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# COMMENT

## THE MONSTER IN THE TELEVISION:

### THE MEDIA'S CONTRIBUTION TO THE CONSUMER LITIGATION BOOGEYMAN

KIMBERLIANNE PODLAS\*

#### INTRODUCTION

Any American who has picked up a newspaper or turned on a television in the last decade has heard how litigation against business has run amok.<sup>1</sup> Empirical evidence, however, suggests these claims lack basis.<sup>2</sup> Nonetheless, the resulting

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<sup>1</sup> THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 2 (2002).

<sup>2</sup> See generally VALERIE P. HANS, *BUSINESS ON TRIAL* 9, 56-58 (2000) [hereinafter *BUSINESS*]; THOMAS KOENIG & MICHAEL RUSTAD, *IN DEFENSE OF TORT LAW* 3-5, 6 (2001) (contesting rhetoric of social litigiousness); Bruce A. Finzen & Brooke B. Tassoni, *Editor's Letter: Regulation of Consumer Products: Myth, Reality, and the Media*, 11 KAN. J. L. & PUB. POL'Y 523 (2002) (business claims lack empirical evidence); Michael J. Saks, *Do We Really Know Anything About The Behavior Of The Tort Litigation System – And Why Not?* 140 U. PENN. L. REV. 1147 (1998) (claims of litigation explosion overblown); Marc S. Galanter, *Reading The Landscape Of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And*

“litigation anxiety” exerts a profound impact on the strategic and operational decisions of business.<sup>3</sup> Unfortunately, litigation management, which purports to be a rationally based assessment of the possibilities and likely outcomes of litigation, is held hostage by fear and hamstrung by ignorance of the propensities of consumer plaintiffs.

With regard to consumers, many things influence litigiousness, but the most constant wide-reaching factor in forecasting the propensity to dispute is the influence of cultural norms.<sup>4</sup> These socially defined expectations tell us whether and under what circumstances society deems litigation appropriate – in short, whether and when to sue. Thus, the key to understanding whether an individual will identify an action as a legal wrong and formally dispute that action is discerning that individual’s social construction of litigious reality.<sup>5</sup>

In contemporary society, the media, specifically television, is our primary messenger of social norms.<sup>6</sup> Television’s images show us how to act and what is normal. In the last decade, the syndicated television courtroom – television shows like *The People’s Court* and *Judge Judy* – assumed the role as cultural messenger with regard to the norms and ways of law. Consequently, it is important to ascertain the norms that “syndi-court” promotes, its influence, if any, on audiences, and how its stories may influence consumer-to-business litigation, particularly, whether syndi-court discourages or encourages litigation and under what circumstances.

This Article investigates and quantifies television’s, specifically syndi-court’s, function as a messenger of norms regarding litigation and litigiousness. After acknowledging the per-

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*Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter *Landscape*] (discrediting claims of litigation crisis).

<sup>3</sup> Katherine E. Giddings & J. Stephen Zielezienski, *Insurance Defense in the Twenty-First Century: The Florida Bar’s Proposed Statement of Insured Client’s Rights – A Unique Approach to the Tripartite Relationship*, 28 FLA. ST. U. L. REV. 855, 868 (2001); see Joseph F. Speelman, *The MTBE Controversy: Defending Mass Tort Claims*, 69 DEF. COUNSEL J. 35 (2002); Jeffery Rothfeder, *Living with Litigation: The way CEOs handle brushes with litigation will probably determine how successfully they manage their companies*, THE CHIEF EXECUTIVE, Dec. 2001 at 20.

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

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

<sup>6</sup> See *infra* notes 102-19 and accompanying text.

vasiveness of litigation anxiety within the business world, the Article outlines deleterious effect of that anxiety on litigation management. It is suggested that restricting litigation management to traditional models of rational analysis – models that ignore the individual rationality of consumer plaintiffs – fails to achieve the goal of accurately assessing litigation risk.

This Article posits that a better understanding of the normative rationality of consumer plaintiffs, i.e., their socially influenced constructions of litigation, their motivations behind suit, and their beliefs regarding litigation, can remediate the shortcomings of the traditional model of litigation risk assessment. A more sophisticated understanding of the factors affecting a consumer's decision to pursue disputing also improves the ability to design responses to consumer disputants.

Research on the civil litigation process, however, tends exclude the transformative process by which individuals choose to pursue litigation.<sup>7</sup> Few studies report empirical evidence of a putative plaintiff's likelihood of doing so. Consequently, this Article seeks to develop an empirical base by critically analyzing syndi-court's structure, normative messages, and effect on the public. Ultimately, the findings are extrapolated to consumer-to-business disputing and litigation management strategies that better account for these normative understandings.

## I. LITIGATION: BUSINESS'S MONSTER UNDER THE BED

### A. BUSINESS'S FEAR OF LITIGATION

Litigation is the boogeyman that business fears.<sup>8</sup> Almost everyone has heard stories of unfair lawsuits<sup>9</sup> that ran an or-

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

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

It is claimed that in the last 30 years, "American business and their insurers have experienced an unprecedented increase in litigation." Giddings & Zielezienski, *supra* note 3, at 867; WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT (1991) (increased litigation since 1940's); John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' And Executives' Opinions*, 3 HARV. NEGOTIATION L. REV. 1, 26 (1998) (94% of executives surveyed be-

ganization out of business,<sup>10</sup> forced it into bankruptcy,<sup>11</sup> or caused its life-saving products to be removed from the shelves.<sup>12</sup> Invariably, the moral of these stories is that “[a]nyone can file a suit forcing a corporation to spend millions defending itself.”<sup>13</sup> In fact, many of corporate America’s biggest names, such as Philip Morris, Ford, and Dow Corning, have “lived under the cloud of litigation for years.”<sup>14</sup> Increasingly, business finds itself plagued by litigious plaintiffs<sup>15</sup> spurred on by gold-digging

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

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

<sup>10</sup> Carlos Conde, *Lawsuit Mania*, HISPANIC, Dec. 1998, at 34 (survival of small business is easily be threatened by suit; suits force small businesses and entrepreneurs out of business); Finzen & Tassoni, *supra* note 2, at 528 (large-scale litigation efforts threatened livelihood of business).

<sup>11</sup> Conde, *supra* note 10 at 34 (litigation can bankrupt business); Rothfeder, *supra* note 3, at 20-21 (litigation has forced some companies into bankruptcy); Finzen & Tassoni, *supra* note 2, at 528-29 (business claims litigation forces them into bankruptcy); Paul Sweeney, *Keeping Legal Costs Down*, FIN. EXECUTIVE, Dec. 2001, at 46 (after \$500 million judgment, Lowen Group “began inexorable slide toward bankruptcy”); PR NEWS, *America’s Love Affair With Litigation Means News For Law for PR*, June 26, 2000, at 1-2 (Dow Corning’s bankruptcy due to breast implant litigation).

<sup>12</sup> Rothfeder, *supra* note 3, at 21; Finzen & Tassoni, *supra* note 2, at 524 (recounting claims that litigation explosion denies world of life-saving products). “[F]ord, Firestone, and Dow Corning, have faced with an onslaught of products liability litigation of late.” Rothfeder, *supra* note 3, at 21.

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

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

<sup>14</sup> Rothfeder, *supra* note 3, at 21.

<sup>15</sup> Mark A. Hoffman, *Common Good Fights Against Litigious Culture*, BUS. INSUR., April 29, 2002, at 40 (“culture of litigiousness” is fundamental problem in society); BURKE, *supra* note 1, at 2 (recounting claims that Americans are litigious and greedy); Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 664 (2000) [hereinafter *Conniving Claimant*] (Americans believe there is too much litigation); Maurice Rosenberg, *Civil Justice and Civil Justice Reform*, 15 LAW & SOC’Y REV. 473 (1981) (litigation explosion); John Leo, *The World’s Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24 (noting litigation explosion); William Mullen, *US Seeks Cure For Legal Dilemma*, CHI. TRIB., July 26, 1991, at C1; Suzanne Oliver, *Let The Loser Pay*, FORBES, March 18, 1991, at 96 (litigation explosion).

attorneys<sup>16</sup> and pro-plaintiff juries eager to reach into the deep pockets of business.<sup>17</sup> In fact, one author claims that legal costs now equal 5-10% of earnings for some of our nation's largest corporations.<sup>18</sup> Another source estimates litigation costs at \$100 - \$300 billion annually.<sup>19</sup> Moreover, these costs are not confined to business, but are passed on to consumers<sup>20</sup> in the form of the infamous "tort tax,"<sup>21</sup> i.e., increased product prices to account for the costs of past or future tort judgments. Although many scholars suggest that this fear of litigation is irrational,<sup>22</sup> just as the monster under the bed paralyzes a child, so does the fear of litigation paralyze business.

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<sup>16</sup> Finzen & Tassoni, *supra* note 2, at 524, 529 (greedy lawyers); Sarah D. Scalet, *See You in Court*, CIO MAGAZINE, Nov. 1, 2001, at 62 (lawyers chase deep pockets and juries like to give deep pocket money).

<sup>17</sup> BUSINESS, *supra* note 2, at 13 (public and business perception that juries operate on deep pocket rationale). Some businesses claim they are victimized by civil juries who rule against them due to their perceived deep pockets rather than on the evidence. *Id.*; Valerie P. Hans, *The Illusions And Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328-29 (1998) [hereinafter *Illusions*]. Others claim that jurors are simply anti-business. *Id.*; but see BUSINESS, *supra* note 2, at 131 (civil juries pre-disposed toward defendants).

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

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

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

<sup>21</sup> Conde, *supra* note 10 (referencing tort tax); This so-called "tort tax" has been estimated at \$300 billion per year. Daniels & Martin, *supra* note 5, at 472. See also PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

<sup>22</sup> See generally KOENIG & RUSTAD, *supra* note 2 (disputing claims of litigiousness and runaway juries). Some researchers dismiss the claims of American litigiousness as sloppy legal scholarship or propaganda. Marc S. Galanter, *The Day After The Litigation Explosion*, 46 MD. L. REV. 3 (1986); *Landscape*, *supra* note 2, at 5 (debunking litigation crisis and suggesting that caseload increases merely tracked population growth and a defined category of product liability cases); See Saks, *supra* note 2, 1157 (claims of litigation explosion overblown); Sauer, *supra* note 13, at H-1 (statistics do not support claims of societal litigiousness); cf. Tom Ramstack, *Lawsuits Few So Far in States with Patients' Bill of Rights, Officials Say*, WASH. TIMES, July 11, 2001 (several states report that "crippling wave of litigation" forecast by business due to patients' bill of rights has not occurred).

