paper No. 9906, 1999). The argument is based in part on ROBERT H. FRANK & PHILIP J. COOK, THE WINNER TAKE ALL SOCIETY: WHY THE FEW AT THE TOP GET SO MUCH MORE THAN THE REST OF US (1995).

22. In other words, being just a little better makes a big difference.

23. The mean income is estimated at \$537,000. *Id.* at 5.

24. The mean income is estimated at about \$82,000. *Id.*

25. *Id.* at 34, tbl. 1.

26. *Id.* at 36, tbl. 1.

27. These multipliers were obtained by exponentiating the logistic regression coefficients shown in Table 6. *Id.* at 39, tbl. 6. This is a standard way of interpreting logistic regression results. See Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 L. & SOC'Y REV. 499, 538-39 (1991).

Using these results, they estimated that 42% of those making \$45,000 while working in a "high business field" are satisfied or very satisfied with their incomes, compared to only 32% of those in "low business fields"; for those making \$162,500, 71% and 80% respectively are satisfied or very satisfied in "high" and "low" business fields.²⁸ The authors found an even larger gap in looking at a second question dealing with the lawyers' satisfaction concerning their chances of advancement; on this question, there is relatively little variation dependent on income for lawyers in practices with high or middling business content (spread from 48% satisfied to 60% satisfied), but quite substantial variation for lawyers in practices in "low business fields" (spread from 39% satisfied to 80% satisfied).

B. Traditional Perspectives on Stratification in the Plaintiffs' Bar

While most research on stratification in the legal profession has distinguished among lawyers from different types of backgrounds or serving different types of clients, a number of scholars have recognized that there are distinctions to be drawn within the plaintiffs' bar itself. While not specifically focused on the plaintiffs' bar per se, Jerome Carlin's study of solo practitioners devoted significant attention to lawyers handling personal injury claims.²⁹ Carlin distinguishes between what he calls the "lower" and "upper" segments of the solo bar handling personal injury cases.³⁰ Lawyers in the lower segment drew their clients largely from a neighborhood or ethnic base and were most likely to handle personal injury cases in the context of a general practice;³¹ lawyers in this lower segment were very concerned about competition for clients.³² In contrast, the "upper" segments of the solo personal injury bar tended to be specialists who frequently drew clients through "suppliers," including referrals from other lawyers;³³ these lawyers were much less concerned about competition for clients.³⁴ Ross's study of the settlement of automobile accident claims also found a clear distinction between lawyers who handled these cases as part of a general practice and those who specialized in negli-

28. SANDEFUR & HEINZ, *supra* note 21, at 39, tbl. 6.

29. JEROME E. CARLIN, *LAWYERS ON THEIR OWN: A STUDY OF INDIVIDUAL PRACTITIONERS IN CHICAGO* 71-91 (1962).

30. *Id.* at 114-16.

31. Most, if not all, of the lawyers in Carlin's study were male.

32. CARLIN, *supra* note 29, at 88-89.

33. *Id.* at 82-91.

34. *Id.* at 89-90.

gence cases.³⁵ In his analysis of claims outcome, Ross found that specialists, which he defined in terms of membership in the predecessor to the Association of Trial Lawyers of America, obtained recoveries that on average were considerably higher than those obtained by other lawyers.³⁶ Rosenthal, in his study of representation in personal injury claims, again found specialists to be more likely (67%) to obtain a "good" result than non-specialists (47%).³⁷ The difference between specialists and non-specialists is by no means limited to the American context, as clearly shown by Genn's study of personal injury claims in England.³⁸

More recent studies of the plaintiffs' bar have emphasized the role of "markets" and link markets to specialization. During the period that Carlin, Ross, and Rosenthal were writing, the market for legal representation for injured persons was essentially local. While there were some occasional exceptions, they typically came through networks of lawyer referrals for fairly rare and high profile cases, such as those arising out of air crash disasters. Advertising and modern communication has changed that. Today, markets for legal services are bounded largely by limitations on legal practice, such as admission to state bars. Instate regional or statewide marketing by plaintiffs' lawyers is now commonplace. Furthermore, certain types of plaintiffs' litigation, most prominently medical malpractice, have come to require increasing levels of substantive expertise combined with significant resources for experts and trial preparation. The result is that the market for personal injury representation is now tiered along several dimensions: geography, size of claim, and substantive expertise. This is most clearly explicated in Van Hoy's study of the plaintiffs' bar in Indiana; Van Hoy distinguished among lawyers who have a local versus statewide client base, lawyers who handle special areas such as medical malpractice and products liability and who tend to be statewide in their practices, and lawyers who limit their practices to "signif-

35. H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 75-78 (1980).

36. *Id.* at 167.

