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If There Be a Crisis, How Shall We Know It?

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IF THERE BE A CRISIS, HOW SHALL WE KNOW IT?

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Legal policy-making often goes on in grand indifference to—and occasionally even in defiance of—available relevant empirical evidence. That is no revelation, of course, and the litigation explosion appears to provide one more excellent illustration of the point. If we are to understand and solve such problems, it will help us to have them accurately described, to have theory and data to assist us in attributing the problems to their true causes, and to implement and test proposed solutions with an empiricist's curiosity rather than a reformer's zeal. I will explain why I think Professor Galanter's article[1] both contributes to this effort and distracts us from it. I will also address an issue he does no more than touch upon, but which may be the most interesting and important question of all: why does legal policy-making so often proceed without regard to available evidence on the matter? Or, to echo the realist theme, what is *really* going on here?

I. EMPIRICAL EVIDENCE OF THE PROBLEM AND ITS CAUSES

One of the most important aspects of this as well as related earlier articles by Professor Galanter[2] and his colleagues[3] is that they inquire into the degree to which relevant empirical evidence supports the claims made concerning a litigation explosion, and they share with us the findings of that inquiry. The explosion appears to be more rhetorical than real.

Those offering wholesale condemnation of our civil justice system, and counseling a variety of reforms ranging from tinkering to

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1. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

2. *E.g.*, 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).

3. *E.g.*, Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (analyzing empirical evidence for proposition that costs of litigation are rising and that these costs are an important public problem) [hereinafter Trubek].

radical alteration, are confident they know a serious problem exists and, what is more, they know its causes.[4] Their language is so strong and so clear that one hesitates to doubt the accuracy of their vision. But in support of their views, they generally offer little more than unsupported assertions or anecdotes, examples of which Professor Galanter has cited. Mere assertion is simply that, and repeating something often or enlarging the chorus does not make it any more true.

As I have noted elsewhere,[5] government by anecdote is a bad idea not because the anecdotes are untrue or are not evidence (though sometimes they are untrue and therefore are not evidence),[6] but because they contribute so little to developing a clear picture of the situation we are concerned about. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, zero, ten, one hundred, one thousand, or ten thousand equal and opposite injustices were done to deserving and innocent plaintiffs.[7] The proportion of cases that results in some sort of error,[8] and the ratio of one kind of error to the other, ought to be of greater interest to a serious policy-maker than a handful of anecdotes on either side of an issue. After all, the reforms to be adopted are intended to change that ratio and the tens of thousands of anecdotes it summarizes.

This brings us, then, to the kind of information that should form the core of the debate: data. If the explosion is real and the

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4. *See, e.g.*, those quoted in Galanter, *supra* note 1, at notes 1-10 and accompanying text.

5. Saks, *In Search of "The Lawsuit Crisis,"* 14(2) L. MED. & HEALTH CARE 77 (1986).

6. I know that lawyers, for whom evidence is evidence whether it is true or false, will find this to be a strange construction. But the rest of humanity, not only social science empiricists, will instantly understand what I mean here.

7. The rhetoric of the liability crisis would have us believe that our tort system frequently rewards plaintiffs without valid claims. Nothing is said about the obverse error, i.e., the failure of our tort system to compensate plaintiffs with valid claims. We do not in fact know the magnitude of this obverse error, but as we will see, *infra* pp. 69-72, there is evidence it is very great.

8. What is an error? This is obviously a difficult question. Arguably, the "real" merits of most, if not all, claims are subject to dispute and are not knowable with certainty. For present purposes, however, it is sufficient to rely on what may reasonably be predicted to be the outcome of a fair trial as the ultimate test of a claim's merit. Our civil justice system, by this definition, generates error when a meritorious claim (i.e., one that would, if fairly tried, win a verdict and damages) is never pursued at all or if brought to court does not prevail or is settled for less than its potential fair-trial damages award. An erroneous result is also generated when an unmeritorious claim is pursued and wins a verdict and damages, or is settled for any amount, or imposes defense costs on an innocent defendant. Obviously, data compiled in accordance with these concepts of error are not readily available.

crisis serious, it should not be difficult to find data confirming those fears. In this regard, Professor Galanter makes two important contributions to the liability crisis debate. He summarizes some important data, and he helps us to think about what they mean.