Indeed, a number of empirically based, rather than anecdotally based, studies demonstrate that litigation is either declining or remaining stable. Generally, scholars

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Notwithstanding the questionable veracity of these claims and business's own contribution to them,<sup>23</sup> litigation anxiety influences organizational decision-making. According to one study, 80% of corporate executives surveyed said that fear of suit impacted business decision-making more now than 10 years ago.<sup>24</sup> Another showed that 60% believed that civil litigation hampered their ability to compete globally.<sup>25</sup> For example, business leaders claim that the specter of litigation forces them to forgo all sorts of opportunities for growth and product development.<sup>26</sup> pursuing novel cost saving technologies,<sup>27</sup> and devel-

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

For example, a study sponsored by the Georgia Civil Justice Foundation and the Georgia State Bar Association found that when adjusted for population growth, tort lawsuits had declined from 1994-97. It thus concluded that the "litigation explosion" was merely "popular and political rhetoric." Bill Rankin, *Litigation Data Disprove the Myth*, THE ATLANTA JOURNAL AND CONSTITUTION, Feb. 9, 2000, at 3C. Another study commissioned by the National Center for State Courts found that in 16 states, the number of tort suits had declined. *National Council for State Courts, Litigation Dimensions: Tort and Contract in Large Urban Areas* (1995); *Bureau of Justice Statistics, Civil Jury Cases and Verdicts in Large Counties* (July 1995). Researchers saw similar trends with regard to malpractice claims. KOENIG & RUSTAD, *supra* note 2, at 131-33, 143-46 (using statistics to dispute claim that medical malpractice suits are increasing); Abbot S. Brown, *The Med-Mal Suit Explosion That Isn't*, N.J. LAW., April 1, 2002, at 1 (though malpractice insurance industry claims a litigation explosion, number of malpractice suits in New Jersey declined more than 25% since 1994); Sauer, *supra* note 13, at H-1 (Judicial Council of California found 50% drop in personal-injury suits over last 15 years).

<sup>23</sup> BUSINESS, *supra* note 2, at 70. Valerie Hans posits that the "litigation explosion" rhetoric has been promulgated by business seeking to influence public consciousness. *Id.* See also Finzen & Tassoni, *supra* note 2, at 524-25. Finzen concurs that business conducted its own public relations campaign to convince the media, the public, and Congress that a litigation explosion was undermining corporate America. *Id.*

<sup>24</sup> Hoffmann, *supra* note 15 at 40 (fear of claims "paralyze[s]" business); See generally Rothfeder, *supra* note 3, at 20 (decisions regarding litigation are among the most critical for CEOs).

<sup>25</sup> Vamos, *supra* note 9.

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

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

oping<sup>28</sup> or marketing new products are associated with unknowns, and unknowns are associated with tort verdicts.<sup>29</sup>

## B. LITIGATION MANAGEMENT

As business's fear of lawsuits has increased, so has the importance of litigation management.<sup>30</sup> Even frivolous suits translate to expense.<sup>31</sup> They can spur copycat suits,<sup>32</sup> damage a business's reputation,<sup>33</sup> and require the involvement of counsel.<sup>34</sup> (Of course, as counsel communicates with plaintiffs, files motions, takes depositions, and negotiates settlements hours

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<sup>28</sup> BUSINESS, *supra* note 2, at 14 (unpredictability of civil juries blamed for preventing innovation of U.S. businesses); *see also* Anderson v. Owens-Corning Fiberglass Corp., 810 P.2d 549, 556 (1991) (manufacturers uncertain on how to limit risks will be discouraged from creating new products for fear that new products will result in legal liability); *cf.* Browning-Ferris Indus. of Vermont Inc. v. Kelco Disposal Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting) (excessive punitive damage awards chill creation of new products).

<sup>29</sup> *Oil Strike*, *supra* note 27, at 738. Galanter, however, has questioned the correlation between liability costs and export performance by industry. *Id.* at 738-39. In fact, "there is absolutely no evidence that product liability hinders the competitiveness of American businesses." Product Liability Reform Act of 1997, S. Rep. No. 105-32, at 79, 82 (1997).

<sup>30</sup> Giddings & Zielezienski, *supra* note 3, at 867.

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

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

Even a novel suit with questionable prospects of success can encourage other suits. Lauren Chambliss, *Courts hold key to great payout escape over Wall St*, EVENING STANDARD (UK), August 6, 2001 (analysts cases against US market analysts not likely to hurt investment banks).

<sup>33</sup> Speelman, *supra* note 3, at 45 (companies cast into the role of tort defendants are commonly forced to defend products in the media); PR NEWS, *supra* note 11, at 1; BUSINESS, *supra* note 2, at 4-5 (Benlate litigation against DuPont harmed company's image).

<sup>34</sup> Indeed, lawyers have also been blamed for the litigation explosion, since more litigation means more business for them. *See e.g.*, Sweeney, *supra* note 11, at 48 (describing "litigation machine" created by lawyers to pool resources and increase business litigation) and (litigation "driven by plaintiff's attorneys who seek out claims on behalf of consumers"); Michael Kirsch, *Lawyers, Heal Thyselves*, 85 A.B.A. J. 96 (May 1999), (lawyers contribute to "litogomania"); Leo, *supra*, note 15, at 24 (trial lawyers promote "litigation lottery"); OLSON, *supra* note 8 (accusing lawyers of prompting plaintiffs to sue and churning out "junk litigation").



will be billed.)<sup>35</sup> Consequently, litigation is now a comprehensively managed, full-time enterprise as well as “a major expense item in annual budgets. . . .”<sup>36</sup> It requires the oversight of millions of dollars, not to mention the companion costs of settlements, verdicts, and corporate reputation.<sup>37</sup> In fact, PricewaterhouseCoopers reports that U.S. based companies spend 3-10% of their yearly revenues on managing litigation.<sup>38</sup>

In its conventional form, litigation risk assessment mimics basic cost-benefit analysis,<sup>39</sup> assigning weights to and balancing factors deemed important to the parties.<sup>40</sup> These factors typically include<sup>41</sup> the cost of judgments, litigation costs and attorney’s fees, ramifications of negative publicity on consumer spending,<sup>42</sup> the loss of market opportunities,<sup>43</sup> and uncertainty about the business that discourages investment.<sup>44</sup> The sum of

<sup>35</sup> Andrew Wood, *Legal Costs Too High?*, CHEMICAL WEEK, Nov. 4, 1998, at 33, 34 (PricewaterhouseCoopers estimates legal spending for chemical companies as 0.42% of yearly revenue); David M. Katz, *Employment Bias: Should You Settle, or Risk a Jury Trial*, CFO.COM, May 24, 2001, <http://www.cfo.com/Article?article=3351> last visited March 10, 2004.

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

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

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

<sup>38</sup> Sweeney, *supra* note 11, at 47. This figure includes insurance premium payments. *Id.*

<sup>39</sup> MacFarlane, *supra* note 4, at 705 (“rational risk assessment is a straightforward cost-benefit analysis”).

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

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

<sup>42</sup> PR NEWS, *supra* note 11, at 1 (“Your reputation is only as good as the last negative allegation”).

<sup>43</sup> MacFarlane, *supra* note 4, at 706. Some tangible commercial consequences include the “loss of future contracts, and workplace morale problems. . . .” *Id.*; Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOTIATION L. REV. 1, 4 (1999) (valuations include how much the case is worth and likelihood of prevailing).

<sup>44</sup> MacFarlane, *supra* note 4, at 706; PR NEWS, *supra* note 11, at 1 (litigation can damage stock prices).

this supposedly objective measurement<sup>45</sup> presumably represents the best interests of the parties.<sup>46</sup> With this calculation, business can decide whether to settle, litigate, pay through insurance, or ignore a claim.

Of course, for risk assessment to work, the calculation must include all relevant factors and weight them correctly. Unfortunately, evidence suggests that calculations are commonly flawed in this regard.<sup>47</sup> Not only are some factors ill-weighted, but those external to business and its ideas of rational action are ignored. Whereas calculations irrationally assume that consumer litigants make risk-neutral outcome-maximizing decisions,<sup>48</sup> studies demonstrate that this is not true.<sup>49</sup> Instead, consumers seldom know the legal rules underpinning their disputes, cannot therefore assess strength or likely gains, and are influenced by factors independent of the facts of the case<sup>50</sup> and economic rationality.<sup>51</sup> For instance, con-

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Regarding claims that punitive damages anxiety deters investment, a statistical analysis of tort lawsuits against publicly-traded businesses found no statistically significant abnormal stock returns and concluded that the data did not support the hypothesis that settlements shaped by punitive damages constitute the main effect of punitive damages. Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 J. L. & ECON. 527, 533-35 (1999) (studying suits from 1986-1996).

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

<sup>46</sup> MacFarlane, *supra* note 4, at 705 ("such accounting represents the best interests of the [disputants])."

<sup>47</sup> See Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 597 (1988).

For further observations regarding the failures of economic analysis in contemplating an individual's choice to dispute, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

<sup>48</sup> Guthrie, *supra* note 45, at 165; MacFarlane, *supra* note 4, at 668.

<sup>49</sup> Guthrie, *supra* note 45, at 175-76; Jolls et al., *supra* note 47, at 1471 (social science research on decision-making).

<sup>50</sup> MacFarlane, *supra* note 4, at 668-69 (disputant's settlement appraisals influenced by factors other than advice from attorney).

<sup>51</sup> *Id.* Even when consumer perceptions of the ease, cost, and benefits of litigation are objectively faulty, their exclusion from calculation hampers rational assessment. Cf. *id.* at 709. In settlement negotiations, discussions should go beyond the factual confines of the legal case to encompass a disputant's expectations and ideas of fairness. *Id.*

sumers are guided by emotions,<sup>52</sup> experience with,<sup>53</sup> and perceptions of law.<sup>54</sup> This does not mean that the behavior of putative plaintiffs is unpredictable or random, but that traditional models are too constricted to quantify it accurately.<sup>55</sup>

One study showed that lawyers' assessment capabilities<sup>56</sup> fall short when it comes to jury awards, as they overestimate both the proportion of verdicts for plaintiffs and the size of awards.<sup>57</sup> Business management fares even worse. Some managers are too distanced from the conflict and dissociated from its outcome<sup>58</sup> to make an accurate assessment. Others have such a dark view of the litigation liability situation<sup>59</sup> that they improperly overestimate risk.<sup>60</sup> In fact, a study showed that administrators perceive the threat of litigation as even *greater* than did legal counsel.<sup>61</sup>

As a result, despite the millions of dollars annually devoted to litigation management,<sup>62</sup> this enterprise suffers from

<sup>52</sup> *Id.* at 668 (studies do not consider how litigants are feeling about the conflict and how it affects orientation toward pursuing and construing it).