37. DOUGLAS E. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 134 (1974).

38. HAZEL GENN, HARD BARGAINING: OUT OF COURT SETTLEMENT IN PERSONAL INJURY ACTIONS (1987). I should note, however, that my own analysis of plaintiffs' success in cases actually filed in court, albeit in a study not limited to personal injury cases or personal plight cases, did not show any impact of lawyer specialization or lawyer experience; specialization did improve success from the viewpoint of the contingency fee lawyer. See HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 135 (1990). However, in another study, which did include contingency fee lawyers in one setting, I did find that specialization was a very significant factor in effectiveness. See HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 170-86 (1998).

icant" injuries, which he defined as those involving damages of \$15,000 or more, versus those whose practices are primarily composed of "moderate-value injuries."³⁹ While moderate-value, personal injury practices tend to be local in their geographic markets, this is by no means necessarily the case, particularly for high volume firms that rely on extensive advertising. Many of the patterns reported by Van Hoy are also described by Daniels and Martin in their study of the Texas plaintiffs' bar.⁴⁰

III. THE CHANGED NATURE OF THE PLAINTIFFS' BAR

The dimensions of market, specialization, and substantial versus moderate injuries only begin to capture the nature of the stratification that has emerged in the plaintiffs' bar over the last decade. While the vast majority of claims handled by lawyers are well below six figures, today we are seeing cases that can involve nine, ten, or eleven, or in the case of the tobacco litigation, twelve figures: \$206,000,000,000 in the national tobacco settlement⁴¹ or \$145,000,000,000 in punitive damages awarded by a jury in a Florida class action jury verdict.⁴² While these are extreme, they do epitomize the gap that has developed between routine and even very significant litigation, such as "bad baby" medical malpractice cases, and extraordinary cases. What is significant here is that the biggest are getting so big as to represent a different world entirely, different even from what Deborah Hensler has characterized in terms of multiple worlds of tort litigation,⁴³ rather than "multiple worlds" of litigation, perhaps we need to start thinking about "multiple solar systems" or "multiple universes."

In its 2001 survey of the largest jury verdicts for the year 2000, the *National Law Journal* listed sixteen verdicts, not including the Florida tobacco case,⁴⁴ ranging from a low of \$32.9 million to \$122.59 million.⁴⁵ Data reported by Jury Verdict Research (JVR) showed that

39. Jerry Van Hoy, *Markets and Contingency: How Client Markets Influence the Work of Plaintiffs' Personal Injury Lawyers*, 6 INT'L J. LEGAL PROFESSION 345-46, 357-58, 360-62 (1999).

40. Stephen Daniels & Joanne Martin, "It's Darwinism—Survival of the Fittest." *How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 LAW & POL'Y 377, 380-82 (1999).

41. Barry Meir, *Cig. Makers and States Draft a \$206 Billion Deal*, N.Y. TIMES, Nov. 14, 1998, at A1.

42. Margaret Cronin Fisk, *Husband-Wife Team Take On the Tobacco Goliath and Walks Away with a Monster Jury Award*, NAT'L L.J., Feb. 19, 2001, at C14.

43. Deborah R. Hensler, *Reading the Tort Litigation Tea Leaves: What's Going on in the Civil Liability System?*, 16 JUST. SYS. J. 140, 141 (1993).

44. *Engle v. R.J. Reynolds*, 122 F. Supp. 2d 1355, 1358 (S.D. Fla. 2000).

45. The mean is at \$63 million. Margaret Cronin Fisk, *Despite 2000 Slump, Juries Remain Bullish*, NAT'L L.J., Feb. 19, 2001, at C3, C26.

about 12% of personal injury verdicts exceed \$1 million, and that percentage is growing; JVR also found that the median personal injury verdict has been stable over the last seven years at \$50,000.⁴⁶ This is particularly noteworthy given that JVR's database tends to be slanted toward larger cases because of its manner of data collection.⁴⁷ Research has shown clearly that verdicts reported in the press are skewed toward the larger cases;⁴⁸ most people realize that typical jury verdicts are in the thousands rather than the millions.⁴⁹ However, the visibility of large, and now occasionally astronomical, verdicts highlights that there is something different going on in at least some types of litigation.

Patterns of Change

One of the first indicators that change in structure of the plaintiffs' bar is evident is the growth of bureaucratic structures in a small segment of the bar. This growth is actually happening at both the bottom and the top of the case universe. At the bottom, there are now firms designed specifically to process high volumes of low value cases. Van Hoy describes one such firm in Indiana:

46. Andrew Harris, *Report Maps Million Dollar Verdict States*, NAT'L L.J., Feb.12, 2001, at A4.

47. A study of jury verdicts in the 75 largest counties in the United States for 1996 found the median verdict in tort cases to be \$31,000, and that only 5.8% of the tort verdicts exceeded \$1 million. CAROL J. DEFRANCES & MARIKA F.X. LITRAS, *CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES 1996* (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf> (last visited Jan. 5, 2002). These figures actually constitute a decline from 1992, when the comparable figures for the same counties were \$51,000 and 7.8%. Carol J. DeFrances et al., *Civil Jury Cases and Verdicts in Large Counties, 1992* BUREAU OF JUST. STAT. BULL. (U.S. Dep't of Justice, Washington D.C.), July 1995, at 5, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cjcavilc.pdf> (last visited Oct. 1, 2001).

