Media Reporting of Jury Verdicts:

Is The Tail (of the Distribution) Wagging the Dog?

Robert J. MacCoun

Boalt Hall School of Law and Goldman School of Public Policy
University of California at Berkeley

Abstract. In 1996, Daniel Bailis and I published a statistical content analysis of media reporting on tort litigation between 1980 and 1990, at the peak of the "tort reform" debate. Compared with objective data on tort cases, we found that the magazine articles considerably overrepresented the relative frequency of controversial forms of litigation (product liability and medical malpractice), the proportion of disputes resolved by trial (rather than settlement), the plaintiff victory rate at trial, and the median and mean jury awards. Since that study was published, several content analyses have extended our work with respect to methodology and legal domain (e.g., employment discrimination cases, air-bag litigation, pharmaceutical industry litigation). In my paper, I will first briefly review the findings of these studies and sketch out their implications for claiming rates, settlement rates, and deterrence. I will then contrast two classes of explanations for the distortion. One class involves functional explanations involving media markets, the political interests of corporations, and the motivations of ordinary citizens. The second class involves formal attributes of the trial narratives themselves (plot features, numerical magnitude, and so on). I will argue that a formal, perceptual account is surprising successful in accounting for the observed pattern of distortion. In contrast, the functional accounts are either tautological or contradictory. If in fact the media distorts trial outcomes in the service of powerful corporate interests, they may be doing those interests a disservice. Everything else being equal, rational choice and psychological accounts agree that exaggerated estimates of the expected value of a lawsuit should encourage blaming, claiming, large awards, and overdeterrence.

WORKING DRAFT (5/16/05): Address correspondence to 2607 Hearst Ave., Berkeley, CA 94720, maccoun@berkeley.edu, tel. 510-642-7518. Prepared for *Who Feels Their Pain? The Challenge of Non-Economic Damages in Civil Litigation* (11th Annual Clifford Symposium on Tort Law and Social Policy), DePaul University College of Law, DePaul University College of Law, 15 April 2005. Earlier versions were presented at Duke University's Fuqua School of Business (DATE) and at the Annual Meeting of the Society for Experimental Social Psychology, Ft. Worth TX, 15 October 2004. I thank Chip Heath (Stanford) for encouragement and advice, and Sean Farhang for very helpful comments on the first draft.

Media Reporting of Jury Verdicts: Is The Tail (of the Distribution) Wagging the Dog?

Several decades back, a series of articles and books by the newly emerging law and economics community articulated the principles of rational litigation behavior.[1] Litigation involves a series of decisions. Potential defendants have to decide whether or not to take actions that could expose them to future litigation. Plaintiffs who believe they have been injured by such actions have to decide whether or not to file a lawsuit. Defendants have to decide on a settlement offer. And plaintiffs have to decide whether to accept that offer or go to trial. Law-and-economics models of these four decisions share a common parameter: *The expected value of a jury verdict if a lawsuit goes to trial.* There are reasons to doubt that rational-actor models provide a valid description of actual litigant behavior.[2] But even a boundedly rational psychological model will assume that expectations play a central role in choice.

The problem, even for the most rational of actors, is that the expected value of the trial verdict isn't a given. It has to be estimated by the actor. Yet there is no simple way to just "look it up" – no expert system, spreadsheet algorithm, or actuarial table. Indeed, until 1981, no one had systematically estimated the mean or median jury award for any jurisdiction. Until the 1980s, there was no government equivalent of the FBI's Uniform Crime Reports or the prison statistics accumulated by the Bureau of Justice Statistics. At best, some communities had "Jury Verdict Reports" – brief synopses of recent local trials compiled and marketed to attorneys practicing in some cities.

---

[1] For a review, see Robert Cooter and Thomas Ulen, *Law and Economics* (4th ed. Pearson Addison Wesley, 2004).

[2] See Robert J. MacCoun, E. Allan Lind, and Tom R. Tyler, *Alternative Dispute Resolution in Trial and Appellate Courts* (pp. 95-118). In D. K. Kagehiro & W. S. Laufer (Eds.), The Handbook of Psychology and Law (New York: Springer Verlag, 1992). Michael J. Saks and Robert F. , Kidd, Human information processing and adjudication: Trial by heuristics. Law and Society Review, 15, 123-160 (1980-1981).

In the early 1980s, Mark Peterson and his colleagues at RAND's Institute for Civil Justice (ICJ) used information from published jury verdict reporters in Cook County, Illinois to compile the first systematic statistical database on civil jury trial characteristics and verdicts.[3] Since that time, the ICJ has maintained a long-term time series on trends in Cook County and in California,[4] and similar databases with shorter time spans but broader geographic coverage have been assembled and analyzed by the ICJ,[5] by Stephen Daniels and Joanne Martin at the American Bar Foundation,[6] and by Brian Ostrom, David Rottman of the National Center for State Courts and their colleagues.[7] The federal government, now, finally, distributes civil jury data.[8] Yet even today, there is no simple way to statistically forecast the expected value of any given case; the published data are inevitably dated, and they do not readily permit one to project the combined effects of case type, jurisdiction, and injury characteristics, much less a host of other potentially relevant factors not coded by the researchers.

In the absence of good actuarial estimates, what is a litigant or litigator to do? Drawing on insights from the psychological literature on judgment under uncertainty,

---

[3] Mark A. Peterson, The Civil Jury: Trends in Trials and Verdicts, Cook County, Illinois, 1960-1979, RAND Institute for Civil Justice, R-2881, 1982. Michael G. Shanley, Mark A. Peterson, Comparative Justice: Civil Jury Verdicts in San Francisco and Cook Counties, 1959-1980, RAND Institute for Civil Justice, R-3006, 1983. Mark Peterson, Compensation of Injuries: Civil Jury Verdicts in Cook County, RAND Institute for Civil Justice, R-3011, 1984. Audrey Chin and Mark A. Peterson, Deep Pockets, Empty Pockets: Who Wins in Cook County Jury Trials, RAND Institute for Civil Justice, R-3249, 1985. Mark A. Peterson, Syam Sarma, Michael G. Shanley, Punitive Damages: Empirical Findings RAND Institute for Civil Justice, RR-3311, 1987.

[4] Seth A. Seabury, Nicholas M. Pace, and Robert T. Reville, Forty Years of Civil Jury Verdicts, 1 J. Empirical Legal Studies 1 (2004).

[5] Erik Moller, Trends in Civil Jury Verdicts: New Data from 15 Jurisdictions, RAND Institute for Civil Justice, MR-694, 1996.

[6] Stephen Daniels and Joanne Martin, Civil Juries and the Politics of Reform (Evanston, IL: Northwestern University Press, 1995).

[7] See Brian J. Ostrom, David B. Rottman and John A. Goerdt. "A Step above Anecdote: A Profile of the Civil Jury in the 1990s: Empirical Data Provided by the Civil Trial Court Network Project Illuminate the Debate over Jury Reform." 79 Judicature 233 (1996). Eisenberg, Theodore, Neil LaFountain, Brian Ostrom, David Rottman and Martin T. Wells. "Juries, Judges, and Punitive Damages: An Empirical Study." 87 Cornell Law Review 743 (2002).

[8] Thomas H. Cohen, Steven K. Smith, "Civil Trial Cases and Verdicts in Large Counties, 2001" April 2004, NCJ 202803, http://www.ojp.usdoj.gov/bjs/abstract/ctcvlc01.htm

Dan Bailis and I concluded that people probably cobbled together rough inductions from a mix of personal experience, local anecdotes, and media reporting. We also wondered whether distorted media coverage might play a role in the widespread view that jury awards were out of control. Despite the persistent complaints of tort reformers, it was already clear by the mid-1980s that median awards were modest and that fairly large awards were a rare event.[9] Thus we set out to systematically document what kind of impression one might form about the expected value of a jury verdict on the basis of popular and business media coverage.[10]

As described below, our findings and those of subsequent studies document a remarkable pattern of distortion. If one were to use the media as a basis for estimating the expected value of a jury verdict, one would grossly overestimate the likelihood that the case would go to trial, the plaintiff's probability of victory, and the magnitude of the award. Moreover, one would form the mistaken impression that tort litigation mostly involves medical malpractice and product liability, rather than automobile negligence cases.