<sup>53</sup> *Id.* at 705 (definition of risk is narrow and suffers from "tendency to exclude the experience of the disputants themselves").

<sup>54</sup> *Id.* at 705 (other factors besides likely legal outcome are important for litigants, and "deserve fuller consideration than they commonly receive").

<sup>55</sup> See Jolls et al., *supra* note 47, at 1474-75.

<sup>56</sup> *Oil Strike*, *supra* note 27, at 746-47. Counsel, however, may not only be ineffective in accurately quantifying litigation risk, but also have an interest in magnifying the menace of litigation. *Id.* at 748.

<sup>57</sup> Songer, *supra* note 47, at 597; see also Lande, *supra* note 8, at 15-16 (outside counsel compared with inside counsel and executives had most favorable view of litigation).

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

<sup>58</sup> MacFarlane, *supra* note 4, at 707 (in competitive culture of corporate governance, purely objective risk appraisal is rare).

<sup>59</sup> *Oil Strike*, *supra* note 27, at 742. Many claimed that the risk of product liability litigation caused them to discontinue products or forgo introduction of new products. *Id.* These beliefs, though common, generally are not based on first-hand experience. *Id.* at 742-43.

<sup>60</sup> *Oil Strike*, *supra* note 27, at 737-38. Galanter reports that more recent studies show that a corporation's total liability risk equaled \$0.255 for every \$100 in revenue, whereas in 1987 it was \$0.259 per \$100 in revenue. *Id.* at 737, citing J. Robert Hunter, *Product Liability Insurance Experience 1984-1993* (March 1995).

<sup>61</sup> *Oil Strike*, *supra* note 27 at 743 (reporting study by Charles Epp). Presumably, counsel is in the better position to assess potential problems. *Id.* at 743; see generally Oliver, *supra* note 15 (business will do almost anything to avoid suit).

<sup>62</sup> Giddings & Zielezienski, *supra* note 3, at 868.

an irrational fear of the litigation it seeks to manage<sup>63</sup> and an ignorance of the propensities, motivations, desires, and understandings about litigation held by consumer plaintiffs. Lacking a valid perspective and empirically-based assessments of the propensities of putative plaintiffs, business tends to overestimate the frequency of high-end litigation,<sup>64</sup> the number of judgments, and the amounts of verdicts.<sup>65</sup> The result is that business unnecessarily pays claims when it should not,<sup>66</sup> settles at dollar amounts that it need not,<sup>67</sup> and relinquishes control to insurance carriers who prey on fear to maintain inflated insurance premiums.<sup>68</sup>

### C. A CALL TO ARMS

It is time to turn on the lights and illuminate the propensities underlying the process by which individuals decide to litigate. A more accurate understanding of when and under what circumstances consumers are prone to litigate and for what anticipated result will modernize the quantification of factors.

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<sup>63</sup> Oliver, *supra* note 15. Fear impacts how legal claims are handled, and whether, when, and with whom to settle. *Id.* Indeed, “[m]ost businesses will do anything to avoid being sued.” *Id.*; See also ROBERT L. KIDDER, *CONNECTING LAW & SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY* 47-48 (1983) (describing strategies and decision-making in identifying with whom to settle and when to pay more for claims than the law requires).

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

<sup>65</sup> *Id.* at 745 (incorrect perceptions about cost and likelihood of punitive damages); *Id.* at 763 (businesses tend to focus on jury’s propensity to award punitive damages).

<sup>66</sup> *Oil Strike*, *supra* note 27, at 747 (may induce corporate functionaries to overestimate threat and make settlement and business decisions that cannot be accounted for in terms of actual propensities of juries).

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

Indeed, plaintiffs-side attorneys have said that the specter of punitive damages provides leverage in settlement negotiations with business. Koenig, *infra* note 57, at 176 (acknowledgment that punitive damages claims provide important leverage for clients); William Glaberson, *Ideas & Trends: The \$2.9 Million Cup of Coffee; When The Verdict Is Just Fantasy*, N.Y. TIMES, June 6, 1999, at a25 (reporting study by National Center for State Courts that found only 0.047% of cases end in punitive damages).

<sup>68</sup> One advocacy organization has argued that business’s irrational fear of suit has had the effect of increasing the number of defense wins of product liability trials, because business settles all but the most easily winnable cases. Koenig, *supra* note 57, at 173.

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In this way, business can better understand litigation risk and its economic ramifications, and construct increasingly responsive consumer-complaint systems that more rationally cost out settlements, refunds, and litigation.

## II. ACCULTURATION TO LITIGATION

### A. FACTORS INFLUENCING THE DECISION TO LITIGATE

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

The cultural environment of litigation<sup>77</sup> is made up of norms.<sup>78</sup> Though there are many definitions,<sup>79</sup> generally, norms

<sup>69</sup> See generally BUSINESS, *supra* note 2, at 5-10.

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

<sup>71</sup> *Oil Strike*, *supra* note 27, at 718 (enlargement of remedy accompanied by cultural shift in expanded notion of rights).

<sup>72</sup> Among those developments: the Supreme Court interpreted law to make summary judgment on behalf of tort defendants more readily available, see e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-48 (1986); *Matsushita Elec. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). State courts tightened sanctions for frivolous lawsuits and The Advisory Committee on the Federal Rules of Civil Procedure amended Rule 11. Guthrie, *supra* note 45, at 164.

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

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

<sup>75</sup> *Id.* at 669 (how disputants make sense of conflict is the most important variable).

<sup>76</sup> *Id.* at 670-71 (culture of conflict includes values and beliefs that influence an individual's construction of conflict and experience with disputes); see generally Jolls et al., *supra* note 47 at 1474 (human preferences are constructed by social situations).

<sup>77</sup> Daniels & Martin, *supra* note 5, at 453-54 ("cultural environment surrounding civil litigation--e.g., what is perceived as an injury; whether and whom to blame for an injury; what to do about it").

are social expectations of how one is to act.<sup>80</sup> They tell us what others deem right or wrong,<sup>81</sup> what behaviors are appropriate, and what reactions are “normal.” Inasmuch as norms tell us what should and should not be done,<sup>82</sup> they influence our choices<sup>83</sup> and behaviors.<sup>84</sup>

Just as norms influence myriad attitudes and behaviors,<sup>85</sup> so do they influence attitudes and behaviors regarding litigation.<sup>86</sup> Norms socialize us into society’s expectations regarding disputes<sup>87</sup> signaling what is an injury, what to do about it,<sup>88</sup> and what society’s reaction to or perceptions about disputes and disputants will be.<sup>89</sup>

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<sup>78</sup> Tom R. Tyler & John M. Darley, *Building a Law-abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 719 (2000) (social values underlie social behavior); Dan Coates and Steven Penrod, *Social Psychology and the Emergence of Disputes*, 15 LAW & SOC’Y REV. 655, 666-67 (1981) (social comparisons influence “naming and blaming” stages of legal disputing).

<sup>79</sup> Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 350 (1997) (“considerable effort has gone into defining exactly what constitutes a norm” and “[t]he economics literature continues to struggle over the issue”) (internal citations omitted); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996) (social norms understood in many different ways).

<sup>80</sup> Sunstein, *supra* note 79, at 914.

<sup>81</sup> JOEL CHARON, *THE MEANINGS OF SOCIOLOGY* 107 (4<sup>th</sup> ed. 1993) (norms signal society’s rules or expectations).

<sup>82</sup> Sunstein, *supra* note 79, at 914. According to Sunstein, norms are “social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done.” *Id.*

<sup>83</sup> *Id.* at 939.

<sup>84</sup> CHARON, *supra* note 81, at 108; McAdams, *supra* note 79, at 339; Sunstein, *supra* note 79, at 907 (behavior “pervasively a function of norms”); see also Tyler & Darley, *supra* note 78, at 719 (social values underlie social behavior).

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

<sup>86</sup> W. BARNETT PEARCE & STEPHEN W. LITTLEJOHN, *MORAL CONFLICT: WHEN SOCIAL WORDS COLLIDE* 50 (1997). Just as culture shapes our beliefs and actions in response to our social world, so does it shape our understanding of conflict, its resolution, and outcomes. *Id.*; Daniels & Martin, *supra* note 5, at 457-58 (culture of litigation deals with people’s ideas about the world around them).

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

<sup>88</sup> Daniels & Martin, *supra* note 5, at 453-54; Sunstein, *supra* note 79, at 914 (norms define what actions to be taken).

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

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

Once a litigious moment is identified, the aggrieved must decide whether to pursue it and to what remedy.<sup>93</sup> Again, this assessment is made with reference to norms. We compare our own situation with those of others, and we consider what they have done and whether society has responded negatively or positively to those choices.<sup>94</sup> Norms also signal when litigation is inappropriate.<sup>95</sup> When the public image of litigation implies that it is disagreeable,<sup>96</sup> demeaning,<sup>97</sup> or embarrassing,<sup>98</sup> and its

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<sup>90</sup> MacFarlane, *supra* note 4, at 679-80. For a grievance to mature into a legal dispute, the victim must perceive a wrong as qualifying for redress. *Id.* Not all aggrieved, however, engage in this "naming," and, therefore, do not recognize a legally cognizable injury. *Id.* See also Saks, *supra* note 2, at 1188-89. The many victims who do not realize that they have viable legal claims, never bother to sue. *Id.* Of course, one may appropriately identify a valid legal claim, may think that they have a cause of action, but be incorrect, or identify a colorable, but very weak claim, and overestimate its value.

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

<sup>92</sup> See *Conniving Claimant*, *supra* note 15 (recounting popular legal legends).

<sup>93</sup> MacFarlane, *supra* note 4, at 682 (transformation of grievance upon voicing it and requesting remedy).

<sup>94</sup> Rohrlich, *supra* note 22, at A1. If she has seen litigants of similar claims treated positively, she may consult an attorney or file a claim in small claims or state civil court. If she has heard about their type of complaint being mediated, she might complain to a company's customer service department, draft a letter, or turn to the local Better Business Bureau for intervention.

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

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

<sup>97</sup> Toni M. Massaro, *The Meanings of Shame: Implications for Legal Reform*, 3 PSYCHOL. PUB. POLY & L. 645, 649-50, 655-56 (1997) (shame influences creation and enforcement of norms).