48. See Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 772-774 (1995); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64, 66 (1996).

49. In a recent national survey (n=1,566), I asked respondents,

In addition to deciding guilt and innocence in criminal trials, juries are used in the U. S. to determine liability and the amount of money to be paid in compensation for damages in noncriminal cases. From what you know, can you give me an estimate of the typical or average amount of money that juries award in a personal injury case of the type that arises from auto accidents, injuries from defective products, medical negligence and the like?

About 40% replied that they could not give an estimate; of the 60% of respondents who did give an estimate, the median was \$100,000; 23.8% of the respondents who could provide an estimate gave a figure of \$1 million or more. Eight respondents gave a figure exceeding \$100 million—which seems absurd until you recall that the survey was in the field around the time of the Florida tobacco verdict! See Herbert M. Kritzer, *Public Perceptions of Civil Trial Verdicts*, 85 JUDICATURE 78, 80 (2001).

Greg operates a mass advertising, mass production personal injury practice that is focused almost completely on the firm's home market. The firm employs "about seven secretaries that we train ourselves" who screen the 75-100 calls the firm receives each day from the local television, radio, and telephone book advertising. The secretaries, who are supervised by Greg and one associate attorney, are responsible for working most case files until settlement.⁵⁰

My own interviews with plaintiffs' lawyers in Wisconsin involved contact with lawyers in several such firms; one of those lawyers described how his practice operated by tracing a hypothetical case:

After our initial interview you would go into an interview room. Now I turn it over to a paralegal. She takes the background, she fills out a bunch of forms, finds out all the doctors, where you live, medical background, medical authorizations, has you sign a retainer agreement, wage authorizations, takes pictures of injuries, and then the file goes into our, for lack of a better term, assembly line. We put it into a fairly sophisticated assembly line. Someone takes the interview; it gets entered into a computer system. It starts then going to various different places. If your case, which in a case like this would need investigation, the file including the interview and police report would go to one of the investigators who would immediately try to get statements and interviews, and pin down the facts. We would set it up; we would confirm the insurance. All the people working on the case at this point are nonlawyers . . . the interviewer is a nonlawyer, investigator is a nonlawyer, and everyone is given the following mission: Number one, look at the case, look at the case, look at the case. What risk do we take, what is the assessment of the risk. These persons are trained to look at the files because lawyers will take cases because they want numbers, they want to say I'm a big rainmaker, I've got a lot of cases. So, the paralegals are trained to go to our managing partner and say this is a case I'm involved in and I don't think it looks like a good liability situation, I don't think it looks like a good risk, I don't think there's insurance, I don't think there's a mode of recovery here, the person doesn't appear that injured, and they are told to bring to us and review with us what they think of the case. They know cases as well as lawyers know cases. And we find that clients will tell them [paralegals] stuff that they won't tell us [lawyers].⁵¹

50. Van Hoy, *supra* note 39, at 345.

51. More details on this study can be found in several articles based on the research of Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22 (1997) [hereinafter Kritzer, *Gatekeepers*]; Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 284-303 (1998) [hereinafter Kritzer, *Wages of Risk*]; Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 813 (1998); Herbert M. Kritzer & Jayanth Krishnan, *Lawyers Seeking Clients, Clients Seeking Lawyers: Sources of Contingency Fee Cases and Their Implications for Case Handling*, 21 LAW & POL'Y 347, 349 (1999).

While these firms are bureaucratic in how they operate, they typically involve a small number of lawyers. Galanter has attributed the small size of plaintiffs' firms to a combination of factors, including the personality of lawyers who are very successful as contingency fee litigators ("the 'alpha male' characteristics of many of the most successful plaintiffs' lawyers")⁵² and the nature of the capital involved in plaintiffs' firms, which typically has been highly dependent on the name of an individual lawyer.

However, at the top end of the spectrum, this is changing.⁵³ One aspect of this change is the shift from the individual charisma of the star litigator toward what is more equivalent to "brand names" tied to a firm rather than to an individual lawyer. A firm that has accomplished this in Wisconsin is Habush, Habush, Davis, and Rottier (HHDR). HHDR, with ten offices around Wisconsin and over thirty attorneys,⁵⁴ relies upon a large advertising budget, along with a well-earned reputation for successful representation.⁵⁵ However, while most lawyer advertising focuses on showing pictures of the lawyers, HHDR's advertising tends to focus on satisfied clients by showing pictures of smiling families. HHDR uses a combination of television, radio, and Yellow Pages advertising,⁵⁶ and a significant fraction of the Wisconsin population will spontaneously name the Habush firm as a law firm to contact in case of accidental injury.⁵⁷ In fact, a report about a baseball park construction accident noted that one of the victims of the accident had specifically told his wife some days before his death, in a premonition of what was to happen, "If anything ever happens to me, I want you to call Bob Habush."⁵⁸ HHDR's prominence in Wisconsin is further reflected in the fact that it was one of three firms, probably the lead firm, representing the State of Wisconsin in

52. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and Its Discontents*, 47 DEPAUL L. REV. 457, 471 (1998).