Our study soon found a place in the growing academic literature critiquing the empirical assertions of the tort reform movement.[11] Seeing our findings repeatedly discussed and cited, I observed that many authors either implicitly or explicitly endorsed two inferences: (1) The media distortion reflects the influence of powerful corporate

---

[9] MacCoun, R. J. (1987). *Getting inside the black box: Toward a better understanding of civil jury behavior.* Santa Monica, CA: RAND. The longest jury verdict time series, from Cook County and San Francisco, suggests an increase in the mean award (which is more sensitive to large awards) over the past 3 decades, but this appears largely attributable to changes in case mix and medical losses. See Seabury, Pace, and Reville, op cit.

[10] Bailis, D. S., & MacCoun, R. J. (1996). Estimating liability risks with the media as your guide: A content analysis of media coverage of civil litigation. Law and Human Behavior, 20, 419-429.

[11] For example, Stephen Daniels & Joanne Martin, *Civil Juries and the Politics of Reform* (1995); Marc Galanter, The Day After the Litigation Explosion, 46 Md. L. Rev. 3 (1986); Marc Galanter, Real World Torts: An Antidote to Anecdote, 55 Md. L. Rev. 1093 (1996); Deborah R. Hensler, "Why We Don't Know More About the Civil Justice System—And What We Could Do About It." USC Law (Fall): 10-15 (1994); MacCoun, R. J. (1993), Inside the black box: What empirical research tells us about decisionmaking by civil juries, in R. E. Litan (Ed.), Verdict: Assessing the civil jury system (pp. 137-180), Washington, D.C.: The Brookings Institution; Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System-and Why Not?, 140 U. Pa. L. Rev. 1147 (1992); Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths About Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* (1995).

interests favoring a tort reform agenda; and (2) the media distortion itself successfully advances that agenda. Only recently have I begun to question these highly plausible assumptions. In this essay, I will question both of them. I will suggest that (1') the media distortion may be parsimoniously explained by the intersection of an asymmetrical, skewed outcome distribution combined with human brains that selectively attend to stimuli on the basis of extremity, valence, and narrative structure. And (2') the media distortion may be at least partly counterproductive for tort reformers, because it conveys descriptive normative information that is at odds with its injunctive normative message; it may even encourage litigation.

Patterns of Distortion in Media Coverage of Tort Litigation

The Bailis and MacCoun content analysis is based on a sample of 249 articles that mentioned tort litigation or lawsuits and were published between 1980 and 1990 in 5 popular news and business magazines: *Time, Newsweek, Fortune, Forbes*, and *Business Week*. We coded the date, type of tort, whether or not the case went to trial, whether the defendant was found liable, and the size of the award. We also coded any evaluative comments made by the authors. In order to assess the representativeness of the cases covered in popular media coverage, we computed the frequency of each tort types, as well as the trial rate, plaintiff victory rate, and median and mean award sizes. We compared these to the best available archival sources on claiming, litigation, trial rates, plaintiff victories, and jury awards.

As seen in Table 1, compared with objective data on tort cases, the magazine articles considerably overrepresented the relative frequency of controversial forms of litigation (product liability and medical malpractice), the proportion of disputes resolved by trial (rather than settlement), and the plaintiff victory rate at trial.

Table 1. Actual and Media-Reported Accident, Filing, and Trial Rates.

	Auto	**Products**	**Medical**
Actual accident rates	**18%**	**30%**	**1%**
Actual tort filings	**60%**	**4%**	**7%**
Actual trial rates	**42%**	**3%**	**10%**
Magazine coverage	***2%***	***49%***	***25%***

Source: Bailis and MacCoun (1996), Table 2.

Table 2. Actual vs. Media-Reported Plaintiff Victory Rates and Mean and Median Jury Awards

Source	Location/period	Tort Type(s)	Pltf. win rate	Mean Award ($1000s)	Median Award ($1000s)
DeFrances et al. (1995)	75 state courts, 1992	All torts	50%	408	51
		Products	40%	727	260
		Med. mal.	30%	1,484	201
Eisenberg, Goerdt, Ostrom, & Rottman (1995)	Federal courts, 1979-93	All torts	46%	1,196	136
		Products	30%	1,547	318
		Med. mal.	27%	1,663	267
Peterson (1987)	Cook County, IL, 1980-84	Products	52%	828	187
		Med. mal.	49%	1,179	121
Peterson (1987)	San Francisco, 1980-84	Products	52%	1,105	200
		Med. mal.	53%	1,162	156
Daniels & Martin (1993)	6 Calif. Counties, 1970-90	Products	55%	1,085	294
GAO (1989)	AZ, MA, MO, ND, & SC, 1983-85	Products	45%	845	157
Magazine coverage sample	5 national magazines, 1980-1990	All torts	85%	5,861	1,750

Source: Bailis and MacCoun (1996), Table 3.

And as seen in Table 2, the pattern of distortion was even more striking for plaintiff win rates and for jury awards. Fully 85 percent of the magazine cases involved plaintiff victories, compared to win rates ranging from 27 to 55 percent in actual tort trials; the exaggeration is even greater when one considers that the magazine stories overrepresent product and medical malpractice cases, which actually have lower than average plaintiff win rates. The mean magazine award was a full order of magnitude higher than the most representative estimate for state courts – almost $6 million vs. about $400,000. The median magazine-reported award was three orders of magnitude higher -- $1.7 million vs. $51,000.

While our paper was in press, a similar comparison of reported awards was reported independently by Oscar Chase,[12] and the same qualitative pattern of media distortion has been replicated by Steve Garber and Anthony Bower[13] for automotive product liability coverage, by Neal Feigenson and Dan Bailis[14] for coverage of airbag safety and litigation, and by Laura Beth Nielsen and Aaron Beim[15] for Title VII discrimination litigation. William Haltom and Michael McCann[16] have recently published the most ambitious book-length study, with a much more extensive sample, a

---

[12] Oscar G. Chase, "Helping Jurors Determine Pain and Suffering Awards." 23 Hofstra Law Review 763 (1995).

[13] Garber, Steven and Anthony G. Bower, "Newspaper Coverage of Automotive Product-Liability Verdicts," 2000. (33): 93-122, Law and Society Review. Garber and Bower's study is especially significant because it used a different methodology which complements the one used by Bailis and MacCoun, Feigenson and Bailis, and Nielsen and Beim. Rather than sampling cases from the media and comparing them to court data, Garber and Bower sampled automotive product liability cases in the 1985-1996 period (259 defense verdicts, 67 plaintiff verdicts), and then searched media databases for coverage of the trials. They found several significant predictors of coverage, including high damages (especially in excess of $1 million), the interaction of high damages and local metropolitan area, cases with punitive damages, and cases with at least one fatality.

[14] Neal R. Feigenson and Daniel Bailis, "Air Bag Safety: Media Coverage, Popular Conceptions, and Public Policy," Psychology, Public Policy, and Law, 7, 444-481 (2001).

[15] Laura Beth Nielsen and Aaron Beim, "Media Misrepresentation: Title VII, Print Media, and Public Perceptions of Discrimination Litigation," 15 Stanford Law & Policy Review 101-130 (2004).

[16] William Haltom and Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis (University of Chicago Press, 2004).

more detailed analysis of content, and a very compelling discussion of the political and institutional factors at play.