Conscientious policy-makers will be interested to learn that 98% of civil litigation goes on in state courts, that those filings have *declined* in the past several years, and that even tort filings have increased only 1% more than population growth.[9] Those urging reform, when they do point to data, usually point to the 2% of litigation that is handled by federal courts. Professor Galanter helps us to interpret the meaning of those federal data,[10] which show a 123% increase in filings over the past decade.

First of all, he notes that an increase in filings is not necessarily a reflection of an increase in plaintiffs' "litigiousness." Changes in filing rates are equally a reflection of defendants' resistance to resolving disputes short of litigation. The filing rate reflects, as well, the volume of transactions, the number of actionable injuries resulting from those transactions, lawyers' case-screening practices, and, no doubt, numerous other variables.[11] Any real understanding of what is going on requires knowing what lies behind and gives rise to any change (or stability) in filing rates.

Moreover, Professor Galanter shows us that the 123% increase

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9. Galanter, *supra* note 1, at 6. Lest we think that legislative ignorance about basic legislative facts is limited to the area of tort reform, consider the following. A survey of Wyoming state legislators found that they believed the insanity defense was invoked 44 times as often as it actually was and succeeded 3000 times as often as it actually did. Pasewark & Pasewark, *The Insanity Plea: Much Ado About Little*, in PSYCHIATRIC PATIENT RIGHTS AND PATIENT ADVOCACY: ISSUES AND EVIDENCE 101, 116 (B. Bloom & S. Asher eds. 1982).

10. Professor Galanter points out that in the context of litigation rates the statistical "facts" can never stand without a theory: "In discussions of policy, figures like litigation rates *are* theories . . . ." Galanter, *supra* note 1, at 15. (I would go further, and argue that this is true of all data.) In practical terms, this admonition means that data cannot be taken at face value. The definitions and assumptions and methods and context that give rise to the data must be thought through. Professor Galanter does a careful job helping us to think about what the numbers may mean.

11. It is interesting to consider what key factors might compose a model of what drives variations in litigation rates: population, number or complexity of human transactions, etc. Even with a steady population, increasing the number of times people do business with or drive past each other is likely to give rise to increasing numbers of disputes and consequential suits. Population itself may provide only a crude statistical control. Productivity, or perhaps sheer activity, probably would come closer to controlling for the social changes that drive litigation. Consider the relations between doctors and patients. If, as a result of new treatments, new ways of delivering health care, new forms of payment, and other efficiencies, doctors are able to have more contacts with patients per unit time, the result should not only be more health care delivered and more fees earned, but simultaneously more injuries, more disputes, and more lawsuits.

means something other than appears at first blush. By disaggregating those cases into the categories supplied by the Administrative Office of the United States Courts, Professor Galanter finds that it is the federal government itself that has added by far the largest fraction of the increase in litigation, having increased its filings (of overpayment recoveries) by 6,683%![12] Except for products liability (of which one-fourth were asbestos claims, now waning), the federal caseload for tort cases has been fairly stable.

These are but a few illustrations of the way Professor Galanter, and other empirically oriented legal scholars, force us to deal with the evidence of the world we propose to reshape through law reform. We need not limit policy debates to a mutually uninformative swapping of anecdotes or a heated exchange of quotations. In my view, it is enormously helpful to inform ourselves about our world empirically, and to think intelligently about the alternative interpretations of the relevant empirical data.[13]

That the topographic map of vociferous reformers is not consistent with the most fundamental features of the landscape over which they presume to reign should give us all pause. If their assessment of our condition—the easiest part of problem-solving—can be so inconsistent with the evidence, we might well be hesitant to accept their diagnosis of causes and their prescribed treatment.

II. BUT WHAT IS "THE PROBLEM"?

In showing that there has been no general litigation explosion to speak of, has Professor Galanter shown that there is no problem? That depends upon what problem we are worried about. The insurance industry, most notably, has been telling the public and our legislators that there is a liability insurance crisis and that its cause, *inter alia*, is a litigation explosion.[14] Professor Galanter makes a strong case that, if nothing else, the liability crisis cannot be due to a litiga-

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12. Galanter, *supra* note 1, at 16 & 23 Tables 2 & 3. Pursuant to the Comprehensive Crime Control Act of 1984, the advent of the United States Sentencing Commission, sentencing guidelines, the abolition of parole, and the right to appeal sentences will, I am sure, provide another government-induced boost in the amount of litigation in the federal courts.