53. On the changing scale of practice on the corporate services side see JOHN P. HEINZ ET AL., *THE SCALE OF JUSTICE: OBSERVATIONS ON THE TRANSFORMATION OF URBAN LAW PRACTICE* (1999) (American Bar Foundation Working Paper #9907); MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991).

54. Information from the firm website, available at <http://www.habush.com> (last visited March 14, 2001).

55. One of the cases listed among the *National Law Journal's* top verdicts of 2000 was a \$99 million dollar award arising from a construction accident at a new baseball park in Milwaukee. Robert Habush was the lawyer who won that award.

56. It has an advertisement on the back cover of the telephone book in most larger towns and cities in Wisconsin.

57. Kritzer & Krishnan, *supra* note 51, at 355.

58. Robert L. Habush, *A 'Typically Relentless' Approach Wins Big*, NAT'L L.J., July 16, 2001, at C9.

the tobacco litigation that led to the \$206 billion multi-state settlement, earning a third or more of the resulting \$75 million fee.

Law firms that litigate huge, complex cases, such as tobacco, breast implant, and the like, require staff and financial resources beyond the scale of the traditional plaintiffs' firms. It is no accident that HHDR was involved in the tobacco litigation; it could bankroll the litigation and even absorb a loss if that had been the end result. It is also no accident that around the country, it was firms such as Robins, Kaplan, Miller & Ciresi in Minnesota, or Ness, Motley, Loadholt, Richardson & Poole in South Carolina, that played lead roles in the tobacco litigation. These firms have both experience in complex litigation and the extensive resources, both in terms of people and money, to handle such cases and their attendant risks. For example, Ness Motley built its resources through its major role in the asbestos litigation that burst onto the national scene twenty years ago. It is an area that continues to be a major part of the firm's practice. Today, Ness Motley is a firm of over seventy lawyers, employs a sizeable support staff, and has a practice of national proportions.⁵⁹ Robins Kaplan, a firm of two hundred lawyers, three hundred support personnel, and offices in five states and Washington, DC, is somewhat different in that its practice goes well beyond personal injury to include business litigation and other areas of business practice; nonetheless, Robins Kaplan lists sixty-six lawyers as practicing in the areas of personal injury, medical malpractice, mass torts, and catastrophe litigation.⁶⁰ Unlike Ness Motley, Robbins Kaplan has long approached plaintiffs' practice in a way that resembles a corporate firm more than the traditional small plaintiffs' firm headed by a single star litigator. At the time that named partner Michael Ciresi was handling hundreds of Dalkon Shield and Copper-7 IUD cases in the 1980s, the firm already had two hundred lawyers, and the importance of these resources was beginning to be recognized; in the words of another lawyer handling large numbers of Copper-7 cases, "Robins, Kaplan is a big firm, and it had the resources to stand toe to toe with Searle. . . . They were able to make the case. We weren't."⁶¹ The importance of the resources of a firm like Robins Kaplan was captured in a news article about the hiring of a top litigator, Jim Fetterly, who specializes in catastrophe

59. While the firm has offices in only four states, lawyers in the firm are licensed to practice in 20 states.

60. Information obtained from the Robins Kaplan website, available at <http://www.rkmc.com> (visited March 13, 2001).

61. Julia Flynn Sier, *Liability Litigator: Michael Ciresi; Winning with Hard Work and Histrionics*, N.Y. TIMES, October 9, 1988, § 3, at 6.

cases, such as the MGM Grand fire in Las Vegas. Fetterly closed his own ten-attorney boutique firm because the resources required to represent clients had begun to exceed the firm's ability to finance cases.⁶²

While in some ways Robins Kaplan is unique, in others it is not. There is an increasing number of firms that specialize in litigation in a way that includes both large scale commercial litigation (typically done on an hourly basis) and high visibility plaintiffs' class action done on a contingency basis. Such firms include Boies, Schiller & Flexner with one hundred lawyer offices in ten cities,⁶³ and Susman Godfrey with more than fifty lawyers headquartered in Houston.⁶⁴ In addition, there are firms that specialize in plaintiffs' class action such as Lief, Cabraser, Heimann & Bernstein with forty-five lawyers based in San Francisco and Waite, Schneider, Bayless & Chesley with sixteen lawyers based in Cincinnati.

Central to all of these firms is resources: the ability to bring to bear substantial legal effort and to deal with the cost of extended, monster-scale litigation. These are repeat players in the truest sense of the concept.⁶⁵ Like the traditional repeat players on the defense, they are in the game for the long term and have the resources to sustain cases that, until recently, would have bankrupted virtually any lawyer or plaintiffs' law firm.⁶⁶ While in the past, one might have started with the assumption that the defendant had the resources to swamp the plaintiff, these firms have accumulated sufficient capital through major victories in cases such as asbestos, tobacco, Dalkon Shield, etc., so that it may well be the plaintiff that is in the stronger resource position. Having greater resources does not ensure victory, as evidenced by the lack of success in recent cases brought against the gun industry by lawyers bankrolled with tobacco winnings,⁶⁷ but losing is something these firms can now afford.