Since the pathbreaking studies of Kahneman and Tversky in the 1970s, it is now well-established that when assessing probabilities, people give undue weight to those cases that come most readily to mind, due to recency, saliency, or ease of imagining.[17] It is also well known that media exposure can render certain issues or outcomes more "available" than others; and indeed, Bailis and I argued that this was a likely consequence of the distortions we uncovered. There are many examples in the literature. The classic early work was a content analysis of newspaper reporting on causes of death, conducted by Barbara Combs and Paul Slovic.[18] Across various causes of death, they found that annual death rates were only weakly correlated with media attention; there was a strong emphasis on "catastrophic" events involving large numbers of deaths in a single incident. A similar pattern is seen in media coverage of crime, where extreme (e.g., violent) crimes are grossly overrepresented.[19] Slovic and his colleagues have found that when actual mortality rates are controlled, there is an almost perfect positive correlation between the frequency of news coverage and people's estimates of the riskiness of each activity. Thus, people mistakenly belief that death by fire is more common than death by diabetes, and that death by homicide is more common than stomach cancer, when in fact the diseases are considerably more prevalent than the more graphically violent forms of death.

At this point, the fact of media distortion is well established. My interest in this essay is understanding why it occurs and what that might tell us. I consider five classes

---

[17] Amos Tversky and Daniel Kahneman, Judgment under uncertainty: Heuristics and biases. Science, 185:1124—1131 (1974). Thomas Gilovich, Dale Grifffin, and Daniel Kahneman, Heuristics and biases: The psychology of intuitive judgment (New York: Cambridge University Press, 2002).

[18] See Barbara Combs and Paul Slovic, Newspaper coverage of causes of death. Journalism Quarterly, 56, 837-849 (1979). Slovic, P., Fischhoff, B., & Lichenstein, S. (1982), Facts versus fears: Understanding perceived risk, In D. Kahneman, P. Slovic, & A. Tversky (Eds.), Judgment under uncertainty: Heuristics and biases (Cambridge: Cambridge University Press). Slovic, P. 1987. Perception of risk. Science. 236:280-285. Singer, E. & Endreny, M. (1993). Reporting on risk. How the mass media portray accidents, diseases, disasters, and other hazards. Russell Sage Foundation.

[19] For a review, see MacCoun, R. (2001). Public opinion about legal issues. International Encyclopedia of the Social and Behavioral Sciences, PAGES.

of explanations; two involving the motivations of the source (the media), two involving the motivations of the audience, and a final account that is more cognitive and perceptual than motivational.

Competing Explanations: Source Motivation

There is a veritable cottage industry – actually more of a big business – in denouncements of political bias by the American mass media. A Google search on the phrase "media biased" turned up 1,710,000 web links.[20] Of course, the problem is that the denouncers hold two diametrically opposed views: that the media are too liberal[21] and that the media have a right-wing slant.[22] It is difficult to casually adjudicate this dispute because of differences in the way one can operationalize concepts like media, bias, and ideology, and because authors tend to cherry pick examples to prove their point.[23] Moreover, psychological research shows that partisans on both sides of a dispute tend to see the exact same media coverage as favoring their opponents' position –the "hostile media phenomenon."[24] But for our purposes the main point is that any accusation of right-wing media bias needs to confront plausible counterarguments for left-wing media bias.

---

[20] http://www.google.com/search?q=media+biased&sourceid=mozilla-search&start=0&start=0&ie=utf-8&oe=utf-8&client=firefox-a&rls=org.mozilla:en-US:official, searched on 30 March 2005.

[21] Examples include L. Brent Bozell, Weapons of Mass Distortion : The Coming Meltdown of the Liberal Media, Crown Forum (2004); Bernard Goldberg, Bias: A CBS Insider Exposes How the Media Distorts the News, Perennial (2003).

[22] For example, Edward S. Herman and Noam Chomsky, Manufacturing Consent: The Political Economy of the Mass Media Pantheon (January 15, 2002); Eric Alterman, What Liberal Media? The Truth About Bias and the News, Basic Books (2003).

[23] See Robert MacCoun, Biases in the interpretation and use of research results, Annual Review of Psychology, 49, 259-287 (1998).

[24] Vallone, R. P., Ross, L. and Lepper, M. R. (1985) The hostile media phenomenon: Biased perception and perceptions of media bias in coverate of the Beirut massacre, Journal of Personality and Social Psychology, 49, 577-585. Roger Giner-Sorolla and Shelly Chaiken, "The causes of hostile media judgments," Journal of Experimental Social Psychology, 30(2), Mar 1994, 165-180. Eveland, William P. Jr.; Shah, Dhavan V. The impact of individual and interpersonal factors on perceived news media bias. Political Psychology. 24(1), Mar 2003, 101-117.

Is There a Right-Wing Bias in the Media?

In presenting these results over the years, I have found that many audiences – especially university students and faculty – take the findings on their face as evidence of a pro-corporate bias in the media. The argument is easily articulated, but hard to test: (1) There has been a long and aggressive corporate campaign for tort reform, contending that juries are irrational and arbitrary and that jury awards must be curtailed or eliminated. (2) The news media are mostly owned by large corporations, and the increasing concentration of the media in the hands of a few large conglomerates has reduced journalistic independency and norms of objectivity.[25] (3) Thus, media coverage of tort cases gets distorted in ways that advance the corporate tort reform campaign.

The first two propositions are demonstrably correct, and the conclusion has face validity for many people – at least on the left. But the conclusion doesn't necessarily follow from the premises. The argument establishes motive, but not intent. And it fails to consider other explanations for the distortion.

For reasons I will give below, I do not believe a right-wing or pro-corporate bias is the most compelling explanation for the statistical misrepresentation in tort coverage. But there is no doubt that the statistical distortion is often accompanied by slanted coverage of the arguments for and against tort reform. Bailis and I found that in magazine stories, explicitly evaluative comments were fairly rare. But where they appeared, they were almost exclusively critical of the tort system: Thirteen percent of the articles mentioned potentially harmful consequences for the economy; ten percent suggested that Americans are too litigious, and ten percent argued that lawyers' fees are too high. We were only able to find two articles with a favorable statement about juries, and only one that suggested the tort system was working correctly.[26]

---

[25] Ben H. Bagdikian, The New Media Monopoly (Beacon Press, 2004).

[26] Haltom and McCann revisited this question more comprehensively in their study. Somewhat surprisingly, in an analysis of the subset of articles focusing on specific cases (rather than tort reform more generally), they actually found slightly more statements favoring plaintiffs (43 percent of evaluative remarks) than favoring defendants (35 percent). They suggest that this near equivalence may partly reflect a journalist attempt to provide balance via offsetting quotes. Even in this subsample, Haltom and McCann report a higher rate of evaluative remarks of either kind than we reported in Bailis and MacCoun (1996).

A Left-Wing Media Bias?

It is intriguing that sociolegal scholars have been quick to assume a conservative media bias in tort reporting without seriously considering the possibility that there's a left-wing slant favoring large awards. Who should be more likely to disproportionately highlight cases in which corporations were *found negligent* by citizen factfinders for the courts – a conservative, or a liberal? And there is evidence that a majority of practicing journalists are Democrats and tend to have centrist to left-of-center personal views.[27] Are journalists playing "gotcha" – highlighting the most egregious forms of misconduct by powerful monied interests?

This argument has an appeal of its own, but also some problems. First, the argument works better for suits against corporations engaged in commercial activities than for individual physicians accused of malpractice. Granted, the AMA is a fairly conservative organization, but it is difficult to see why liberal journalists would have a political motive for going after individual physicians. Second, the argument leaves unexplained the popularity of media "tort tales," plaintiff victories that – as described – seem absurd on their face: The McDonalds coffee case; the psychic who blamed a CAT scan for destroying her telepathic skills; the injured robbers, burglars, and carjackers who sued their victims.[28] I will argue below that such cases are explicable without recourse to political bias, but if a political bias is involved, it is surely more likely to be right- than left-wing.

This could any number of differences between the studies, including the choice of time periods, media covered, search terms, and coding procedures.