13. "[T]here is no substitute for *patient attendance to the empirical facts of life*, and no substitute for systematic reasoning about them." P. SAMUELSON, ECONOMICS 10 (10th ed. 1976) (emphasis in original).

14. *See, e.g.*, INSURANCE INFORMATION INST., THE LAWSUIT CRISIS 2 (Apr. 1986) ("[T]he number of personal injury, product liability or property damage suits . . . has created a crisis . . . ."). The insurance industry is making its views known, among other ways, through a $6.5 million advertising campaign. *The Manufactured Crisis*, 51 CONSUMER REP. 544, 545 (Aug. 1986).

tion explosion because there is none. But finding out that the liability problem has been attributed to the wrong causes does not make it go away.

The liability problem remains. Insurance premiums have been going up, coverage is becoming harder to find, and the insurance industry appears to have lost money, at least in some years.[15] The industry officials and legislators quoted in Professor Galanter's article complain about rising costs and threats to industry at least as much as they accuse the average American of causing the problem by being so litigious. The problems of unavailable or too-costly insurance are no less real, and require analysis and solution. They may not be due to an increase in litigation rates, but they are due to something, be it increasing unpredictability in jury awards,[16] stock market fluctuation, interest rate declines, mismanagement, collusion, or whatever.

Burdens on the civil justice system remain. The civil justice system suffers increased demands from the growth in cases, even if the growth is exactly proportional to population. Even absolute growth puts increasing demands on the system to handle the new business—demands that are not being met by enlarged judicial resources, and perhaps cannot be.[17] As we see from Galanter's Table 4, caseloads have been increasing faster than judgeships.[18]

Serious flaws in the tort system remain. The final judgment of the tort system may be that it is an unacceptably imperfect way to achieve the goals we have set for it. It is, in several senses, an inefficient means for allocating resources to injured people. It is uneven in its ability to compensate: a relatively few plaintiffs strike it rich in the tort lottery; a much larger proportion of injured people obtain inadequate compensation or none at all.[19] And the transaction costs

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15. These numbers are difficult to pin down. While the liability insurance industry experienced underwriting losses of $21.5 billion in 1984 and $24.7 billion in 1985, it made a profit in the former but not in the latter year. *The Manufactured Crisis*, *supra* note 14, at 544. In many years it pays out more in claims and expenses than it takes in premiums. Whether it makes a profit or not depends upon how successfully it invests the money between the time the premiums are received and the claims are paid. When investment opportunities are good, the industry can lower its premiums, have larger underwriting losses, *and* make larger profits.

16. See discussion, *infra* pp. 75-76, on the increase in unpredictability and its causes.

17. Merely adding judgeships may not solve all of the problems of even a flat per capita caseload. The system may suffer from inefficiencies of scale, routinization, poor management, poor case handling, poor quality of justice, and so on. Even without a crisis, reform of judicial administration may be necessary.

18. To be precise, 122.9% vs. 29.2%. Galanter, *supra* note 1, at 6 & 26 Tables 1 & 4.

19. *See* D. HARRIS, M. MACLEAN, H. GENN, S. LLOYD-BOSTOCK, P. FENN, P. CORFIELD

are enormous: a small portion of the total expense of the tort system winds up compensating injured plaintiffs; a large portion is spent on insurers, shareholders, lawyers, experts, and courts.[20]

In short, while "litigiousness"—judging from the data—does not appear to be a problem for society, problems involving the liability system do remain. We do not know nearly enough about them or their causes, or what to do to improve matters. Is such a system worth what society has to pay for it? Does it provide the best mix of goal attainment—cost-spreading, deterrence, minimizing safety costs, minimizing injury costs, redistribution—that can be achieved?