62. David Phelps, *Robins, Kaplan Catastrophic Group Adds Firepower of Top Litigator Jim Fetterly*, STAR TRIBUNE (Minneapolis), January 28, 2001 at D1.

63. Michael D. Goldhaber, *Boies Schiller's Big Year*, NAT'L L.J., February 12, 2001 at A1.

64. Information from firm website, available at <http://susmangodfrey.com/Default.htm>, (last visited March 14, 2001).

65. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97-98 (1974).

66. JONATHAN HARR, A CIVIL ACTION 123-32 (1995).

67. See Bob Van Voris, *Gun Cases Use Tobacco Know-How; the Sequel*, NAT'L L.J., Dec. 7, 1998, at A1; Richard Turbin, *Gun Manufacturers in Plaintiffs' Sights*, NAT'L L.J., Aug. 9, 1999, at B20; Elizabeth Amon, *Cincinnati Gun Suit Fires a Dud*, NAT'L L.J., Sept. 4, 2000, at A10; Robert Levy, *Blackmail of Gun Makers*, NAT'L L.J., Jan. 31, 2000, at A20; Shannon P. Duffy, *Philly Loses Its Gun Maker Suit*, NAT'L L.J., Jan. 8, 2001 at A4.

IV. THE IMPACT OF THE DIVISIONS WITHIN THE PLAINTIFFS' BAR

While competition is nothing new within the plaintiffs' bar, it now functions in a way that differs from competition of the past. The plaintiffs' firms with large bankrolls have a capability to dominate the market for profitable cases in a way that was not previously possible. The largest of the bankrolls has accrued to the firms that took on the tobacco cases, and they are now beginning to use those bankrolls to open new avenues of litigation.

Traditionally, within a highly competitive market for clients and cases, the plaintiffs' bar has nonetheless seen itself as sharing common interests: the need for sympathetic judges,⁶⁸ the need for rules that favor plaintiffs,⁶⁹ restrictions on client solicitation and advertising, and general opposition to various aspects of tort reform, such as limitations on the contingent fee, limitations on various types of damages, such as punitive damages, noneconomic damages, changes to the American rule on fee shifting, eliminating joint and several liability, and statutes of repose. The general assumption is that if a change might hurt some plaintiffs' lawyers' clients and, thus, hurt those lawyers themselves, it must be bad for all plaintiffs and all plaintiffs' lawyers. In fact, what is in the interest of one segment of the plaintiffs' bar need not be in the interest of other segments.

A. *Income Stratification*

The "winner-take-all" market discussed above presents one line of cleavage within the bar. Recall Sandefur and Heinz's analysis of the relationship between income and satisfaction with income: they estimated that 40% of those making \$45,000 working in a "high business field" are satisfied or very satisfied with their incomes, compared to only 32% of those in "low business fields"; for those making \$162,500, 72% and 80% respectively are satisfied or very satisfied in "high" and "low" business fields.⁷⁰ At my request, Rebecca Sandefur reran the analysis for lawyers who devoted 25% or more of their practice to plaintiffs' personal injury work and for those who devoted 50% or more to this area. While the number of respondents was small, forty-eight and thirty-seven for the two groups respectively, the impact of income was much greater than for even the low business fields group

68. See RICHARD A. WATSON & RONDAL G. DOWNING, *THE POLITICS OF THE BENCH AND BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN* (1969); Anthony Champagne & Kyle Cheek, *PACs and Judicial Politics in Texas*, 80 *JUDICATURE* 26, 26 (1996).

69. Albert Lipson, *California Enacts Prejudgment Interest: A Case Study of Legislative Action* (1984) [RAND Report].

70. SANDEFUR & HEINZ, *supra* note 21.

looked at by Sandefur and Heinz. For those whose practice was 50% or more plaintiffs' personal injury, an estimated 15% of those making \$45,000 were satisfied with their income compared to 97% making \$162,500; expanding the group to include those with 25% or more plaintiffs' personal injury produced corresponding figures of 23% and 93%.

One interpretation of these figures is that those at the lower end of the income range among plaintiffs' personal injury practitioners look at those who are doing extremely well and feel an acute sense of relative deprivation. This is consistent with the "winner-take-all" image. It may also reflect a sense that the chances for moving up significantly in income do not seem particularly positive; however, it might also mean that the lawyers in this area are very ambitious in terms of income and simply have not begun to achieve their expected goals.

B. *Direct Mailers Versus the Brand Names*

One clear example of conflict with the plaintiffs' bar involves the limitations on client solicitation. Those law firms that have invested heavily in advertising and have, through that medium, established themselves as a "brand name" have a strong incentive to try to limit the ability of other lawyers to reach out to clients via direct mail contacts in the wake of an injury producing accident. The "brand name" firms want potential clients to think of them first; receiving a mail solicitation from another firm has a significant likelihood of diverting the potential client to the mailer when, otherwise, the potential client might have called the "brand name" firm.