[27] In a 1996 poll of reporters at 61 newspapers, 61 percent described their political leaning as "liberal," 24 percent "independent/other," and only 15 percent "conservative." See "The Newspaper Journalists of the '90s (31 October 1997), http://www.asne.org/index.cfm?id=2480. In a 2004 poll, the Pew Research Center for the People and the Press found that 34 percent of the national press consider themselves liberal, 41 percent moderate, and 33 percent conservative, vs. 20, 41 and 33 percent, respectively, among the general public. See Pew Research Center for the People and the Press, "Bottom-Line Pressures Now Hurting Coverage, Say Journalists," 23 May 2004, http://people-press.org/reports/display.php3?ReportID=214

[28] See Stephen Daniels, "The Question of Jury Competence and the Politics of Tort Reform." 52 Law and Contemporary Problems 269 (1989); Marc Galanter "An Oil Strike in Hell! Contemporary Legends About the Civil Justice System" Arizona Law Review, Vol. 40, No. 3, Pp.717-752, Fall 1998.

Competing Explanations: Audience Motivation

Just Providing What Readers Want?

Political accounts of right- and left-wing bias imply that the motivations of the sources drive media coverage. But of course, media are for-profit enterprises operating in a market, so it is not unreasonably to counter that the media may simply give us what we want from them. The economic analysis of media markets is complex. In a truly competitive market for a single commodity, consumers might reign sovereign. But media markets are are highly segmented with respect to products, outlets, and audience demographics.[29] Moreover, the "right-wing bias" theory contends that the media form oligopolies (and in some markets, near monopolies), reducing their responsiveness to consumer desires. So the "giving us what we want" account is too simplistic, and even if it were true, it leaves the extent and pattern of media distortion of tort cases unexplained, shifting the puzzle from the question of source motivation to the question of audience motivation.

Audience Fear of Liability Losses?

It is tempting to view the concern over very large awards as "irrational." Bailis and I implied as much in our 1996 paper, and others have voiced that view as well. For example, in the early 1990s, Thomas Koenig and Michael Rustad systematically documented just how extremely rare punitive damage awards really are, much less blockbuster punitives.[30] For tort reform critics, this was seen as clear evidence that reform advocates were being either foolish or duplicitous.

---

[29] James T. Hamilton, All the News That's Fit to Sell: How the Market Transforms Information into News (Princeton University Press, 2003).

[30] Thomas Koenig and Michael Rustad, "The Quiet Revolution Revisited: An Empirical Study of the Impact of State Tort Reform of Punitive Damages in Products Liability," The Justice System Journal , Volume 16/2:21-44, 1993; Michael Rustad and Thomas Koenig. 1993. "The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers." American University Law Review 42: 1269-1333.

The availability heuristic (discussed above) may well have evolved because it is (or once was) generally adaptive.[31] But it does seem safe to say that it is at least irrational to rely on reports of blockbuster awards if one is trying to estimate the central tendency of the distribution – the "expected value" needed in the law-and-economic accounts of litigation rationality. Particularly if there are more representative data sources available.

However, there other reasons why one might focus on the unrepresentative tails of a distribution; reasons that are defensible under some accounts of rationality. In the decision theory tradition, attitudes toward risk are exogenous parameters of a rational model and cannot themselves be judged as either rational or irrational so long as the parameters are used coherently to derive a choice from inputs.[32] From the coherence perspective, there is nothing inherently irrational about extreme risk aversion.[33]

Thus a disproportionate focus on extreme outcomes may simply reflect extreme risk aversion. In lay terms, the perceiver isn't trying to estimate the typical (median), average (mean) or most likely (modal) award; the perceived is trying to anticipate *worst-case* (or for plaintiffs, best-case) scenarios. Lola Lopes[34] and James March[35] have promoted psychological models of choice in which people strive to balance a concern

---

[31] See Gerd Gigerenzer, Adaptive thinking: Rationality in the real world (New York: Oxford University Press, 2000). Gerd Gigerenzer and R. Selten, (Eds.), Bounded rationality: The adaptive toolbox (Cambridge, MA: MIT Press, 2001).

[32] George Stigler and Gary Becker, De Gustibus Non Est Disputandum. American Economic Review 67, 76-90 (1977). On the coherence-correspondence distinction, see Kenneth R. Hammond, 2000 'Coherence and Correspondence Theories in Judgment and Decision Making' in Judgment and Decision Making: An Interdisciplinary Reader, T. Connolly, H.R. Arkes and K.R. Hammond (eds.): 53-65. 2nd ed. New York: Oxford University Press.

[33] A similar argument can be made for the "arationality" of extreme myopia, at least with respect to the exponential discounting posited by economists. The form of time discounting that psychologists believe actually describes choice -- hyperbolic discounting – is harder to defend because it leads to intertemporal preference reversals. See George Ainslie, Breakdown of Will (Cambridge: Cambridge University Press, 2001).

[34] For example, Lola L. Lopes, "The role of aspiration level in risky choice: A comparison of Cumulative Prospect Theory and SP/A Theory," Journal of Mathematical Psychology, 1999.

[35] March, James G. & Shapira, Zur Managerial Perspectives on Risk and risk Taking, Management Science, 33:11 Nov 1987 p.1404 - 1418. Richard M. Cyert, James G. March, A Behavioral Theory of the Firm. Englewood Cliffs, NJ: Prentice Hall (1963).

with expected values and a concern with extreme outcomes. Indeed, surveys of corporate managers reveal that they frequently focus on worst-case scenarios in making choices; they are reluctant to take actions that could potentially jeopardize their firm's (or their own) survival, even the expected value of the gamble looks profitable.[36]

The equivalent concept in game theory is the minimax principle: Choose the option that has the least-bad worst-case outcome.[37] John Rawls famously used this principle to defend his theory of the justice principles people would adopt in the "original position," operating behind a veil of ignorance.[38] Shrader-Frechette uses a similar perspective to defend risk regulation policies that strike many economists, from an expected value perspective, as grossly inefficient if not socially irrational.[39] And most recently, environmentalists have championed – and sometimes written into law -- a "precautionary principle" in which global responses cannot wait for solid proof of looming ecological crises.[40]

So perhaps the media are indeed giving people exactly the information they want – the tail of the distribution rather than its central tendency. One could test this empirically using an information search paradigm: Let consumers click a button to indicate which information they most want – the mean award, the median award, the upper quartile (described in lay terms) – and make the choice costly with respect to time or some other currency so they don't simply choose everything. One could vary their goals by assigning them the role of media consumer, corporate risk manager, injured person, etc. A complementary experiment would provide consumers with one of these

---

[36] March, James G. & Shapira, Zur Managerial Perspectives on Risk and risk Taking, Management Science, 33:11 Nov 1987 p.1404 - 1418.

[37] Duncan Luce and Howard Raiffa: Games and Decisions, Wiley, 1957. Many authors use the term "maximin" rather than minimax; the terms are interchangeable and only differ in whether one is describing the column player or the row player in a game matrix.

[38] John Rawls, A Theory of Justice (Harvard University Press, 1971).

[39] K. S. Shrader-Frechette, Risk and Rationality: Philosophical Foundations for Populist Reforms, Berkeley: Univ Calif Press (1991).

[40] See David Appell, The New Uncertainty Principle, Scientific American, January 2001. Kenneth R. Foster, Paolo Vecchia, Michael H. Repacholi, "Science and the Precautionary Principle," Science, p. 979-981 (May 12 2000). Also see the essay "Precautionary principle" in Wikipedia, the free encyclopedia, at http://en.wikipedia.org/wiki/Precautionary_principle

distributional features, assigned randomly, to see how it affected their judgments about a hypothetical course of action (going forward with a product, filing a lawsuit, settling before trial).

Without knowing what such studies would reveal, it is unclear whether this "minimax" account describes the citizenry as a whole. Why should ordinary citizens fear large awards against product manufacturers, or against physicians? Citizens may fear the "trickle down" effect on prices, product availability, and insurance premiums, but if those factors are affected by tort awards, they are surely affected by the whole distribution, not just the tail. At any rate, media consumers and corporate actors are not discrete sets; the readers of the Wall Street Journal, Forbes, Fortune, and Business Week are likely to be citizens who work for corporations. So at least some consumers may want to know what the worst case awards look like. Indirect support for this view comes from Garber and Bower's finding that cases that were both local and involved high damages were particularly likely to receive media coverage, though this finding is also consistent with the alternative account offered below.[41] Still, if readers were using the media to monitor their own liability risk, one would expect greater coverage of suits against *individual* defendants.