III. How Do We Go About Evaluating the Tort System?

Professor Galanter suggests that one needs to view the civil justice system in a fairly complex way, that its effects on both litigants (through specific deterrence and law-controlled wealth transfers) and on others arranging their lives in the shadow of the law (general deterrence) need to be assessed as part of any discussion of whether on balance the tort system is working well—and, more to the point, working better than the alternatives being proposed for it. I agree.[21]

But we cannot evaluate any system if we are not in agreement about what its goals really are, and the goals of tort law are not without some controversy. What we might do is ask, and try to obtain empirical answers, about the degree to which the tort system is achieving a number of its possible goals. If it is a deterrence system,

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& Y. BRITTAN, COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY (1984) [hereinafter HARRIS]. This comprehensive empirical study, which found that only a small minority—12%—of all accident victims initiate legal claims and obtain damages for their losses, *id.* at 317, was based on British data. Given significant differences between the British tort system and our own, these results cannot be extrapolated without qualification; but, given the underlying similarities of the two systems, the results point to serious flaws in both systems. *See generally* Abel, *£'s of Cure, Ounces of Prevention* (Book Review), 73 CALIF. L. REV. 1003 (1985) (reviewing HARRIS and also discussing relevant American research). *But see* Kornhauser, *Theory and Fact in the Law of Accidents* (Book Review), 73 CALIF. L. REV. 1024, 1029 (1985) (arguing that several factors suggest the American tort system provides more compensation than does the British system).

20. For example, a study by the Rand Corporation's Institute for Civil Justice found that of every dollar paid out in asbestos claims, an average of 62 cents went to attorney's fees and litigation expenses. *See* REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 42 (Feb. 1986) (citing J. KAKALIK, P. EBENER, W. FELSTINER, G. HAGGSTROM & M. SHANLEY, VARIATIONS IN ASBESTOS LITIGATION COMPENSATION AND EXPENSES xviii (1984)).

21. Melton & Saks, *The Law as an Instrument of Socialization and Social Control*, 33 NEB. SYMP. ON MOTIVATION 235 (1985).

how well is it deterring? If it is a compensation system, how well is it compensating? If it is a cost-spreading system, how well is it spreading costs?

Suppose we wanted to evaluate the extent to which the tort system is compensating injured persons, doing so with a measure of efficiency, while creating an effective deterrent. One aspect of such an inquiry might look to the correspondence between the incidence of actionable injuries and the compensation awarded to the victims. Those with a valid claim to compensation under the substantive rules of tort law should win compensation if they seek it, and those without a valid claim should not. A system that brought about large transfers from defendants who were not liable under the law (false positive errors by the system) would not be desirable. And a system that failed to compensate plaintiffs who had been injured by defendants whose actions breached the requisite duty of care (false negative errors) would also not be desirable.

This question asks not only whether juries and judges make the right decisions on individual cases. It asks more generally whether the larger system provides adequate opportunities for injured plaintiffs to recover—or whether instead it errs in the ways noted above: false positive and false negative errors at the system level. These errors might have an unfavorable impact on the deterrent function of tort law by reducing its real and perceived accuracy, either by deterring conduct that is desirable or by failing to deter conduct that is undesirable. These errors would also reduce the perception of the institution's ability to do justice. And, clearly, such errors represent failure as a compensator.

While I am aware of no adequate data on the ratio of false positive (invalid claims granted) to false negative errors (valid claims uncompensated), the system does appear to contain a large percentage of false negatives.[22] That is an ironic finding in the face of the current uproar, which would lead us to believe that the system's major difficulty involves rewarding frivolous claims. The reverse may well be the more serious problem.

Take the area of medical malpractice. Insurers, physicians, and

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22. *See, e.g.*, Danzon, *An Economic Analysis of the Medical Malpractice System*, 1(1) BEHAVIORAL SCI. & L. 39, 42 (1983) ("[R]oughly one in 25 patients injured as a result of negligent care receives compensation through the malpractice system . . . ."); J. LADINSKY & C. SUSMILCH, COMMUNITY FACTORS IN THE BROKERAGE OF CONSUMER PRODUCT AND SERVICE PROBLEMS 12-13 (Univ. of Wisc. Disputes Processing Research Program Working Paper 1983-14, 1983) (one-quarter of consumer product complaints surveyed were not pursued; roughly one-third of claims pursued were unsuccessful or only partially successful).