It may well be the case that the kinds of clients that the "brand name" firm wants differ from those of the direct mailer. That is, the brand name and direct mailer firms may not actually be in all that much competition for clients *most of the time*; however, the "brand name" wants first crack at the client. Moreover, the kinds of clients the "brand name" wants (i.e., clients with significant damages and fairly clear liability) are more likely to want to see a lawyer before considering a settlement than many, if not most, of the direct mailer's potential clients; those clients, with relatively lesser damages and less clear liability, are prime targets for quick and early settlements offered by a seemingly friendly and sympathetic insurance adjuster. Most limitations on direct mail bar such contacts by attorneys for thirty days after an injury producing accident; this is prime time for insurance adjusters to contact injury victims and try to reach a quick, and almost certainly advantageous from the insurer's perspective, set-

tlement.⁷¹ The injury victims most likely to settle at this stage are the bread-and-butter clients of the direct mailers, but may be of much less importance to the “brand name” firms. Of course, the “brand name” firms will express their opposition to direct mail not in terms of their own interests, but rather in terms of professional dignity or concerns about “ambulance chasing.”

C. *Those Handling Speculative Litigation Versus Those Handling Routine Litigation*

More important, particularly in terms of understanding the impact of litigation such as the tobacco litigation on the plaintiffs' bar, is the distinction between high risk, high return, speculative litigation, and low risk, low return, routine litigation. The lawyers who undertook the current round of tobacco cases were incurring significant risks: no one had ever prevailed in personal injury cases against the tobacco industry when the injury arose from the long-term exposure to tobacco products. In fact, it was not until 2001 that any individual had actually collected money as compensation for an injury caused by their own smoking. The lawyers who undertook these suits combined a kind of risk sharing pool and significant firm-specific resources to make the litigation viable. States turned to contingency fee arrangements as a way of eliminating their own risks of having to devote substantial dollars or other resources to the litigation. The tobacco industry poured many millions of dollars into legal fees and expert consultant fees to fight the cases brought against them. Imagine what difference it might have made if the states or their contingency fee lawyers had been at risk of having to pay a significant portion of the tobacco industry's legal expenses? It is hard to imagine that the litigation could have gone forward under that circumstance.

1. *Fee Shifting*

Generally, it is assumed that fee shifting rules are bad for plaintiffs; I have made that argument in my own writing.⁷² However, the little real empirical research that has been done on the subject in the U.S. context of contingency fees shows that the picture is more complex.⁷³

71. Insurance adjusters are also under pressure to close claims quickly simply as a measure of productivity. See ROSS, *supra* note 35, at 59-60.

72. Herbert M. Kritzer, *The English Rule*, 78 A.B.A. J. 54 (1992); Herbert M. Kritzer, *Fee Arrangements and Fee Shifting: Lessons from the Experience in Ontario*, 47 LAW & CONTEMP. PROBS. 125, 136-37 (1984).

73. See James W. Hughes & Edward A. Snyder, *Litigation and Settlement under the English and American Rules: Theory and Evidence*, 38 J. L. & ECON. 225, 234-48 (1995); SUSANNE DI

While fee shifting does create disincentives to litigate, particularly for persons in the middle class who have assets that could be used to satisfy a fee award, it also strengthens the hand of the plaintiff who has a good case by effectively increasing the value of the case. Furthermore, one can imagine fee shifting regimes that include insurance for plaintiffs against the downside risk of losing and having to pay the other side's fee.⁷⁴

For example, imagine a system where the lawyer agreed to bear the plaintiffs' downside risk in return for receiving the "shifted" fees in addition to the commission fee that we call a contingency fee. We already know that most contingency fee lawyers decline most relatively risky cases, and the key risk contingency fee practitioners face is in terms of how much of their time a case will require and how much of a fee they will actually receive.⁷⁵ A significant percentage of cases are declined because the amount that the lawyer estimates can be recovered will not yield a fee sufficient to cover the lawyer's time.⁷⁶ If the lawyer's fee were to include both the percentage of the recovery and an amount paid by the defendant, the calculation changes. While the defendant's ability to recover some of its costs from the plaintiff or the plaintiff's lawyer, if a case results in a verdict for the defendant, will lead some defendants in some cases to litigate rather than settle, it is also true that the ability to recover costs from the defendant if the case goes to trial will make a plaintiff's lawyer's threat to go to trial more credible in a modest case. Furthermore, the additional fee will mean that many valid cases that today are not economical for a lawyer to handle will have the potential of producing a satisfactory fee. Some of these cases may be quite significant and relatively clear on liability, but simply uneconomical given current defendant practices (e.g., modest but reasonably clear cut medical malpractice cases).