<sup>98</sup> Saks, *supra* note 2, at 1189 (potential plaintiffs avoid suit because of stigma associated with litigation).

plaintiffs “blameworthy”<sup>99</sup> or greedy,<sup>100</sup> it imputes norms disfavoring litigation. For example, though the public now may be legally conscious that McDonald’s could be liable should one spill coffee on oneself and be burned, society’s reaction to Stella’s coffee spill and tort recovery<sup>101</sup> was so negative that an injured spiller might forgo litigation.

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

## B. NORMS ON TELEVISION

Though a universally-accepted theory of how norms originate has yet to emerge,<sup>102</sup> two conditions are clearly necessary for their formation:<sup>103</sup> (1) an apparent consensus of belief or behavior and (2) publicity<sup>104</sup> of that consensus to the public.<sup>105</sup> In other words, popularity of action or belief is not enough. Rather, individuals must be aware that such a consensus<sup>106</sup> exists so that they have a standard against which to judge their own behavior.<sup>107</sup> The media plays a critical role in ensuring that

<sup>99</sup> *Illusions*, *supra* note 17, at 334-35 (research demonstrates that victims are often blamed for fate).

<sup>100</sup> Daniels & Martin, *supra* note 5, at 454 (public believes plaintiffs bring unjustified lawsuits); *Conniving Claimant*, *supra* note 15, at 664 (litigants portrayed as “petty, oversensitive, obsessive, exploitative, and sociopathic”).

<sup>101</sup> See BURKE, *supra* note 1, at 2. This refers to Stella Liebeck’s tort suit against McDonald’s for coffee burns and related medical expenses.

<sup>102</sup> McAdams, *supra* note 79, at 391. Indeed, much literature discusses how law might change norms, but ignores theories of their origin. *Id.* at 352; Massaro, *supra* note 97, at 674 (sociologists disagree about which cultural variables exert most influence on norms).

<sup>103</sup> McAdams, *supra* note 79, at 391.

<sup>104</sup> *Id.* at 400. This publicity condition is difficult to satisfy and is “[t]he determinative obstacle to societal norm formation.” *Id.* at 400-01.

<sup>105</sup> *Id.* at 360 (esteem-based norms require publicized consensus).

<sup>106</sup> *Id.* at 362 (ignorance of consensus cannot produce norm).

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



both of these prerequisites are met. It shows us, accurately or not, what the consensus behavior is, and publicizes it to us with word, sound, and image. The media also does so with regard to norms of disputing,<sup>108</sup> presenting stories about litigation that define normality.

For instance, at the turn of the century, litigation was uncommon,<sup>109</sup> and this was paralleled by media coverage that either did not report litigation or described it as inappropriate.<sup>110</sup> When industrial accidents skyrocketed,<sup>111</sup> coverage changed. Newspapers began publicizing these accidents,<sup>112</sup> and spoke of suits filed by injured innocents against big business.<sup>113</sup> The tone and content of these stories indicated that litigation of this type was just, and helped support social norms favoring litigation.<sup>114</sup> Soon, a society that had eschewed litigation, began to sue in greater numbers.<sup>115</sup>

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

<sup>109</sup> BURKE, *supra* note 1, at 2-3 (culture kept Americans out of court). Litigation was inconsistent with the belief systems of fatalistic Americans who accepted injuries and adversity. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW [hereinafter HISTORY] 185-87 (2d ed. 1985); cf. Paquin, *supra* note 96, at 30 (people who hold fatalistic beliefs may lack motivation to sue); *Illusions*, *supra* note 17, at 331 (societal desires to stimulate economy led to generous treatment of business corporations).

<sup>110</sup> HISTORY, *supra* note 109, at 4-8.

<sup>111</sup> *Id.* at 468-70. See also LAWRENCE M. FRIEDMAN, LAW IN AMERICA 43 (2002). ("Nothing does a better job of mangling human bodies than machines").

<sup>112</sup> *Id.* at 545 (newspapers sensationalized high profile trials and accidents).

<sup>113</sup> McAdams, *supra* note 79, at 391-92; BUSINESS, *supra* note 2, at 7. Most of that coverage focused on citizens suing business. See *Id.* See also Miklave, *supra* note 36, at 57 (publicity of trials and monetary awards encourages individuals to sue); BUSINESS, *supra* note 2, at 8. It also covered protests against unsafe working conditions. *Id.*

<sup>114</sup> McAdams, *supra* note 79, at 391-92; BUSINESS, *supra* note 2, at 7-8; see also Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire Of 1911: Social Change, Industrial Accidents, And The Evolution Of Common Sense Causality*, 20 LAW & SOC. INQUIRY 621, 637-38 (1995) (describing how the publicity related to the fire influenced public opinion regarding business responsibility for accidents).

<sup>115</sup> See generally *Illusions*, *supra* note 17, at 332 (cultural values began to change); Marc S. Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1154 (1996) (media culture stories about out of control jurors and the litigation explosion have influenced public opinions but are incorrect).

More recently, the media has publicized beliefs that we are in the midst of a litigation explosion.<sup>116</sup> We have seen a torrent of stories about greedy plaintiffs and businesses victimized because of their deep pockets.<sup>117</sup> News publications and broadcasts overrepresent sensational tort stories (distorting the realities of litigation),<sup>118</sup> and refer to punitive damages in 21% of those reports, though they occur in only 4.6% of cases.<sup>119</sup>

### C. CULTIVATION

Although the media includes newspapers, film, and radio, its primary mode of normative transmission is television. The public receives much of its information about the world from television.<sup>120</sup> Its images<sup>121</sup> inform the way people view and act

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<sup>116</sup> Daniels & Martin, *supra* note 5, at 461-63 (business and insurance industry sponsored public relations campaigns asserting there was a litigation explosion).

A law professor at New York University found that, while the average verdict in the New York area was \$1.1 million, the average verdict as reported by The New York Times was \$20.5 million. Glaberson, *supra* note 67, at a25 (reporting findings of NYU study); cf. Vidmar, *supra* note 67, at 875-76 (media's skewed coverage of plaintiff wins and large damage awards influences public).

<sup>117</sup> BURKE, *supra* note 1, at 3. Business conjured the litigation crisis for its own ends.

<sup>118</sup> Lande, *supra* note 8, at 6-7.

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

<sup>119</sup> *Oil Strike*, *supra* note 27 at 476 (reporting study of newspaper coverage from 1985-96).

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

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

<sup>121</sup> Moreover, the influence of these images is enhanced by television's auditory and visual stimuli. Gary R. Edgerton & Michael T. Marsden, *The Teacher-Scholar in Film and Televisions, Introduction: Media Literacy and Education*, J. POPULAR FILM & TELEVISION 2, 3 (2002) (in past century, priorities shifted away from the printed word and toward the image). Print media describes, but it cannot add moving pictures, speech, tone, lighting, camera angles, music, and interspersions of shots. Television's

upon the world.<sup>122</sup> Moreover, because virtually every American owns a television<sup>123</sup> and watches it regularly,<sup>124</sup> a huge audience<sup>125</sup> is privy to the behaviors and opinions of others<sup>126</sup> – at least as they are represented on the television screen. This makes television a profound normative messenger.<sup>127</sup>

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

news includes pictures with its narrative, but its narratives are a metered vocal tone, accompanied by stolid sets and largely static images. It is the difference between reading a screenplay and seeing the completed, scored movie. Sankowski, *supra* note 108, at 1 (film and related media are important sources of visually centered media);

<sup>122</sup> Daniels & Martin, *supra* note 5, at 457-58 (describing law as popular culture that informs views of world and decision-making in response to law).

<sup>123</sup> 98% of Americans have at least 1 television. Todd Picus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1085 n.172.

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

<sup>125</sup> Paul, *supra* note 120, at 656 (Americans get majority of information from television); Lowry, *supra* note 120, at 1.

<sup>126</sup> Kahan, *supra* note 107, at 351 (we draw inferences from the behavior of others).

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

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

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

<sup>130</sup> JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS, CULTIVATION THEORY AND RESEARCH ix-x (Gerbner introduction) (1999).

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

Essentially, television establishes a symbolic environment into which we are all born and with which we all interact.<sup>140</sup>

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<sup>131</sup> Edgerton & Marsden, *supra* note 121, at 4.

Although cultivation began as a more limited concept, its emphasis shifted “from individual short-term effects to the long-term cultural-ideological socialization role of repetitive messages found in television programming.” John L. Sherry, *Media Saturation and Entertainment-Education*, 12 COMM. THEORY 206, 211 (2002).

<sup>132</sup> Cohen & Weimann, *supra* note 129, 212 (cultivation accounts for effects of the dominant messages on television).

<sup>133</sup> SHANAHAN & MORGAN, *supra* note 130, at 72.

Cultivation analysis is the theoretical approach and research strategy that grew out of The Cultural Indicators project. This project, which began in 1967, studies television policies, programs, and impacts. Gerbner et al., *supra* note 120, at 43, 45-47.

<sup>134</sup> Thomas C. O’Guinn & C.J. Shrum, *The Role Of Television In The Construction Of Consumer Reality*, 23 J. CONSUMER RES. 278, 280 (1996). Cultivation analysis quantifies and tracks the most recurrent images in television content (*i.e.*, message system analysis), and investigates whether and how television contributes to viewers’s conceptions of social reality. See generally Gerbner et al., *supra* note 120.

<sup>135</sup> Sotirovic, *supra* note 108, at 750.

<sup>136</sup> Gerbner et al., *supra* note 120, at 47.

<sup>137</sup> *Id.* at 43-44 (medium’s contribution to perceptions of social reality) and at 47 (total immersion outlook).

<sup>138</sup> Cohen & Weimann, *supra* note 129, at 99.

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

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

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

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Individuals learn from what they see on television.<sup>141</sup> Even if they forget its specific elements, they retain general impressions. These impressions influence their assessments of the world<sup>142</sup> and, regardless of their accuracy, impact their decisions.<sup>143</sup> The world as seen on television, however, may bear little resemblance to reality.<sup>144</sup> In fact, it may cultivate a distorted view of the world.<sup>145</sup>

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

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<sup>141</sup> Paul, *supra* note 120, at 656 (Americans get majority of information from television).

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

<sup>143</sup> Sotirovic, *supra* note 108 (these perceptions of reality "are consequential for individuals' judgments and decisions").

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

George Gerbner asserts that television does not merely reflect beliefs, but that cumulative exposure to it generates a unique set of beliefs in viewers. George Gerbner et al., *supra* note 120 at 23-25.

<sup>144</sup> L.J. Shrum, *supra* note 124, at 261.

<sup>145</sup> See generally, Gerbner et al., *supra* note 120, at 23-25.