hospitals believe that the rise in filings[23] means the system in general has gone "berserk"[24] and that the increased proportion of judgments for plaintiffs[25] plus larger awards[26] means that juries in particular have gone crazy.[27] An alternative assessment is that these changes represent modest adjustments in a system that continues to provide substantial (if not excessive) protection for defendants. Numerous studies in the medical literature show a far greater incidence of medical errors than are ever called to account through a lawsuit.[28] For example, a review of patient records in California hospitals found that 1 in every 126 patients suffered iatrogenic injuries for which compensation could be awarded under existing law.[29] But fewer than one-tenth of those potential plaintiffs sought any compensation.[30] "Lumping it" seems to be the preferred style of dispute resolution—quite a different picture from that being painted for the public.[31]

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23. What kind of evidence permits a conclusion that there has been "a rise in malpractice filings"? If there are more filings per capita at $Time_2$ than at $Time_1$, does that reveal greater litigiousness toward physicians and hospitals? Or should it be more filings per *patient*? Or more filings per doctor-patient transaction? If people are receiving more medical care more often, commensurately more injuries and more suits will occur. What kind of evidence will tell us in some meaningful sense that filings are "up"?

24. AEtna advertisement, Wall St. J., Apr. 8, 1986, at 9, col. 1.

25. M. PETERSON & G. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960-1979, viii (Inst. for Civil Justice, Rand Corp. 1982).

26. See discussion, *infra* pp. 72-74, concerning the difficulties of determining whether or not there are "larger awards."

27. Or at least are among those having a "mad romance" with the civil litigation process. 132 CONG. REC. S948 (daily ed. Feb. 4, 1986) (statement of Sen. McConnell, made on previous day).

28. *See, e.g.*, Gilbert, Light & Mosteller, *Assessing Social Innovations: An Empirical Base for Policy*, in STATISTICS AND PUBLIC POLICY 185, 211-12 (Fairley & Mosteller eds. 1977) (eight of twelve surgical innovations studied were either harmful or had on balance no positive effect); A. Benedict, Regulation of Professional Behavior: (Mis)Use of Electroconvulsive Therapy 59-62 (Ph.D. dissertation, Boston College 1985) (ninety percent of the administrations of ECT in Massachusetts violate one or more major aspects of the profession's standards for the treatment).

29. *Danzon, supra* note 22, at 42 (citing CAL. MED. ASS'N & CAL. HOSP. ASS'N, MEDICAL INSURANCE FEASIBILITY STUDY (1977)).

30. *Danzon, supra* note 22, at 42, links data from CAL. MED. ASS'N with data from NAT'L ASS'N INS. COMM'RS, MALPRACTICE CLAIMS (1980), to infer the rate of injuries per malpractice claim in California hospitals.

31. Any real increase in malpractice cases may be attributable to a number of changes in law and in society. Some of the long-standing special protections enjoyed by malpractice defendants have been removed, among them the abolition of the locality rule and the charitable immunity doctrine. Changes in the structure of medical practice may leave patients less fond of their doctors (and therefore less forgiving of errors), or may have increased the number and potency of doctor-patient contacts, which would increase the opportunities for malpractice to occur even as it increases the opportunities for health benefits to occur. Changes in society may have produced patients who are

From this viewpoint, the tort system creates barriers for people who have a valid claim to compensation. It protects defendants from having to internalize more than a fraction of the costs they create. This perspective might view the tort system as too passive, too favorable to defendants, and as one whose errors favor defendants by too great a margin. If a good tort system is one that, among other things, fosters a close correlation between actionable injuries and compensation awarded, then our present system might be judged to be doing far less well than it might. At the same time, this highly skewed rate of errors might contribute to its failure to provide the necessary level of deterrence.[32]

If these were the shortcomings of the tort system with which reformers concerned themselves, different sorts of reforms would be called for. Instead of trying to make bringing suits more difficult or reducing the incentives to sue, concern would focus on ways to improve the correspondence between compensable injuries and awards.[33]

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better informed than in the past. All these possible causes of altered malpractice litigation rates merit inquiry.

Moreover, because cases involving complex litigation generally are difficult and expensive to prepare, an unusually large fraction of them probably are screened out by attorneys. It makes no economic sense for an attorney to take such a case unless the value of the injury is well over three times the cost of preparing the case. *See, e.g.*, Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48(3) LAW & CONTEMP. PROBS. 5 (1985) (arguing that a plaintiff's incentives in shareholder litigation differ from those of plaintiff's counsel, so that until the value of plaintiff's injury exceeds a certain level, counsel has no incentive to take the case). This gives defendants virtual impunity to injure people in an amount up to three times the cost of preparing a plaintiff's case. In technical and complicated cases such as medical malpractice, toxic torts, and products liability, this will create a large fraction of potential plaintiffs who have no chance of pursuing recovery.