A lawyer-financed fee shifting system would be very problematic for lawyers who handle speculative cases that produce fees in eight figures or more. This litigation is speculative simply because of the risks involved. Settlements occur, in part, because the defendants per-

PIETRO, ET AL., ALASKA'S ENGLISH RULE: ATTORNEY'S FEE SHIFTING IN CIVIL CASES 100-23 (1995); Susan Di Pietro, *The English Rule at Work in Alaska*, 80 JUDICATURE 88, 89 (1996).

74. These kinds of insurance schemes have been developed in England over the last half dozen years in conjunction with the introduction of a form of contingency fee that is labeled a "conditional fee"; see Jill Papworth, *Policies to Stop You Footing the Bill After the Damage Is Done*, GUARDIAN, London, May 30, 1998, at 7; STELLA YARROW & PAMELA ABRAMS, SUMMARY: NOTHING TO LOSE: CLIENTS' EXPERIENCES OF USING CONDITIONAL FEES 10 (1999) (report published by School of Law, University of Westminster); ACCESS TO JUSTICE WITH CONDITIONAL FEES [A Lord Chancellor's Department Consultation Paper] §4.13 (1998).

75. Kritzer, *The Wages of Risk*, *supra* note 51, at 267.

76. Kritzer, *Gatekeepers*, *supra* note 51, at 22.

ceive the potential cost of losing as being so high that they make a considered business judgment about the potential costs of losing and litigating and the risks associated with them.⁷⁷ Plaintiffs' lawyers can pursue these cases because what they put at risk is considerably less than it would be under a fee-shifting system where they covered their clients' downside risk. For the lawyers handling high risk cases, a fee shifting regime such as I describe would make such cases much less attractive.

2. *Damage Caps*

The plaintiffs' bar has been united in its opposition to caps on punitive damages and other types of noneconomic damages, such as compensation for pain and suffering. Typical caps that have been proposed have been on the order of \$250,000 and/or some link to the amount of economic loss.⁷⁸ For most lawyers handling personal injury cases, these caps are essentially irrelevant. For such caps to be relevant, two conditions are necessary; the injuries must be such that the lawyer can justify either a large punitive award or a large pain and suffering award, and there must be a source of payment for a large award.

Punitive awards in personal injury cases are quite uncommon, and even when they do occur, they tend toward the modest side; in 1992, less than 1% of plaintiff verdicts in tort cases in seventy-five large counties produced punitive awards exceeding \$250,000,⁷⁹ and in 1996, the figure was considerably less than 1%.⁸⁰

As for pain and suffering awards, economic damages drive most awards and settlements, combined with a source of compensation. The most common source of compensation is another driver's insurance policy, and most of these have damage limits well below the caps that have been discussed. The problem for most lawyers is making a case for significant pain and suffering damages. One could readily imagine reforms in noneconomic damages that would actually work to the advantage of most lawyers: place some limits at the upper end, but

77. An excellent example of this kind of decision can be seen in the litigation over Bendectin. Ultimately Merrill Dow prevailed but the company sought to avoid the costs of litigation and the potential costs of losing by agreeing to a \$180 million settlement. The litigation proceeded because the class certification that was central to that settlement was thrown out by the Sixth Circuit Court of Appeals. On the history of the Bendectin litigation see JOSEPH SANDERS, *BENDECTIN ON TRIAL: A STUDY OF MASS TORT LITIGATION* 35-39 (1998).

78. Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 *CAP. U.L. REV.* 701, 726 (1997).

79. DeFrances, et al., *supra* note 47, at 8.

80. DEFRANCES & LITRAS, *supra* note 47, at 9.

permit plaintiffs' lawyers to prove pain and suffering through per diem arguments; or alternatively, set some statutory guideline for noneconomic damages in routine cases that is indexed to the cost of living. The idea that some mechanism other than juries would be used to set noneconomic damages is an anathema to most plaintiffs' lawyers, but for those working with low end, routine injuries something other than the "shadow of the jury" might be more effective and actually produce increased compensation for injuries where pain is a major component. While there is an assumption that juries are more favorable to plaintiffs than are judges, empirical evidence is beginning to mount that calls that assumption into question.⁸¹

These arguments may also apply for major medical malpractice cases. The cases in which the largest damages are paid are not driven by pain and suffering but by the high cost of long-term intensive medical care. The standard line about punitive damages and noneconomic damages is that it is the threat of huge awards that convince defendants and insurers to make realistic settlement offers for economic damages. However, in most types of cases, the threat of massive economic damages associated with long-term medical care is more than enough to convince a defendant to settle these cases. Again, the assumption that juries are the key to reasonable compensation may not be true in medical malpractice cases. In 1996, the median medical malpractice award by a judge was \$454,000 compared to about half that (\$254,000) by a jury.⁸² Similarly, judges found for plaintiffs in 38% of medical malpractice trials compared to juries, which found for plaintiffs in only 23% of trials.⁸³

Given that the controversy over damage caps is often tied to "out of control juries," one might imagine a situation where a compromise over damage caps might be that such caps would apply only to jury trials requested by plaintiffs. That is, if a plaintiff agreed to have a case tried by a judge, then no cap would apply. A defendant could

81. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1125-26 (1992); William Glaberson, *A Study's Verdict: Jury Awards Are Not Out of Control*, N.Y. TIMES, August 6, 2001, at A9 (reporting on forthcoming study by Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. (forthcoming March 2002)). I have been told by a number of plaintiffs' lawyers that, in today's climate, they would just as soon try a routine soft tissue injury case to a judge than to a jury. In fact, 1996 verdict data from the 75 largest counties in the U.S. show that in automobile tort cases, the median award by judges was higher (\$20,000) than the median award by juries (\$18,000), and that judges's verdicts were more likely to exceed \$250,000 (12.2% versus 8.4%) or \$1 million (7.1% versus 3.0%) than were juries. See DEFRANCES & LITRAS, *supra* note 47, at 8.

82. DEFRANCES & LITRAS, *supra* note 47, at 8.

83. *Id.* at 6.

insist on a jury trial, but in doing so, the defendant would waive any damage caps.⁸⁴

This type of compromise might be very attractive to lawyers handling large cases other than what I have termed “speculative” cases. It is in the most speculative cases where the uncertainty about extreme jury verdicts is most important, and the type of limitation I described would be most threatening to those lawyers.

V. CONCLUSION

The legal profession in the United States is heterogeneous along many dimensions, ranging from social background to clientele. While members of the profession ostensibly share a background of legal training and an interest in the well-being of the profession, this commonality is eclipsed by cleavages that range from economic interest to political outlook. Within the swirl of diverging views and interests, the plaintiffs’ bar, a.k.a. “trial lawyers,” might seem to be a group of lawyers with a strong shared core of interests and outlooks. Politically, the organized plaintiffs’ bar has supported politicians, most often Democrats, who oppose changes in the civil justice system that, on first view, seem anti-plaintiff. How real is this supposed commonality of interest?

In this Article, I have discussed recent developments that begin to raise questions about the commonality of interests within the range of lawyers who represent plaintiffs on a contingency basis. The kinds of cases handled by identifiable subgroups within the plaintiffs’ bar differ in ways that reflect conflicts of interest with other plaintiffs’ lawyers rather than commonalities. I have illustrated these conflicts by looking at a variety of issues on most of which the plaintiffs’ bar has traditionally taken a united stand:

- fee shifting (losers pay)
- damage caps
- right to jury trial
- client solicitation

In discussing these various issues, I have outlined ways in which changes might be made that would be advantageous to some segments of the plaintiffs’ bar and their clients, but disadvantageous to other segments. Some of the “proposals” I have advanced would be significant departures from current practice, and none of them are by any

84. I am not proposing this as a system change. There are a variety of side impacts that would need to be examined, the most obvious of which would be the increased role of judges, and the implications of that for judicial selection processes.

means fully developed as policy proposals to be considered in the immediate future. However, they do provide a prism to help us think about the conflicts within the plaintiffs' bar.

What difference will it make when and if the plaintiffs' bar begins to realize the nature of these conflicts? One possible insight into that question is the one example listed above where conflict has already occurred: client solicitation. Generally, the "establishment" of the plaintiffs' bar, lawyers who tend to be extremely successful practitioners who have no need to rely upon direct mail, has sought to take the supposed "high" road by endorsing strictures on direct solicitation. The primary defenders of direct mail are those who do use it, or think they might use it at some point in the future. Most plaintiffs' lawyers sit on the sideline of this battle, if for no other reason that a letter from an unknown plaintiffs' lawyer may lead someone to contact *them* based upon their local reputation because the injured person was prompted by the letter to "ask around" for an idea of lawyers to contact.⁸⁵ In other words, the split within the plaintiffs' bar is right where one would expect to find it: in the wallet. There is no reason to expect differing responses should some of the other issues I have outlined arise.

The practice of law is "a changin'," to paraphrase Bob Dylan. The economic structures that have governed the work of the personal services sector is shifting in significant ways in the United States and in other countries as well.⁸⁶ While the underlying causes of change are complex, the result is the transformation of the economics of personal services practice. The common result will be increasing stratification and conflict among lawyers who previously shared a set of interests because of the common plight of their client base.

85. In fact, one survey of recipients of direct mail found that only 11 percent of those recipients who hired a lawyer actually hired a lawyer from whom they had received a mailing. Some significant percentage beyond the 11 percent undoubtedly were prompted to contact a lawyer by the letter. See Kritzer & Krishnan, *Lawyers Seeking Clients*, *supra* note 51, at 353.

86. For an extension of the arguments presented in this paper to England, see Herbert M. Kritzer, *The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers* (paper presented at the W.G. Hart Workshop, Institute for Advanced Legal Studies, London, England, June 26-28, 2001; available at <http://www.polisci.wisc.edu/~kritzer/research/legalprof/hart.pdf>) (last visited Oct. 22, 2001). This paper will appear in the *International Journal of the Legal Profession* in 2002 or 2003.