<sup>146</sup> *Id.* This was due to the belief that television's programs represented the world a violent place; see also *Id.* at 52-53 (outlining "mean world" syndrome).

<sup>147</sup> Eschholz, *supra* note 118, at 37-38 (outlining "violence in society" syndrome).

<sup>148</sup> *Id.* at 38-39 (television greatly exaggerates the incidence of crime in society).

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

## D. LAW ON TELEVISION

1. *Television as a Window Into the Courtroom*

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

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

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

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

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

<sup>154</sup> Cripe, *supra* note 150, at 240 (television provides public with insight into trial system).

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

<sup>155</sup> Of course, those television representations may be distorted. Birke & Fox, *supra* note 43, at 9.

<sup>156</sup> Elliot E. Slotnik, *Television News And The Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (television provides majority of public with its only information about law); see also Bruce M. Selya, *The Confidence Games: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 913 (1996) ("few individuals have direct experience with the justice system"); Mertez, *supra* note 150, at 206 (primary knowledge

2. *The Impact of Syndi-Court*

Though television has long hosted some fictional legal fare,<sup>157</sup> it is now an environment rich in reality law.<sup>158</sup> In the last decade, the syndicated television courtroom has metastasized into the public consciousness as the “hottest trend in daytime television.”<sup>159</sup> Television courtrooms like those of Judge Judy and Judge Mathis currently reach more Americans than any other type of legal information.<sup>160</sup> Moreover, the syndi-court genre hosts up to 8.5 million viewers daily.<sup>161</sup> In light of this popularity, syndi-court’s potential for influence is enormous.<sup>162</sup>

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about law comes from pop culture sources, including television; television shapes public’s perception of law) (this material has become too pervasive to ignore); Cripe, *supra* note 150, at 240 (public relies on media’s portrayal of justice system).

<sup>157</sup> Popular legal television shows include “Perry Mason,” “L.A. Law,” “The Practice,” and “Ally McBeal.” See Diane Klein, *Ally McBeal and Her Sisters: A Quantitative and Qualitative Analysis of Representation of Women Lawyers on Prime-Time Television*, 18 LOY. L.A. ENT. L. REV. 259 (1998). Everywhere one looks, stories are being told about civil litigation. Landsman, *supra* note 153, at 421; Neal R. Feigenson, *Legal Meaning in the Age of Images: Accidents as Melodrama*, 43 N.Y.L. SCH. L. REV. 741, 742 (1999/ 2000) (televised legal events, both fictional and real, show pop culture visions of the justice system).

<sup>158</sup> Lisa Scottoline, *Law and Popular Culture: Get Off The Screen*, in 24 NOVA L. REV. 655, 656 (2000) (television shows like Judge Judy represent new breed of televised law).

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

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

<sup>161</sup> Schlosser, *supra* note 160, at 15. The week of January 21-27, 2002, “Judge Judy” had 8.4 million viewers, and “Judge Joe Brown” 4.4 million. ENT. WKLY., Feb. 22, 2002, at 133; see also Bill Keveny, *Syndicated Goldies Are Oldies: New Shows Are No Match*, USA TODAY, Nov. 26, 2001, at 4D (“Judge Judy” garners 7,061,000 viewers). Its closest competitor, Court TV, once had 6% of that audience. Harris, *supra* note 152, at 803. Court TV reached its largest audience ever, 557,000 viewers, by changing its programming to include a non-courtroom show, “Forensic Files” and syndicated dramas. Ed., *Court TV Has Highest Quarterly Rating in Network’s History*, BUS. WIR\*, April 2, 2002, at 1.

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

Syndi-court boasts other characteristics enhancing its ability to influence audiences. First, it is produced to be swift and interesting with simple,<sup>163</sup> accessible conflicts.<sup>164</sup> By contrast, as one television critic observed, programming such as Court TV “stands out because of its tediousness.”<sup>165</sup> As syndi-court is more interesting to viewers, it becomes more memorable.<sup>166</sup> Second, its editing<sup>167</sup>— the camera constantly moves between the litigant narratives and the judge’s reaction<sup>168</sup>— also increases viewer attention and thus memory.<sup>169</sup> Third, unlike periodic reporting of trial or appellate decisions,<sup>170</sup> syndi-courts are stable and homogenous. The images and lessons of one syndi-court are the lessons and images of all. This unified body of information heightens the ability of the audience to identify consistent messages within the genre and to apply them to

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<sup>163</sup> Epstein, *supra* note 157, at (syndi-court is rarely dull or hard to understand).

<sup>164</sup> Scottoline, *supra*, note 158, at 657.

<sup>165</sup> Harris, *supra* note 152, at 803.

<sup>166</sup> Itzhak Yanovitzky, *Effects of News Coverage on Policy Attention and Actions*, 29 *Comm. Res.* at 424 (“media effects are contingent on a person’s motivation to attend to the message . . . [m]otivation, in turn, is a function of . . . message attributes”).

<sup>167</sup> Studies have demonstrated that increasing the number of edits in a television “message” increases viewers’s attention as well as their ability to remember the message. Annie Lang, et al., *The Effects of Edit on Arousal, Attention, and Memory For Television Images: When an Edit is an Edit Can an Edit Be Too Much?* 44 *J. Broad. & Elec. Media* 94, 105 (2000).

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

<sup>169</sup> These elicit an “orienting response” that directs the viewer’s attention to particular information presented. Lang et al., *supra* note 167, at 96.

The availability heuristic further enhances the influence of these comparisons. People infer the prevalence of something from the ease with which they can conjure an example of it. Shrum, *supra* note 124, at 262. Of course, the more popular something seems to be, the easier it is to remember. *Id.* at 262. Thus, with syndi-court’s Nielsen popularity and imagery, frequent litigation and numerous pro se litigants are easy to recall. Unfortunately, research indicates that people are often unaware of the source of their information and unable or unwilling to determine the source of their memories. *Id.* at 264. Therefore, it is unlikely that people will first reflect and then discount information, because it was gleaned from syndi-court. D. Lawrence Kincaid, *Drama, Emotion, and Cultural Convergence*, 2 *Comm. Theory* 136 (2002) (elements increase the “active participation and involvement of the audience”).

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



real-life situations. These enhance syndi-court's potential for cultivating social norms.<sup>171</sup>

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

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

This, however, is not the only possibility of syndi-court influence. Syndi-court might stoke the fires of litigiousness, encouraging litigation and public attitudes accepting it as normal. Though the public may not necessarily look at litigation as honorable, having heard about its commonality,<sup>177</sup> and now see-

<sup>171</sup> Shanahan & Morgan, *supra* note 130, at 2-3, 5.

Considering the influence and messages of syndi-court independent of those of television or even court shows generally is quite valid. Gunter has suggested that the cultivation effect is not medium-general, but genre-specific. Barie Gunter, *The Question of Media Violence*, in *Media Effects*, *supra* note 120; Cohen & Weimann, *supra* note 129, at 101-02, and 102, 108 (cultivation process varies across genres).

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

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

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

<sup>175</sup> Saks, *supra* note 2, at 1189 (stigma deters suit); Kidder, *supra* note 63, at 4. Some believe that business has promoted litigation as shameful. Rohrlich, *supra* note 22 at A1. ("[c]orporations have created a stigma for people [who sue]").

<sup>176</sup> People are inclined to give up rather than fight. Rohrlich, *supra* note 22, at A1.

<sup>177</sup> See *supra* notes 8-29 and accompanying text.

ing thousands of syndi-court litigants yearly, the public may come away with the impression that, good or evil, litigation is nevertheless appropriate. Moreover, to the extent that syndi-court presents litigants who are of questionable intelligence or emotional maturity, viewers may think, "if they can do this, anyone can." Thus, syndi-court might communicate and construct norms encouraging litigation and litigiousness.

### III. EMPIRICAL ANALYSES OF SYNDI-COURT

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

#### A. CONTENT ANALYSIS

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

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

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

<sup>180</sup> This yielded a total of 333 segments.

<sup>181</sup> This is consistent with the "message system analysis" of cultivation analysis. See *infra* notes 120-49 and accompanying text.

number of plaintiffs per show,<sup>182</sup> remedy sought, and type of case.<sup>183</sup>

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

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

<sup>182</sup> This was later calculated to determine the average number of plaintiffs per week.

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

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

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

<sup>185</sup> This would amount to 1024 plaintiffs per year.

<sup>186</sup> This looks at only damages sought, not damages awarded.

<sup>187</sup> That is, the plaintiff sought the return of property in addition to monetary damages or as an alternate to monetary damages.

B. THE JUROR PROTOCOL<sup>189</sup>

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

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

As summarized below, statistically significant differences emerged between the FV and NV responses to questions measuring propensities toward pro se representation ( $P < .05$ ).<sup>194</sup> Ad-

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

<sup>189</sup> Data from this study pertaining to how syndi-court representations affect juror opinions about judge behavior appear in Podlas, *supra* note 152.

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

<sup>191</sup> I \_\_\_ would consider bringing a claim in court  
 I \_\_\_ would NOT consider bringing a claim in court  
 I \_\_\_ would bring a claim in court  
 I \_\_\_ would NOT bring a claim in court

<sup>192</sup> I \_\_\_ would consider representing myself in court without the aid of an attorney

I \_\_\_ would NOT consider representing myself in court without the aid of an attorney

If I was unable to afford an attorney,

I \_\_\_ would appear in court without the aid of an attorney  
 I \_\_\_ would NOT appear in court without the aid of an attorney

<sup>193</sup> A "frequent viewer" watched syndi-court between two to three times and more than five times per week (and checked the corresponding response on the descriptive scale of viewing). Non-viewers did not watch syndi-courts or did so, at most, once per week (and checked the appropriate response on the corresponding descriptive scale). This denomination is also consistent with Gerbner's division of society into "heavy viewers" and non-viewers.

<sup>194</sup> P is the "probability level," SD = standard deviation from the mean, M stands for "mean," and a z score calculates significance."

ditionally, statistically significant differences ( $P < .05$ ) emerged between FV and NV responses to questions measuring propensities toward litigiousness.<sup>195</sup>

### *Litigiousness and Pro Se Propensities*

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

### C. THE JURY-ELIGIBLE [ELIGIBLES] PROTOCOL

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

Over two semesters, a one-page survey instrument was distributed to 148 jury-eligible adults on the 1<sup>st</sup> or 2<sup>nd</sup> day of class in an introductory-level business law course.<sup>196</sup> The instrument included all of the questions from the Juror questionnaire as well as questions pertaining to law viewing habits and propensity toward self-representation in various civil and criminal contexts.<sup>197</sup> Researchers later translated these self-representation scenarios into “high risk” and “low risk” categories as shown below.<sup>198</sup>

<sup>195</sup> While statistically significant, these differences were not quite as pronounced.