Of malpractice cases that do go to a jury, a smaller fraction is decided for plaintiffs than is true in any other category of litigation. *See* M. PETERSON & G. PRIEST, *supra* note 25, at 19, Table 3 (data from Cook County, Illinois). That the probability of a finding for the plaintiff is small may say that the claims often are without merit, or that juries continue to give doctors and hospitals a large benefit of the doubt. That the fraction of plaintiff verdicts is increasing, *id.* at 17, may reflect changes in jury attitudes, or changes in the pool of cases being brought to attorneys, or changes in attorney screening of cases, or changes in the quality of case preparation and presentation. Again, all of these possibilities would be well worth studying if we wanted to know what was really going on.

32. Or, to express this proposition in different terms, the errors may lead to an uneconomic under-allocation of social resources to injury prevention. *See generally* G. CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970) (discussing tort law in terms of economic principles); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972) (same).

33. A simple reform might be to increase the availability of relevant information by requiring that copies of medical records, especially pathology reports, be sent routinely

It may be, however, that notwithstanding these errors the system as now structured may not be able to do better and still survive. Perhaps the current tort system is so cumbersome and has such huge transaction costs that it works only if few injured people make use of it and those few receive damages that far exceed their real need for compensation.[34] A few extreme awards may total a fraction of the real costs of injury, while looming so large in the public mind that they serve a deterrent function out of proportion to the real costs extracted from defendants and their insurers. Such a system would, also, appear to the public to be unfair to (some few) defendants, while the larger systemic unfairness to plaintiffs (false negatives) remains invisible.[35] These suggest interesting questions to which we do not know the answers.

IV. MONEY

One of the most important issues not addressed in this particular article by Professor Galanter (but certainly studied by him and his colleagues previously[36]) is that of cost. Are those protesting the current tort system really concerned about the litigiousness of the American people or how busy the courts are? I think they have made plain that what really concerns them is that the present arrangement may be costing them more money than they can afford. A look back at the quotations included in Professor Galanter's article will reveal few critics whose focus is not on distributional concerns. Like so many other issues in this life, the real heart of the present crisis may be money.

Do we know as much about these cost issues as we do about filings, trials, settlements, and so on? I think not. Are awards up in real terms? If so, why? We know that insurance premiums are ris-

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to patients or to their lawyers. Or we might think about abolishing the system of private enforcement altogether in favor of some alternative that was better able to identify injuries, compensate the injured, and correct harmful patterns of practice by injurers.

34. R. POSNER, ECONOMIC ANALYSIS OF LAW 170 (2d ed. 1977), argues that just such an arrangement might constitute an efficient deterrence scheme for the criminal law.

35. Among the many cognitive heuristics that guide human thinking is the "availability heuristic." Research on this shows that people erroneously estimate the frequency of occurrence of some event to be proportional to the ease with which they can retrieve from memory instances of the event. Saks & Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123 (1980-81). Thus, a few shocking instances of some event (such as an outrageous jury award) will be readily available to memory and its frequency will be overestimated. Events in the larger class, uncompensated injuries, are really system nonevents, and are unavailable to memory (or to newspapers) and will be thought to occur infrequently or not at all.

36. *See, e.g.*, *supra* notes 2 & 3.

ing precipitously, but the reasons for this are a matter of controversy.[37] What is the impact of these awards on the willingness of parties to settle, on deterrence, and on the panoply of other things we want a good system of liability to accomplish? Let me take us through what should be the simplest of questions in order to demonstrate how elusive the answers might be.

Are jury awards up? Total costs to defendants certainly are up, if only because population and absolute numbers of cases are up. Similarly, the number of unusually high awards is likely to be up, again if only because the total caseload has grown with the population. From the viewpoint of defendants, this is exacerbated by any rise in the proportion of verdicts favoring plaintiffs[38] and the impact that change has on settlements.