Citizen Vigilance over Powerful Corporate Actors?

Another possibility is roughly the audience equivalent of the "left-biased source" account. The idea is that citizens look to the media to keep them informed of potentially dangerous misbehavior by powerful corporations. This argument has a lot going for it. Consumer watchdog stories are now a staple of the print, radio, and TV media. The argument would also explain the disproportionate focus on medical malpractice and product liability cases, domains where people may feel they have less control than "slip-and-fall" and automobile domains.[42] Moreover, at least when serving on a jury, citizens

[41] Garber and Bower.

[42] MacCoun, R. J. (1993). Blaming others to a fault? Chance, 6, 31-34 and 18.

do appear to hold corporations to higher standards of conduct than they apply to individuals.[43]

Yet there are also some problems with this account. It is difficult to reconcile the argument that citizens are ever on the alert for corporate negligence, when in fact seriously injured accident victims rarely even consider filing a claim against a corporation.[44] Indeed, the injured mostly blame themselves, and they are more likely to blame someone else in auto accidents (the other driver) than in product- or medicine-related accidents.[45] And if we are eagerly monitoring corporate misconduct, why are so many specific tort accounts about patently (according to the telling) irrational jury verdicts – the so-called "tort tales"?[46]

A Non-Motivational Account: Formal Stimulus Properties and the Brain

Though I once endorsed a more political view of media distortion, upon closer examination I've come to conclude that politics may play little role in the news media's dissemination of distorted tort statistics. This distortion may well be welcomed enthusiastically by tort reformers,[47] but it isn't necessarily produced with that as the aim. Here is my argument in a nutshell:

(1) Journalists are sampling cases for their interest value, not their statistical representativeness.

(2) Our brains have evolved to give disproportionate weight to extreme stimuli.

---

[43] Hans, Valerie P. Business on Trial: The Civil Jury and Corporate Responsibility. New Haven: Yale University Press, 2000. MacCoun, Robert J. 1996. "Differential Treatment of Corporate Defendants by Juries: An Examination of the 'Deep Pockets' Hypothesis." Law and Society Review 30: 121-161.

[44] Hensler, D., Marquis, S., Abrahamse, A., Berry S., Ebener, P., Lewis, E., Lind, A., MacCoun, R., Manning, W., Rogowski, J., & Vaiana, M. (1991). Compensation for accidental injuries in the United States. (Externally reviewed 210-page monograph). Santa Monica, CA: RAND.

[45] MacCoun, R. J. (1993). Blaming others to a fault? Chance, 6, 31-34 and 18. MacCoun, R. J. (1993). Is there a deep-pockets bias in the tort system? Institute for Civil Justice Issue Paper. Santa Monica, CA: RAND.

[46] Stephen Daniels, "The Question of Jury Competence and the Politics of Tort Reform." 52 Law and Contemporary Problems 269 (1989); Marc Galanter "An Oil Strike in Hell! Contemporary Legends About the Civil Justice System" Arizona Law Review, Vol. 40, No. 3, Pp.717-752, Fall 1998. Haltom and McCann, 2004.

[47] See Haltom and McCann for a similar argument.

(3) Jury awards are distributed asymmetrically, bounded at zero on the left but unbounded in the right tail.

(4) As a result, very large awards will attract interest, but very small awards will not.

(5) Because product liability, medical malpractice, and class action cases produce more extremity, they will be overrepresented in the set of attention-grabbing cases.

(6) And because only plaintiff victories produce extreme awards, plaintiff victories they will be overrepresented in the set of attention-grabbing cases, relative to are defense verdicts.

I will also argue that other newsworthy (and even politicized) outcome distributions don't share this asymmetry.

The asymmetric distribution. I start with a statistical observation long familiar to jury researchers[48]: The distribution of jury awards is highly asymmetric. It is bounded on the low end at zero – awards can't be negative – but effectively unbounded at the upper end. As a result, awards data have a strong positive skew; most awards pile up at the low end of the distribution, there is a long "right tail" of occasional very large awards, the median is smaller than the mean, and indeed most awards are lower than the mean award. See Figure 1 for a stylistic example.

These features of the award distribution play a key role in the recent work by Daniel Kahneman, David Schkade, and Cass Sunstein on punitive damage decisions by juries.[49] Kahneman and colleagues argue that citizens have great difficulty making judgments on a dollar scale because the scale lacks clear anchors – citizens may agree that a defendant behaved outrageously, but how much money does it take to express that

[48] Mostly as an analytical nuisance, because awards data must be log-transformed before they can be analyzed using traditional methods of statistical inference.

[49] Kahneman, D., Schkade, D. A., & Sunstein, C. R. (1998). Shared outrage and erratic awards: The psychology of punitive damages. Journal of Risk and Uncertainty, 16, 49–86. Sunstein, Cass R., Daniel Kahneman, and David Schkade 1998 "Assessing Punitive Damages (With Notes on Cognition and Valuation in Law)." Yale Law Journal 107: 2071. Schkade, David, Cass R. Sunstein, and David Kahneman 2000 "Deliberating About Dollars: The Severity Shift." Columbia Law Review 100: 1139. Sunstein, Cass R., Reid Hastie, John W. Payne, David A. Schkade, and W. Kip Viscusi 2002 Punitive Damages, How Juries Decide. Chicago, IL: University of Chicago Press.

outrage or deter a multinational corporation?[50] As a result, dollar judgments are likely to be much more variable across citizens than the range of their views on a 7-point attitude scale might predict. And because, in the tort context, the dollar scale is bounded at zero, variability can only be expressed in one direction – the larger end.

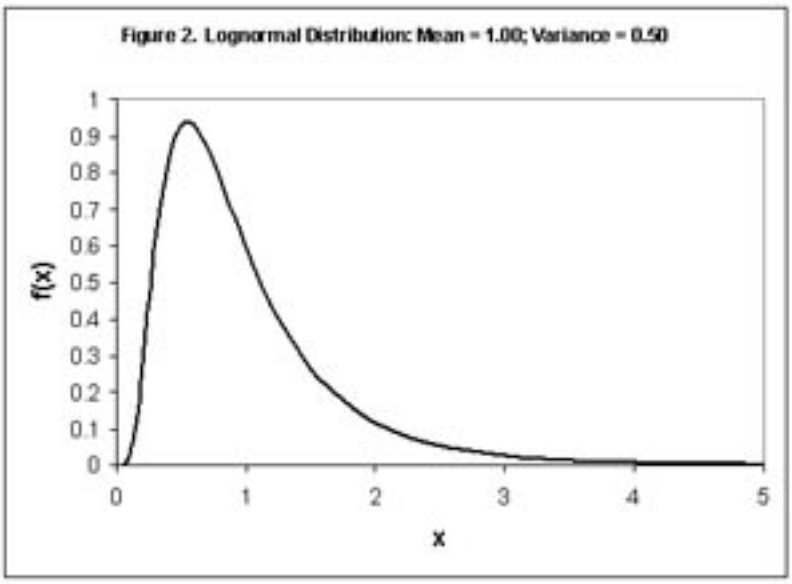

Figure 1. The lognormal distribution, a typical asymmetric distribution, bounded at zero on the left, but unbounded on the right.

Interestingly, the late paleontologist Stephan Jay Gould made a very similar argument in his book *Full House.*[51] Gould disputed the widely held view that evolution has favored the development of ever-more complex organisms, with us humans at the apex. Gould argued that the apparently increasing complexity of organisms was artifactual. Since complexity is necessarily bounded at a low level near zero – a niche long occupied by bacteria – a purely random process (a "random walk" in statistical terms) would inevitably produce an ever-increasing right tail of complexity (see Figure 2).