<sup>196</sup> These respondents ranged in age from 18-21 and were either second-semester freshmen or sophomores.

<sup>197</sup> Because this study was originally contemplated to be independent of and sequential to the Juror Study, its questions were broader.

<sup>198</sup> Risk/ Jeopardy was assessed as follows:

Civil, low: \$0-\$1,500

high: above \$1,500

Criminal, low: fines up to \$1,500

Probation

Up to 3 days in jail

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

As summarized below, statistically significant differences again emerged between the frequent and non-frequent viewers ( $P < .05$ ).<sup>199</sup> This time, however, those differences were apparent only at the low risk/ jeopardy levels. No difference was found when respondents contemplated high risk/ jeopardy situations. Rather, it appeared that, where respondents were faced with high levels of risk/ jeopardy, they rejected the potential of pro se representation, notwithstanding viewing profiles.

### *Litigiousness and Pro Se Propensities*

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

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high: fines above \$1,500

weeks, months in jail

1 yr. or more imprisonment

<sup>199</sup> Additionally, an earlier study sampled 88 college students who had either completed or were currently enrolled in an introductory-level business course. Of the 88 questionnaires completed, 22 were excluded from analysis (25%). Of the remaining 64, 45 (70.3%) were FV and 19 (29.69%) NV (as defined by the Juror Study).

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

Expressed Propensity For Self-Representation

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

*Pro Se Propensity as per Risk / Jeopardy  
(Eligibles)*

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

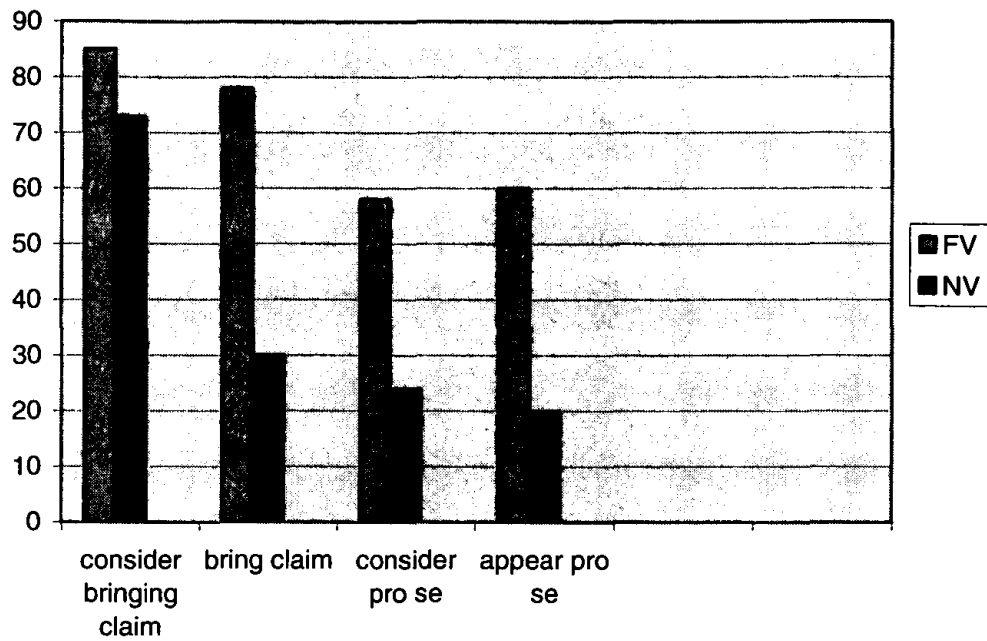
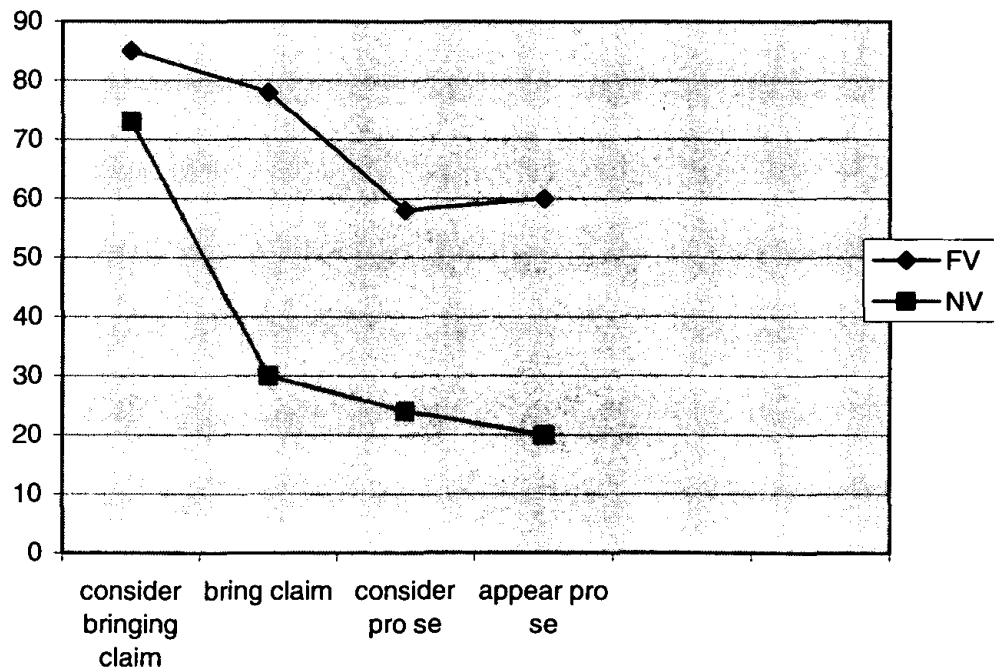
#### D. META-ANALYSIS

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

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

*Litigiousness and Pro Se Propensities*

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

*Meta-Analysis Proportions**Meta-Analysis Proportions*



## IV. DISCUSSION

## A. NORMS OF LITIGIOUSNESS

The data demonstrate that frequent viewers of syndi-court hold a number of views regarding litigation that not only differ from those held by non-viewers, but also conform to the predominant imagery of the syndi-court genre. Moreover, these are expressed as propensities toward action. First, the Juror and Eligibles Studies demonstrate that frequent viewers express a propensity toward pro se representation, whereas non-viewers do not. As clarified by the Eligibles Study, this difference is evident only in the “low risk/ jeopardy” categories,<sup>200</sup> the situations most resembling those of syndi-court as well as those reflected in the mythology of litigiousness. Notably, no difference is apparent in “high risk/ jeopardy” situations. Second, both studies show that frequent viewers are more disposed toward considering and pursuing litigation than are non-viewers.<sup>201</sup> The Eligibles expressed this in even greater proportions than did the Jurors.<sup>202</sup> This suggests that syndi-court is a normative messenger of litigation. Its effect, however, is not to discourage litigious tendencies, but, rather, to encourage them. Specifically, syndi-court publicizes (accurately or not) a cultural acceptance of suit, commonality of pro se representation, and the courtroom as a forum for all manner of disputes.

It is hard to turn on daytime television without seeing syndi-court litigants and their “causes.” It seems that anyone can sue and that everyone does. With this vivid normative backdrop, it is hardly surprising that viewers hold attitudes favoring litigation. After all, syndi-court shows us that litigation is engaged in by many regular folk: it is neither reserved

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<sup>200</sup> Although frequent viewers opt for self-representation at a level beyond that of non-viewers, the type of case or degree of risk involved might temper this desire. The pro se response appears where jeopardy (either punitive or economic) to the pro se litigant is low but dissipates when jeopardy increases.

<sup>201</sup> Moreover, where responses of frequent viewers and non-viewers are closest proportionally, it does not appear that both groups begin to move toward a center, but that non-viewers begin to look more like those of frequent viewers.

<sup>202</sup> The Eligibles were younger than the Jurors and had at least one year of college education.

for the rich nor practiced only by the deviant.<sup>203</sup> Rather, litigation is common and appropriate behavior.<sup>204</sup>

The types of disputes prevalent on syndi-court also encourage litigious tendencies. As demonstrated by the content analysis,<sup>205</sup> on syndi-court, every dispute and middling amount of money justifies a day in court. In fact, a majority of disputants sued for less than \$500. Moreover, the plaintiffs and stories provide to viewers a “short-cut” cost-benefit analysis of pursuing litigation, albeit a truncated one. Viewers can see that, apparently, the benefits to litigation outweigh its costs. Though the public would ideally need to compare the disputes litigated with those not litigated, when syndi-litigants sue over a few dollars, what could possibly qualify as a non-litigable situation? One can only conclude that there is no situation in which litigation is not the answer. Consequently, when comparing their own disputes to those of syndi-court, viewers will be inclined to complain formally.<sup>206</sup>

The character of disputes broadcast may even communicate that litigation about moral issues or “because of the principle” is socially appropriate. The courtroom, then, is transformed from an adversarial tribunal of last resort to a therapeutic mechanism.<sup>207</sup> “Therapeutic justice is the study of the role of law as a “therapeutic agent.”<sup>208</sup> Thus, the act of litigating is what the person wants – litigation is the primary remedy that she seeks – and through this public expression in the way

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<sup>203</sup> That is, litigation is not practiced by only by the deviant.

<sup>204</sup> This also supports the heuristic processing model of cultivation effects. L.J. Shrum, *Media Consumption and Perceptions of Reality: Effects and Underlying Processes*, in *Media Effects, Advances in Theory and Research*, at 78. In short, television viewing enhances construct accessibility, and, because particular televised concepts are accessible to viewers, viewers tend to overestimate the frequency or likelihood of those events. *Id.* at 78-79.

<sup>205</sup> See *infra* pp. 37.

<sup>206</sup> This litigious empowerment could also encourage litigants to push their issue more vehemently and for higher monetary awards than previously seen.

<sup>207</sup> For a discussion of the role of therapeutic justice in dispute settlement, see Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying The Lens of Therapeutic Jurisprudence*, 82 *Marq. L. Rev.* 155, 158-60 (1998) [hereinafter *Therapeutic Jurisprudence*]; Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 *Hastings. L. J.* 703, 705-06, 714-16 (1997).