But if, more sensibly, we ask about the median jury award, as representative of what juries are doing, and discover that it has been rising over time, we have to ask carefully what that tells us. The only adjustment most researchers think to make is for inflation.[39] But that is likely to be an underadjustment for a variety of reasons. If a large fraction of damages is for the cost of medical care and rehabilitation, then awards are not rising if they merely track the rate of health cost inflation.[40] To the degree that medicine and other emergency services have improved their ability to rescue people and prolong life, that may raise costs justifiably. To lost earnings and medical expenses, defendants in more cases can now add the cost of additional decades of round-the-clock care and rehabilitation. If injured persons receive such treatment and live longer for having received it, costs to defendants will understandably be greater. If jury awards reflect such changes, they are not irrational or antidefendant. Alternatively, changes in awards may reflect changes in the mix of cases attorneys are bringing to court. If more people are bringing their complaints to lawyers, and lawyers have a larger pool of cases from which to choose, they would understandably select the

37. Other reasons for the insurance premium rise might include poor risk management and a down cycle in the stock market or in interest rates. *See* Heydinger, *Congress Hears RIMS' Testimony on Insurance Availability*, 33 RISK MGMT. 36, 40 (Apr. 1986).

38. The Rand Corporation data show a somewhat increased fraction of verdicts for plaintiffs, at least in Cook County, Illinois. M. PETERSON & G. PRIEST, *supra* note 25, at 17.

39. *See, e.g., id.* at 20-21, Figures 6-8.

40. The Consumer Price Index for all goods and services rose 93% in the decade from 1975 through 1984; for medical care it rose 125%. STATISTICAL ABSTRACTS OF THE UNITED STATES 477, Table 795 (1986).

larger ones.[41] There are still other possibilities. Again, we do not know which of them is a faithful reflection of what is happening.

Before altering the law to save defendants money, we need to ascertain if changes in real terms have occurred, and if so what has caused them. None of the possible causes mentioned above would suggest the system has gone berserk. Even if an increase in average awards reflects nothing more than jurors placing a higher value on life and health than they once did, or on intangible hurts, we need to think hard about whether this is undesirable.

Finally, the debate about cost reflects a normative debate that has not been made as explicit as it should be. Many who object to the current tort system are fond of noting that "we all pay."[42] That is, in legally defined circumstances, the system transfers the cost of injuries from plaintiffs to defendants, and through defendants the cost is spread more widely. Is this a defect in the system or is it one of its virtues? Before we change the system because "we all pay," we need to decide if cost-spreading continues to be a cultural value preference or if the existing system is just on other grounds. Those who criticize the tort system on this score are criticizing something deeper than the current workings of the system. They seek fundamental change in our law's strategy for taking some of the sting out of accidents.

V. WHAT IS REALLY GOING ON HERE?

Professor Galanter's article and my comments have addressed mostly the problem of describing and explaining litigation behavior. To develop a clear and accurate picture of this behavior is no simple or unimportant matter. But what is perhaps even less simple and more important is to understand why so large a gap exists between the widespread perception that the American litigation system is wildly out of control and the picture that emerges from an examination of the available evidence.[43] Surely it is no small concern that newspapers, legislators,[44] lawyers, and the average person on the street seem quite thoroughly convinced about some things that appear not to be true. Moreover, we must somehow square the appar-

41. This assumes there is not enough lawyer time to go around. Otherwise all cases that offered a reasonable return on an attorney's investment of time would be accepted.

42. INSURANCE INFORMATION INST., *supra* note 14, at 2.

43. Professor Galanter devotes a few paragraphs toward the end of his article to some hypotheses to explain this odd behavior.

44. *See Forty Legislatures Act to Readjust Liability Rules*, N.Y. Times, July 14, 1986, at 1, col. 1.

ently growing costs to insurers with the lack of a lawsuit crisis and the very real possibility of no real dollar increase in awards.

This gap might be the product of an honest and innocent error, which for some reason had sufficient plausibility to be widely accepted without much demand for evidence. The insurance liability crisis does involve certain real events—rising insurance premiums and cancellations. Perhaps these events have been attributed to an incorrect cause, no matter how "obvious" the litigation explosion may appear.