---

[50] Kahneman, D., Ritov, I., & Schkade, D. (1999). Economic preferences or attitude expressions? An analysis of dollar responses to public issues. Journal of Risk and Uncertainty, 19, 220–242. Sunstein, Cass R., Daniel Kahneman, David Schkade, and Ilana Ritov. 2002. "Predictably Incoherent Judgments." Stanford Law Review 54: 1153.

[51] Stephen Jay Gould, Full House: The Spread of Excellence from Plato to Darwin, Harmony Books, 1996.

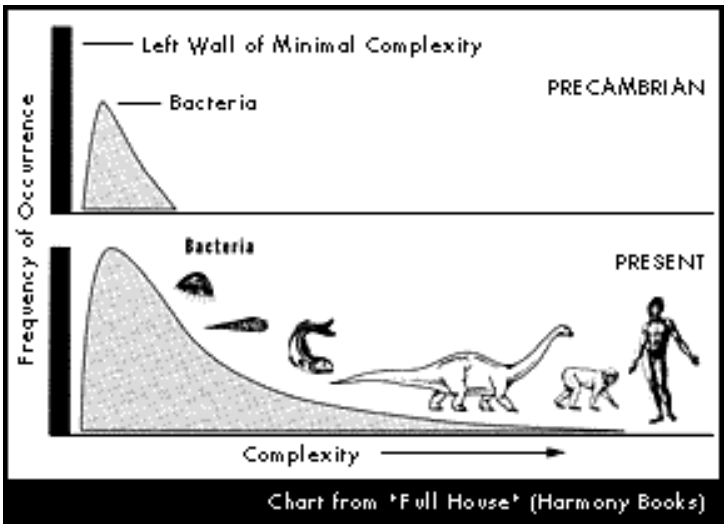

Figure 2. Stephen Jay Gould's use of a lognormal distribution to argue that a "random walk" process could create an illusion that evolution favors increasing complexity. Taken from Stephen Jay Gould, Full House: The Spread of Excellence from Plato to Darwin, Harmony Books, 1996.

Once we recognize the form of the tort award distribution, it becomes apparent that it can only produce extreme awards in the right tail – the large awards. Indeed, the only exception that comes to mind is perhaps the exception that proves the rule – a jury's tart choice to award only $1 to the US Football League in its antitrust suit (for $0.5 billion) against the NFL.[52]

Extremity Bias. The problem – from an inductive standpoint – is that the right tail, by its vary extremity, is bound to attract our attention. Psychologists long ago established that the brain forms a "cortical model" of the stimuli in the environment. We habituate to the typical range of stimuli, but we "wake up" and pay attention when an extreme stimulus deviates from this range – the so-called "orienting reflex."[53] And once

[52] The NFL never cashed the check, which was trebled to $3.76 plus interest in accordance to antitrust law. See Darren Rovell, Former executive holding onto monumental check, espn.com. Story obtained on 1 April 2005 from http://www.thisistheusfl.com/ESPN_20th_ChecksandBalances.htm

[53] Sokolov, Y. N. (1963). Perception and the conditioned reflex. New York: Pergamon.

beyond the act of perception, our brains continue to give extreme stimuli disproportionate weight in emotion,[54] evaluative judgment,[55] and impression formation.[56]

An additional factor – more social than neurological – is suggested by linguistic and cognitive theories of conversational pragmatics. In a widely cited 1975 paper, Paul Grice proposed that a list of "conversational maxims" are implicitly assumed by competent speakers during a conversation.[57] His first maxim of quantity was that one should "make your contribution to the conversation as informative as is required." Arguably, a description of a typical low-stakes lawsuit is not very informative for anyone. Of course, another of his maxims – "do not say that for which you lack adequate evidence" – is grossly violated by tort coverage in the media.

Implications for media coverage. If this line of reasoning is correct, then it may not be necessary (or even accurate) to invoke politics as an explanation for media distortion of jury awards. According to this account, the media should be preoccupied with extreme events – a claim that is hardly counterintuitive. But what is perhaps more novel about this account is that those extremes should be bilateral in some domains (drawn from both tails), but unilateral in others (drawn from one tail) – depending on the distribution in question. Table 3 offers examples of each type. I don't attempt to cite evidence for these cases, because I think they are fairly self-evident to any consumer of the media.

---

[54] Dijksterhuis, Ap; Smith, Pamela K. Affective habituation: Subliminal exposure to extreme stimuli decreases their extremity. Emotion. 2(3), Sep 2002, 203-214. Kahneman, D., & Miller, DT Norm theory: Comparing reality to its alternatives, Psychological Review, 1986, 93, 136-153.

[55] For example, Fazio, R. H., Sanbonmatsu, D. M., Powell, M. C., & Kardes, F. R. (1986). On the automatic activation of attitudes. *Journal of Personality and Social Psychology, 50,* 229-238.

[56] Skowronski, John J.; Carlston, Donal E. Negativity and extremity biases in impression formation: A review of explanations. Psychological Bulletin. 105(1), Jan 1989, 131-142.

[57] Grice, H. P. (1975). Logic and conversation. In P. Cole (ed.) Syntax and Semantics. Vol. 3. New York: Academic Press. 41-58. For a critical view, see Dan Sperber and Deirdre Wilson, Relevance: Communication and Cognition (Cambridge: Harvard Univ. Press, 1986).

Table 3. Newsworthy Outliers Drawn from Asymmetrical and Symmetrical Distributions

Asymmetrical Distributions (one tail is newsworthy)	*Symmetrical Distributions (both tails are newsworthy)*
Jury awards	Swings in corporate earnings and stock prices
Lottery winners	Casino winners and losers
Campaign expenditures	Budget and trade deficits and surpluses
Human longevity (oldest)	Human height (shortest, tallest)
Most strikeouts by a baseball pitcher	Most wins/losses per season, for a baseball pitcher
Record snowfalls	Record temperatures

This stimulus-based account has several attractive features. It accounts for the magnitude effect (the fact that reported awards are disproportionately high), the case-type effect (the overrepresentation of product and medical cases, which produce higher damages than auto cases), the plaintiff effect (defense verdicts can't really be "extreme"), and the trial effect (settlements are less likely to happen if they are too extreme, and don't always get revealed to the press anyway). It is memetic, in keeping with a growing recognition that the formal features of a message can encourage its propagation, irrespective of any intent by the communicator or recipient.[58] And notably, the stimulus-based account works without any political conspiracies – or at least, *in addition to* any

[58] The term "meme" – by now probably familiar to most readers -- was introduced by Richard Dawkins to convey the notion that certain types of information might replicate in a manner at least roughly analogous to genes; see Richard Dawkins, The Selfish Gene, Oxford University Press, 1976, 2nd edition, December 1989. For an enthusiastic scholarly elaboration, see Susan Blackmore, The Meme Machine, Oxford University Press, 1999. For various scholarly critiques, see Darwinizing Culture: The Status of Memetics as a Science, ed. by Robert Aunger, Oxford: Oxford University Press.] Chip Heath has published a variety of studies showing meme-like transmission in the "marketplace of ideas"; e.g., Chip Heath, Chris Bell, and Emily Sternberg, "Emotional selection in memes: The case of urban legends," Journal of Personality & Social Psychology. 81(6), Dec 2001, 1028-1041. Bangerter, A. & Heath, C. (2004). The Mozart Effect: Tracking the evolution of a scientific legend. British Journal of Social Psychology, 43, 1-37. Heath, Chip; Bell, Chris; Sternberg, Emily Emotional selection in memes: The case of urban legends. Journal of Personality & Social Psychology. 81(6), Dec 2001, 1028-1041.

conspiracies.[59] To say this is not to argue that the media distortion is politically neutral in its consequences. It is surely pernicious, distorting decision making by injury victims, lawyers, manufacturers, government. Whether the net effect actually benefits tort reformers is a question I take up in the final section.

But What About Tort Tales?