<sup>208</sup> Waldman [Therapeutic Jurisprudence], *supra* note 206, at 158. Hence, law and litigating produces therapeutic (or anti-therapeutic) consequences. Though therapeutic justice originated within the mental health field, it has more recently been extended to how existing law can be interpreted or applied in a therapeutic manner. *Id.* at 158-59.

of claiming, the plaintiff seeks to feel better or be made whole. If lucky, the plaintiff will get her pound of flesh; if not, at least she will have engaged in the socially endorsed process for closure.

The promotion of pro se litigation also has ramifications for litigation generally. In both studies, a substantial portion of frequent viewers stated that they would consider and pursue pro se litigation, although the propensity to do so was tempered by the type of legal situation involved.<sup>209</sup> While showcasing litigants operating without counsel certainly encourages this model, it also enables litigation overall.

Since the rise of syndi-court, several employees of the justice system have noted an increase in pro se litigants.<sup>210</sup> Though exact numbers are hard to come by,<sup>211</sup> increases in self-representation are significant.<sup>212</sup> In fact, judges have commented that syndi-courts appear to embolden pro se litiga-

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<sup>209</sup> Another national survey, 58% of respondents agreed or strongly agreed with the statement, "It would be possible for me to represent myself in court. . . ." Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 *Fam. Ct. Rev.* 36, 37 (2002) [hereinafter *Struggle for Access*].

<sup>210</sup> Russell Engler, *And Justice For All – Including The Underrepresented Poor: Revisiting The Roles Of The Judges, Mediators, and Clerks*, 67 *Fordham L. Rev.* 1987 (1999) (pro se litigants "flooding the courts"); L. Karl Branting, *An Advisory System For Pro Se Protection Order Applicants*, 14 *Int'l Rev. L., Comps., & Tech.* 357 (2000) (increasing numbers of litigants represent themselves in court); Alan Feuer, *More Litigants Are Taking a Do-It-Yourself Tack*, *N.Y. Times* [Late Ed., East Coast], Jan. 22, 2001, at B1 (pro se litigants increasing, quoting New York State Deputy Chief Administrative Judge, Juanita Bing Newton); Chris Mahoney, *Verdict: Litigants Without Attorneys Are On The Rise*, 20 *Bar Bus. J.*, Sep. 1, 2000, at 13 (recounting claims of court officials); Daisy Whitney, *Well-Documented "People" Company Helps Do-It-Yourselfers With Legal Tasks*, *Denver Post*, August 3, 1999, at C-01 (increase in pro se litigation over past 5 years, quoting spokesperson for Colorado Judicial Department).

<sup>211</sup> Raul V. Esquivel, III, *The Ability Of The Indigent To Access The Legal Process In Family Law Matters*, 1 *Loy. J. Pub. Int. L.* 79, 90 (2000); Mahoney, *supra*, note 209, at 13 (overall figures of pro se litigants are hard to come by).

<sup>212</sup> Jona Goldschmidt, *Meeting the Challenge of Pro Se Litigation: A Report and Guidebook For Judges and Court Managers* 49 (1998); *Struggle for Access*, *supra* note 208, 36-38.

The last decade has witnessed a dramatic increase in the number of pro se litigants in divorce cases, Mahoney, *supra* note 209 (in 75% of divorce cases, at least 1 spouse is pro se); Terry Carter, *Self-Help Speeds Up*, 87 *A.B.A. J.*, July 2001, at 34 ("Growing pro se representation problem in bankruptcy courts"), and federal criminal appeals, Peter J. Ausili, *Outside Counsel: Federal Court Statistics For Fiscal Year 1997*, *N.Y. L. J.* April 28, 1998, at 1 (reporting that filings have increased slightly each year since 1993); cf. Feuer, *supra* note 209, at B1 (courtwatchers attribute increase in pro se litigation, in part, to abundance of court programs on television).

tion.<sup>213</sup> Because people now see what occurs inside the courtroom, they believe that they are capable of litigating on their own behalf.<sup>214</sup> One assistant court executive even related an exchange with a pro se litigant who explained that he and his wife obtained all of their information about the courts from watching Judge Judy.<sup>215</sup>

When aggrieved individuals cannot afford legal fees, they may forgo assertion of their rights.<sup>216</sup> Pro se representation, however, provides a way around this hurdle of expense. Pro se representation, therefore, transforms into litigants individuals who would otherwise be economically-barred from the courtroom.<sup>217</sup> Indeed, some have asserted that the recent increase in pro se litigation is due to the lack of affordable legal services for the poor and middle class.<sup>218</sup> For example, a New York State Bar Association survey concluded that the cost of legal services<sup>219</sup> persuades middle income New Yorkers to represent

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<sup>213</sup> Struggle for Access, *supra* note 208, at 37-38.

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

<sup>214</sup> Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, And The Judge: A Proposal For Better-Defined Roles*, 71 U. Colo. L. Rev. 789, 816 (2000).

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

<sup>215</sup> *Id.* Another pro se plaintiff considered his watching the Simpson trial a sufficient legal education. Feuer, *supra* note 209, at B1.

<sup>216</sup> But see Paquin, *supra* note 96, at 30 (in empirical study of litigious personalities, few respondents mentioned cost as barrier to litigation or reason underlying decision to sue or not to sue).

<sup>217</sup> Chinni, *supra* note 213 (some litigants go pro se because hiring a lawyer is cost-prohibitive).

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

<sup>218</sup> Engler, *supra* note 209 at 1987; Struggle for Access, *supra* note 208, at 36 (cost of lawyers has contributed to increase in pro se litigation); Janet Reno, Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School, 63 Ford. L. Rev. 5, 8 (1994) (at least 80% of poor and "working poor" have no access to legal services).

<sup>219</sup> Or least their perceived cost. Gary Spencer, *Middle-Income Consumers Seen Handling Legal Matters Pro Se*, N.Y. L.J. May 29, 1996, at 1.

themselves.<sup>220</sup> Syndi-court thus demonstrates that pro se representation is both a reasonable alternative to representation by paid counsel and something that virtually anyone can handle.<sup>221</sup>

Similarly, the promotion of pro se litigation encourages litigiousness by eliminating another hurdle into the courtroom: a weak legal claim. Usually, an individual cannot litigate unless a lawyer accepts her case. A lawyer, however, will often refuse representation if a claim is specious or the likelihood of success and monetary recovery is low.<sup>222</sup> Therefore, much as the expense of counsel may prevent people from suing, so may an attorney refusal.<sup>223</sup> Yet, when a person chooses to bring her claim pro se, she circumvents the effect of attorney refusal and can initiate litigation despite the weakness of her claim.<sup>224</sup>

Ironically, business's promotion of the mythology of litigiousness and rampant overclaiming may have laid the groundwork for the syndi-court-inspired litigation to play the litigation lottery.<sup>225</sup> The imagery reinforces the sense that the system is so routinely abused that one would be a fool not to play the game,<sup>226</sup> and it makes people believe that "if anything

<sup>220</sup> *Id.* "Middle income" was defined as \$25,000 - \$95,000. *Id.*

<sup>221</sup> *Struggle for Access*, supra note 208 (increased literacy and sense of rugged individualism contribute to pro se litigation); Chinni, supra at note 213 (television makes self-representation look simple enough; reporting 1999 survey from National Center for the State courts finding that 58% of American believe that they could represent themselves, if necessary).

<sup>222</sup> Saks, supra note 2, at 1190-92; Daniels & Martin, supra note 5, at 484 (in light of court costs and strength of cases, 57% of average lawyers are signing up a smaller percentage of clients than 5 years ago). "As a result, the client with a small, but legitimate claim may not be able to find a competent attorney, or have his or her claim successfully settled." *Id.* at 485.

<sup>223</sup> Daniels & Martin, supra note 5, at 486. Lawyers state that they now screen cases and litigants much more harshly. One Houston litigator explained, "We look for a client with no prior problems. It makes a good impression. . . ." *Id.*

<sup>224</sup> Although this is not equivalent to recovering a large cash settlement, as explained above, it will create an expense.

<sup>225</sup> *Oil Strike*, supra note 27, at 747 ("corporate investment in projecting an image of unrestrained litigiousness and rampant overclaiming may have the paradoxical effect of increasing the level of claiming"); see also Daniels & Martin, supra note 5, at 459-74 (business and industry allies created and marketed vision of rampant litigation).

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

<sup>226</sup> *Oil Strike*, supra note 27, at 747.

goes wrong they can get significant compensation.”<sup>227</sup> This creates a self-fulfilling prophecy encouraging individuals to bring claims.<sup>228</sup>

#### IV. SIGNIFICANCE

The key to understanding whether an individual will formally dispute is discerning that person’s social construction of litigious reality – to this person, what is a legal wrong, what is law for, and how or when is it appropriate to use litigation?<sup>229</sup> Consequently, when we seek to quantify litigious decisions via individual rationality,<sup>230</sup> we must refer to norms and understandings of litigation.<sup>231</sup> In fact, to the degree that people appear to behave irrationally<sup>232</sup> as calculated by traditional litigation management, it can be explained by reference to norms.<sup>233</sup> Once the desire to follow social norms is incorporated into our understanding of litigious choices,<sup>234</sup> any anomalies of rational choice become explainable.<sup>235</sup> As syndi-court influences the construction of that normative firmament,<sup>236</sup> it influences the litigious tendencies and choices of the public.

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<sup>227</sup> *Id.*

<sup>228</sup> *Conniving Claimant*, *supra* note 15, at 647, 662.

<sup>229</sup> Daniels & Martin, *supra* note 5, at 453 (environment of civil litigation includes what is an injury, whom to blame, and how to respond to others).

<sup>230</sup> *Id.* Hence, there is normative rationality. Jules Coleman, *Risk and Reason* 46-47 (1992) (conceptions of morality are influenced by cultural norms; rationality linked to norms).

<sup>231</sup> Birke & Fox, *supra* note 43, at 15. For instance, plaintiffs may believe that litigation is easy and inexpensive. Legal expertise and concrete reality become largely irrelevant. Putative plaintiffs may harbor what Birke and Fox have called “positive illusions,” essentially unrealistic optimism regarding outcomes.

<sup>232</sup> Or deviate from economic predictions of action.

<sup>233</sup> Sunstein, *supra* note 79, at 909, 940.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 941.

<sup>236</sup> See Jolls et al., *supra* note 47 at 1474. (normative judgments are both predictive and non-arbitrary).