Another possibility, of course, is that the insurance crisis has been manufactured by the insurance industry.[45] Risky investments or the vicissitudes of the market seem to play the largest part in whether insurance companies make or lose money.[46] However much the industry might wish to pass legislation guaranteeing high returns on investments, that cannot be done. So one tries to change what can be changed: tort law. If less money has to be paid out, more is left to invest. If the public already is primed to believe that the cause of the problem is too many unwarranted lawsuits, greedy lawyers, crazy laws, and malingering plaintiffs, that can be used as the theme of an advertising campaign.[47]

It is also possible that underwriting decisionmaking in the insurance industry is somewhat out of control. Such decisionmaking depends upon many unknowns (expected investment income, tax law changes, inflation, expected claims, the competition's pricing, etc.) and may not be handled in as statistically rational a way as prudence dictates. In deciding how much in claims an insurer may be liable for, and therefore how much to set aside in reserves, and therefore how much to charge in premiums, insurers must engage in statistical decisionmaking. They could rationally choose the mean of the distribution of previous claims, adjusted for inflation or some other increase. But if underwriters are frightened by increasing outlyers,[48] or by increasing variability (unpredictability) in jury awards, they might choose a more extreme point from which to estimate future costs. Such choices will make a dramatic difference in premiums.

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45. *See The Manufactured Crisis*, *supra* note 14.

46. During the insurance crisis of 1974, the industry lost $5 billion in underwriting losses, but double that amount on its investments in common stocks alone. Danzon, *supra* note 22, at 48-49.

47. *See supra* note 14.

48. Outlyers are the few cases that appear far above or far below the main body of a frequency distribution.

Some data do suggest that jury awards have grown increasingly unpredictable. The liability crisis might in part be a misunderstanding of the causes of, and an overreaction to, this increased variability. Data on Cook County jury awards, for example, suggest that, for at least some categories of litigation, since the mid-1970s the ninetieth percentile of jury awards has risen sharply while the tenth percentile has fallen sharply.[49] That is, the variation in the distribution of awards has spread out, so that both larger and smaller awards are more frequent than had been the case.[50] Such an occurrence may surprise and frighten insurers. What could be causing such a phenomenon? One important possibility was predicted by researchers in the 1970s when the Supreme Court authorized and many states adopted smaller juries in civil cases. Smaller sized juries, like any smaller samples, produce less stable and more variable results than larger samples. While defendants and insurers may attribute this growth in unpredictability to mysterious changes in the minds of jurors, it may be due simply to a change in their numbers.[51] If this is indeed the cause, we can expect it to level off at the new magnitude of variability. If we decide it is harder to run a stable tort system with such a degree of variability, that can be adjusted easily enough. As the number of jurors on a civil jury rises, the variability in awards will decline.[52]

"What-is-really-going-on-here?" is complicated by any number of other themes and threads that help form the crisis tapestry. One of them may be the tension between corporations and consumers.[53] Or part of the tapestry may be another version of the haves objecting to government enforced transfers to the have-nots—never mind the antiquity of the justifications or the nonwelfare-state origins of the laws in question. Or it may be another variation on the theme of hostility toward lawyers or law.

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49. M. PETERSON & G. PRIEST, *supra* note 25, at 22-23.

50. The proponents of radical reform have—perhaps unknowingly, perhaps disingenuously—pointed only to a higher ceiling, when the floor has dropped as well.

51. To be precise, when the size of the jury is reduced by one-half (from 12 to 6), all other things equal, the variability in its awards will increase by the square root of 2, or 1.41. That is, the variability in awards will increase by 41%. M. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE 15, 34 n.1 (1977).

52. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 716-19 (1971).

53. The Rand Corporation's data reveal that the single greatest category of growth in trials, at least in Cook County, Illinois, has been businesses suing businesses. M. PETERSON & G. PRIEST, *supra* note 25, at 13-16. The complaints of growing litigiousness have omitted mention of these offenders.

VI. CONCLUSION

While I believe it is useful—indeed, essential—to have empirical evidence to inform us about the great variety of issues we face, I wonder how such evidence can be effectively obtained and considered. How do myths such as the litigation "explosion" come into being notwithstanding the evidence? How can we replace such myths with more accurate and useful pictures of how our society and our legal system function? And how do we keep ourselves from damaging our society through the passion to fix things that we have no good reason to believe are broken, while overlooking real problems and real causes?