The pattern of distortion I am attempting to explain in this paper is the statistical misrepresentation of torts. But at various points I have invoked the media's fascination with "tort tales" as a constraint on these explanations. It isn't logically necessary for an explanation for the statistical distortion to also explain the focus on tort tales, but it would help. And on its face, the telling of tort tales seems to reveal a pro-tort reform bias. But it is easy to offer a brief sketch of why we might be attracted to tort tales, irrespective of any political motives.

Narrative structures play a central role in human cognition,[60] and sociolegal scholars have argued that lay people reason about legal cases by constructing stories rather than employing abstract doctrinal or Bayesian analysis.[61] Tort tales aren't just

---

[59] Motivational explanations are ubiquitous in lay psychology, but since the 1970s, most professional psychologists have preferred to explain a behavior in cognitive and situational terms unless there is fairly direct evidence for that it was specifically motivated. See Richard Nisbett and Lee Ross, Human Inference: Strategies and Shortcomings of Social Judgment (Englewood Cliffs, New Jersey: Prentice-Hall, 1980). Lee Ross and Richard Nisbett, The person and the situation (New York: McGraw-Hill, 1991). But it is difficult to isolate these classes of explanations in practice, and the differences are sometimes a matter of interpretation. See Philip Tetlock and A. Levi, Attribution bias: On the inconclusiveness of the cognition-motivation debate. Journal of Experimental Social Psychology, 18, 68-88 (1982).

[60] Jerome Bruner, Making Stories: Law, Literature, Life; Farrar, Straus and Giroux; 1st edition (2002). Walter Kintsch, Comprehension: A paradigm for cognition. (New York: Cambridge University Press, 1998). Roger C. Schank and Robert P. Abelson, Scripts, plans, goals, and understanding: An inquiry into human knowledge structures (Hillsdale, NJ: Lawrence Erlbaum, 1977). Tom Trabasso and Jake Bartolone, Story understanding and counterfactual reasoning, Journal of Experimental Psychology: Learning, Memory, & Cognition. 29(5), Sep 2003, 904-923.

[61] W. Lance Bennett and Martha S. Feldman, Reconstructing Reality in the Courtroom: Justice and Judgment in American Culture (Rutgers University Press, USA, 1981). Pennington, N., & Hastie, R. (1991). A cognitive theory of juror decision making: The Story Model. Cardozo Law Review, 13, 519-557.

comprehensible, they are engaging and even entertaining. Incongruent or unexpected events are particularly likely to attract our attention and to provoke rumination.[62] In a very short narrative, they set up an expectation – surely the jurors will see right through this outrageous legal claim – and then violate it. The fact that the outcome seems unexpectedly unfair rather than unexpectedly fair is icing on the cake, since bad outcomes attract more attention than good outcomes.[63] Evolutionary psychologists even maintain that there is an evolved "cheater detection module" in the brain; if so, tort tales involving successful but undeserving plaintiffs seem particularly well suited to trigger it.[64]

Does Media Distortion Really Benefit the Tort Reformers?

Recall that I started this paper with the argument that rational actors (potential and actual defendants, potential and actual plaintiffs, and their lawyers) ought to base their tort-relevant decisions on the expected value of a lawsuit at trial. But the media is grossly overestimating that expected value, with respect to the probability of trial, the probability of a plaintiff victory, and the size of the resulting award. So if citizens do in fact base their expectations in part on what they learn about tort outcomes from the media, then it follows, ceteris paribus, that the media distortion is (a) increasing the rate at which citizens file lawsuits, (b) discouraging plaintiffs and their attorneys from settling out of court, (c) informing jurors that it is "normal" to award large amounts, and (d)

---

[62] See Donald E. Berlyne, Conflict, arousal, and curiosity (New York: McGraw-Hill, 1960). Hastie R, 1984, Causes and Effects of Causal Attribution, Journal of Personality and Social Psychology, Vol. 46, No. 1, 44-56. Jeffrey Loewenstein: A plot structure to generate interest: Jokes, advertisements, and fairy tales, presented at "On the Psychology of Culture: Selection Mechanisms in Culture and the Marketplace of Ideas," Society for Experimental Social Psychology Annual Meeting, Ft. Worth TX, 15 October 2004. Achim Schützwohl, Surprise and Schema Strength, Journal of Experimental Psychology: Learning, Memory, and Cognition, September 1998 Vol. 24, No. 5, 1182-1199. Wong, P. T. P., & Weiner, B. (1981). When people ask "why" questions and the heuristics of attributional search. Journal of Personality and Social Psychology, 40, 650-663.

[63] Chip Heath, Do people prefer to pass along good or bad news? Valence and relevance of news as predictors of transmission propensity. Organizational Behavior & Human Decision Processes. 68(2), Nov 1996, 79-94. Skowronski, John J.; Carlston; Ito, Tiffany A.; Larsen, Jeff T.; Smith, N. Kyle; Cacioppo, John T. Negative information weighs more heavily on the brain: The negativity bias in evaluative categorizations. Journal of Personality & Social Psychology. 75(4), Oct 1998, 887-900.

[64] Leda Cosmides and John Tooby (1992). Cognitive adaptations for social exchange. In J.Barkow, L.Cosmides and J.Tooby, eds., The Adapted Mind, Oxford University Press, 163-228.

discouraging producers and innovators from engaging in otherwise beneficial actions. So why should tort reformers embrace a process that *actually encourages litigation, large awards, and overdeterrence?*

One possibility, that I will acknowledge but not pursue, is that tort reformers *don't* assume citizens are rational economic actors. But it seems doubtful that anyone really believes citizens are *completely* impervious to the expected consequences of their actions. I will also note that it is puzzling that why tort reformers highlight cases involving deep-pocket defendants, if in fact the goal is to win support among ordinary citizens.

But I suspect that tort reformers believe that the "greedy plaintiffs and irrational juries" message works because of its *moral* content – because it offends popular standards of equity, justice, and morality. The problem with this as a rhetorical approach is that two messages are being delivered simultaneously. To explain this point, it is useful to make use of Robert Cialdini's important distinction between injunctive norms (what others think I should do in this situation) and descriptive norms (what others are doing in this situation).[65] Cialdini's focus theory of normative influence predicts that the momentary salience of each normative source (descriptive/injunctive) will determine their joint influence on behavior. He and his colleagues have tested the theory in numerous field experiments involving littering of public spaces, where they have manipulated the salience and content of injunctive and descriptive norms in the environment and observed the effects on those passing through the environment.

Cialdini makes the provocative suggestion that many public services advertisements may have actually backfired because they presented descriptive normative

---

[65] Robert B Cialdini, Raymond R Reno, Carl A Kallgren,. A Focus Theory of Normative Conduct: Recycling The Concept Of Norms To Reduce Littering In Public Places. 58 (6) Journal of Personality & Social Psychology 1015 (1990); Carl A Kallgren Raymond Reno, R Robert B; Cialdini,. A Focus Theory Of Normative Conduct: When Norms Do And Do Not Affect Behavior. 26 (8): Personality & Social Psychology Bulletin 1002 (2000). For a related sociological analysis, see Compare with the sociological taxonomy of first order and second order expectations, see Lisa C. Troyer, Wesley Younts Whose Expectations Matter? The Relative Power of First-And Second-Order Expectations in Determining Social Influence 103(3) American Journal of Sociology, (1997) 692-732. For a discussion of the relevance of the social psychology of norms for legal theory, see Feldman, Y., & MacCoun, R. J. (2005). Some well-aged wines for the "new norms" bottles: Implications of social psychology for law and economics. In Francesco Parisi and Vernon Smith (eds.), The law and economics of irrational behavior (pp.358-394). Stanford University Press.

information that conflicted with the stated injunctive messages. Take, for instance, the classic anti-littering ad featuring actor Iron Eyes Cody, in full Native American ritual garb tearfully eyeing a heavily littered beach, further desecrated by trash thrown from a passing car. Cialdini argues that the poignant injunctive message – littering is a tragic betrayal of our planet – may well have been subtly undermined by the clear descriptive message: "this is how people usually behave at this beach."

Dan Kahan[66] offers a related argument regarding tax compliance: "…if the state says that it will enforce [tax law], it basically signaling to other people that many other people evade the law...When the IRS engages in dramatic gestures to make individuals aware that it is redoubling its efforts to catch and punish tax evaders, it also causes individuals to infer that more taxpayers than they thought are choosing to cheat. ...This inference in turn triggers a reciprocal motive to evade, which dominates the greater material incentive to comply associated with the higher than expected penalty."

Similar concerns have been raised in the prevention literature. For example, Dishion, McCord, and Poulin[67] argue that interventions for juvenile delinquency often inadvertently reinforce problem behavior by bringing delinquent youth together in settings with few if any non-delinquent peers. Finding that college students actually overestimate the prevalence of binge drinking on their campus, Prentice and Miller[68] argued that an important prevention strategy is to present the behavior as statistically deviant, rather than as a growing menace.

Theory and research on the anchoring-and-adjustment heuristic[69] and on the range-frequency model also suggest that the availability or salience of large dollar awards

---

[66] Dan Kahan, Trust, collective action, and law. Boston University Law Review, 81:333.

[67] Thomas J Dishion; Joan McCord; Francois Poulin, When interventions harm: Peer groups and problem behavior, 54(9), American Psychologist. 755-764 (1999)

[68] Deborah A. Prentice and Dale T. Miller, Pluralistic Ignorance and Alcohol Use on Campus: Some Consequences of Misperceiving the Social Norm, Journal of Personality and Social Psychology, 64(2), 243-256 (1993).

[69] See Tversky and Kahneman (1974); Karen E. Jacowitz, and Daniel Kahneman, Measures of anchoring in estimation tasks, Personality & Social Psychology Bulletin. 21(11), Nov 1995, 1161-1166; and Thomas Mussweiler, The durability of anchoring effects, European Journal of Social Psychology. 31(4), Jul-Aug 2001, 431-442.

could inflate lay judgments.[70] There are many empirical demonstrations that the availability or salience of large scale values can increase the magnitude of judgments about lesser stimuli.[71] In fact, some of the most striking examples involve tort litigation, where plaintiff recommendations and caps on damages each serve to inflate judgments in laboratory experiments.[72]

But hasn't the tort reform campaign been a big success? It is hard to know how to operationalize such a claim or what baseline to use for comparison. There have been many small victories, and both Bush administrations have featured it prominently from the bully pulpit. But it is striking just how few of the major goals have been achieved – we have not abandoned the contingency fee or the civil jury (unlike England) and few jurisdictions have not adopted a loser pays rule (again, unlike England) or caps on damages.[73] Those states that have capped damages and/or contingency fees may have reduced litigation rates,[74] and surveys do indicate that many jury pool members share tort

---

[70] Allen Parducci, Category judgment: A range-frequency model, Psychological Review. 72(6), 1965, 407-418.

[71] For example, Kimihiko Yamagishi, Effects of response range in frequency judgments of common versus uncommon events, Perceptual & Motor Skills. 82(3, Pt 2), Jun 1996, 1371-1376. Ronald W. Niedrich, Subhash Sharma, and Douglas H. Wedell, Reference price and price perceptions: A comparison of alternative models, Journal of Consumer Research. 28(3), Dec 2001, 339-354. Michael R. Hagerty, Social comparisons of income in one's community: Evidence from national surveys of income and happiness. Journal of Personality & Social Psychology. 78(4), Apr 2000, 764-771.

[72] Jennifer K. Robbennolt and Christina A. Studebaker, Anchoring in the courtroom: The effects of caps on punitive damages, Law & Human Behavior. 23(3), Jun 1999, 353-373. Mollie W. Marti and Roselle L. Wissler, Be careful what you ask for: The effect of anchors on personal-injury damages awards, Journal of Experimental Psychology: Applied. 6(2), Jun 2000, 91-103. Reid Hastie, David A. Schkade, and John W. Payne, Juror judgments in civil cases: Effects of plaintiff's requests and plaintiff's identity on punitive damage awards, Law & Human Behavior. 23(4), Aug 1999, 445-470. For examples involving criminal sentencing, see: Michelle D. St. Amand and Edward Zamble, Impact of information about sentencing decisions on public attitudes toward the criminal justice system. Law & Human Behavior. 25(5), Oct 2001, 515-528. Birte Englich, and Thomas Mussweiler, Sentencing under uncertainty: Anchoring effects in the courtroom, Journal of Applied Social Psychology. 31(7), Jul 2001, 1535-1551.

[73] My colleague Steve Sugarman argues that "After 30 years of fighting, although most States have engaged in some statutory reform, the overall pattern across the nation is something of a crazy quilt, with different States adopting very different parts of the defence package." See US Tort Reform Wars (published in University of New South Wales Law Journal December 2002)

[74] Danzon, Patricia M. 1987. "The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims." Ohio State Law Journal 84: 413. Danzon, Patricia M., and Lee A. Lillard. 1983. "Settlement Out of Court: The Disposition of Medical Malpractice Claims." Journal of Legal Studies 12: 345.

reformers' jaundiced views of plaintiffs, attorneys, and run-away juries.[75] But it is not clear to what extent these views were shaped by tort reform ads or media coverage.

An experiment by Elizabeth Loftus[76] did find that mock jurors who were exposed to tort reform ads recommended significantly (but not dramatically) smaller awards than those in an unexposed condition. But because actual reform ads were used, the injunctive message (large awards are bad) and the descriptive message (large awards are increasingly common) were confounded. In a later study, Greene, Goodman, and Loftus[77] found a significant positive correlation between jury-pool members beliefs about the frequency of large jury awards and their subsequent award recommendations in a mock trial; "jurors who believed that million dollar awards were common tended to award more, not less." To the extent that messages become dissociated from their sources, and from each other, over time, it is conceivable that the descriptive norm content of a tort reform ad has a delayed and diffuse effect that is independent of its moral disapprobation.[78] Moreover, even if jurors are persuaded by the injunctive message, prospective plaintiffs and their attorneys seem more likely to attend to the enticement of the descriptive message.

Thus, distortion in tort reporting may have several simultaneous effects, and these effects are in tension. The injunctive message ("the system is irrational and unfair") may be advancing tort reform in citizen voting and state and federal legislative behavior. The descriptive message ("expect large and frequent awards") may be encouraging the filing of lawsuits, inflated settlement offers, and overdeterrence. Because we don't yet know the magnitude of either type of influence, we should not take for granted that the net

---

[75] See Valerie Hans & William S. Lofquist, Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate, 26 Law & Soc. Rev. 85 (1992); Edith Greene, Jane Goodman & Elizabeth F. Loftus, Jurors' Attitudes About Civil Litigation and the Size of Damage Awards, 40 Am. U.L. Rev. 805 (1991).

[76] Elizabeth Loftus, Insurance Advertising and Jury Awards, (ABA Journal, January 1979, 68-70)..

[77] Edith Greene, Jane Goodman, and Elizabeth F. Loftus, Jurors' Attitudes about Civil Litigation and the Size of Damage Awards, 40 Am. Univ. Law Rev. 805 (1991).

[78] See G. Tarcan Kumkale and Dolores Albarracín, The Sleeper Effect in Persuasion: A Meta-Analytic Review. Psychological Bulletin. 130(1), Jan 2004, 143-172. Alice H. Eagly and Shelly Chaiken, *The Psychology of Attitudes* (Harcourt, Brace, Jovanovich, 1993, at 612-619).

effect of distorted reporting benefits those who favor tort reform. If there is even a grain of truth in conventional models of litigation behavior, it is far from clear why tort reformers should unequivocally welcome, or why the plaintiffs' bar should decry, media coverage that exaggerates the public view that lawsuits (especially those involving products or doctors) have a good chance of going to trial and providing plaintiffs with a victory and a very large award.