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

There are several implications for the results.<sup>237</sup> The litigious propensities and norms favoring (or at least not disfavoring) disputing, low-end disputing, and pro se representation may be expressed in the consumer-business context in a number of ways. First, these may prompt an increase in formal complaining by consumers. This does not necessarily mean that consumers will suddenly buy a product and then file suit for every warranted failure or psychic injury. Rather, consumers may be more inclined to complain “officially” and seek some remediation. This remediation may be in the form of a refund, a de minimis settlement, or an apology or admission. Of course, the more formal a complaint is, the more likely it becomes that the complaint will escalate into a formal legal dispute. Nevertheless, again, these reflect a continuum of disputing, i.e., filing in small claims, filing in state civil court, or seeking class certification. In the end, more plaintiffs or more people even considering the preliminary steps toward suit, means greater expense at the low end of disputing.

Second, the litigious propensities imply a particular character to complaints, specifically, those involving low monetary sums, seeking low monetary settlements or some type of moral redress.<sup>238</sup> Believing that legal action is warranted or seeing the courtroom as a venue of last resort when a business defendant fails to apologize might yield consumer litigants increasingly prone to pursue relatively minor (at least in terms of rational economic assessments) litigation. Hence, business may notice an increase in “pocket-change” cases or small-claims cases previously unheard of.

Third, the inclination toward litigation could encourage putative plaintiffs to pursue novel claims.<sup>239</sup> Indeed, there has

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<sup>237</sup> This article does not consider whether increased consumer litigation is good or bad, but merely notes that it may increase due to the confluence of factors noted above, and considers the ways in which this might be reflected in consumer-to-business disputing.

<sup>238</sup> Marc Galanter, *Worlds of Deals: Using the Legal Process to Teach Negotiation*, 34 J. Legal Educ. 268, 268 (1984). This might be an expression of “litigotiation.” As coined by Marc Galanter, litigotiation is a combination of negotiation and litigation, or the strategic pursuit of settlement by mobilizing the court process.

<sup>239</sup> Neil Vidmar & Regina Schuller, *Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry*, 11 L. & Human Behav. 299, 300-02 (1987). Such litigiousness might reflect or interact with one’s “claims consciousness.” *Id.* Vidmar and Schuller have identified personal “claims consciousness” that is affected by a range of factors such as personality and socio-economic status. *Id.*

been a spate of novel litigation of late. For instance, this past Fall, Rhode Island became the first state to sue lead paint manufacturers on the theory that they had created a public nuisance.<sup>240</sup> Over the last year, cities in Massachusetts, California, and New Jersey sued gun manufacturers, asserting that they systematically ignore evidence that firearms shops illegally sell firearms to individuals with criminal records, make unsafe weapons, and fail to make such dangers known to the public.<sup>241</sup> Last year, attorneys began to press claims for slavery reparations from both the government and corporate America.<sup>242</sup> Though novel claims are exciting for legal theorists, they are frightening for business decision-makers, as they smack of risk that is not merely unforeseen but unforeseeable. Looking to statistical support for propositions they can rely on and integrating into risk calculations understandings of litigious propensities can help business mitigate the biases that infect its litigation assessments.

As noted, verdicts, let alone large ones, are highly unusual.<sup>243</sup> Studies show that jurors are actually biased *against* plaintiffs<sup>244</sup> and distrustful of their motives.<sup>245</sup> Perhaps the liti-

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<sup>240</sup> Peter B. Lord, *Jury Deadlock in Rhode Island Forces Mistrial in Suit Against Paint Firms*, Providence J., October 30, 2002 ("Rhode Island took novel approach of accusing [lead paint] companies of creating a public nuisance").

<sup>241</sup> David Abel, *Gun Control Forces Say Suits to Go On, Despite Boston's Choice to End Effort*, Boston Globe, March 29, 2002 (33 cities suing gun manufacturers); Tom Schoenberg, *D.C. Judge Holds Fire: Still No Ruling in City's Novel Suit Over Gun Violence*, Legal Times, May 20, 2002, at P. 1 (D.C. suit against 25 gun manufacturers from violating district's Assault Weapons Strict Liability Act of 1990); Joseph W. Cleary, *Municipalities Versus Gun Manufacturers: Why Public Nuisance Claims Just Do Not Work*, 31 U. Balt. L. Rev. 273, 283 (suing gun manufacturers under public nuisance theory is novel) (2002). A number of "novel legal theories underpin[]" these cases. *Id.*

In June of 2001, shareholders sued WorldCom executives accusing them of a scheme to keep earnings and WorldCom's stock price high. Beatrice E. Garcia, *Many WorldCom Executives Knew Score, Lawsuit Says*, Miami Herald, August 5, 2002. Two class action suits were also filed against investment banks Morgan Stanley and Credit Suisse First Boston, brought by investors against analysts. Chambliss, *supra* note 32 at 35 ("There are novel legal problems associated with these suits").

<sup>242</sup> James E. Watson, *Lawyers Plan to Sue U.S. Government, Business For Slavery Reparations*, Legal Times, April 13, 2001; see also Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law 13-20* (2003) (recounting variety of recent, novel legal claims).

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

<sup>244</sup> Shari Seidman Diamond, et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways To Increase Consistency*, 48 DePaul L. Rev. 301, 307 (1998); Business, *supra* note 2 at 75. Some mock juror studies indicate that those



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gation rhetoric has had some of its pro-business desired effect. Therefore, the real threat for business is not that plaintiffs will suddenly win huge judgments at trial,<sup>246</sup> rendering businesses economic paraplegics, but that people who would never have considered disputing now will. Consequently, rather than anchoring cost-benefit analysis to the fear of multi-million dollar judgments, litigation management should focus on increases in low-end or introductory disputing. Furthermore, litigation assessments must integrate the motivation behind litigation, such as its normative expectations, its therapeutic use, and its use as a mechanism to extract an apology.

Short of changing products<sup>247</sup> or the legal landscape,<sup>248</sup> the data indicate that disputing is not likely to decrease. Consequently, business should concentrate on methods to prevent disputes from mutating into full-blown litigation, be it in small claims or civil court. Resolving disputes at lower levels is usually more cost-effective and less disruptive to business practices than litigation.<sup>249</sup> In fact, some lawyers have also redes-

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who support tort reform are more likely to be negatively disposed toward plaintiffs, *Id.*, or at least approach toward interpreting evidence in favor of defendants, see generally *Business*, *supra* note 2, at 75-6.

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

<sup>246</sup> MacFarlane, *supra* note 4, at 665 (most cases filed do not result in trial).

<sup>247</sup> George Priest has argued that where business does not purchase insurance, it is less prone to engage in risky behavior. George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *Yale L. J.* 1521 (1987). Simply if business knows that its costs are covered, it does not have an adequate incentive to keep those costs down, via improved, safer products. *Id.*

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

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

As is dispute avoidance altogether. Ann L. MacNaughton & Gary A. Munneke, *Practising Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47

igned the way that small-dollar-amount disputes are handled so as to provide for early settlement.<sup>250</sup>

The results here underscore the importance of responding to low-end consumer disputes. When a consumer complainant does not get her pound of flesh upon direct contact with the business or when she wishes to extract an apology, she may be prone to seek her day in court. It seems that an increasing number of individuals balance on this precipice of litigation and can easily be swayed to sue. Therefore, although business or its customer service may have previously employed a strategy of initial response that declines or deflects all responsibility, it may wish to rethink that. Regardless of the objectively sound sources of refusal, lack of acknowledgement will not make a complainant feel that her complaints have been seriously considered.<sup>251</sup> The perception of fairness is critical. In fact, being treated fairly has been shown to be at least as important to litigants<sup>252</sup> as the ultimate outcome.<sup>253</sup> Some people are even willing to harm themselves just to punish those that they believe are acting unfairly.<sup>254</sup> Moreover, litigants have long memories of unfair treatment.<sup>255</sup>

Hence, refusal will not amount to finality for the consumer, but will be a signal that the consumer need go further to obtain the rightful admission or remedy. The consumer may now harbor ill feelings that her complaint has been either rejected out of hand or simply ignored. As shown here, it may prompt a plaintiff to formalize the action or to take the next step into the courtroom. Additionally, this quantification of

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Loy. L. Rev. 665, 707 (2001) (advocating that business implement dispute system design projects to avoid and manage disputes).

<sup>250</sup> McEwen, *supra* note 248, at 19.

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

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

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

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

<sup>255</sup> MacFarlane, *supra* note 4, at 703. These persistent and detailed recollections of an earlier affront can derail settlement or final resolution.

justice or fairness is tenuous. The “principle of the matter” may overshadow a simple concrete dispute,<sup>256</sup> thus causing the substantive issue to mutate.<sup>257</sup> In such instances, the normative issues may come to dominate the dispute.<sup>258</sup> In fact, one unit of a company adopted such a “tough guy” culture with regard to complaints that it tended to *generate* disputes and prompt litigation!<sup>259</sup> Similarly, another company counsel noted that its business people so often insisted that they were right, that disputes grew into full-blown litigation, naming the company as a defendant.<sup>260</sup>

Each company must calibrate its own unique response system to consumer complaints. Yet, in addition to considering the type of business, the nature of complaints, and the costs of claims, a response strategy should also offer to consumers a few ounces of flesh. People want apologies and minor sums, so business should seriously consider giving them exactly that. Ultimately, the cost of the olive branch,<sup>261</sup> i.e., appeasing the complainant or doing the right thing, could be far less than that of prolonging a dispute. A truly minor sum or even the coveted “we are sorry,” might go a long way toward settling a dispute. For instance, business could replace refusal letters with a “We’re sorry letter/ Here’s the check letter/ Waiver letter.” Hence, business would send a letter expressing regret but not guilt, enclosing a minimal check (for a minimal claim) whose endorsement waives any future claim. This gives the consumer an apology and a dose of therapy. When priced out with reference to product costs, this duo limits the consumer’s incentive to continue the dispute.

Moreover, though institutionalizing claims payments in this way may seem radical, if payments per year represent only a portion of insurance and legal costs devoted to this class of

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<sup>256</sup> Id. at 692. MacFarlane describes the situation where “a straightforward claim on an unpaid account develops into an argument over treatment of this particular client or customer, or assertions of discourtesy or rudeness. . . .”

<sup>257</sup> Id. (as the conflict develops over a period of time, the importance of the original issue may be replaced by subsequent issues of treatment).

<sup>258</sup> Id. at 693.

<sup>259</sup> McEwen, *supra* note 249, at 9-10.

<sup>260</sup> Id. at 10 (“We’re the defendant almost all of the time. Our business people think they’re [always] right. . . .”).

<sup>261</sup> PR News, *supra* note 11, at 1 (quoting crisis litigation consultant, “The check you write today is the smallest check you’re ever going to write”).

complaints, it could ultimately reduce costs. In particular, this type of self-insurance could cause insurance rates to decrease,<sup>262</sup> since one of the purported ramifications of litigiousness is that it increases insurance costs.<sup>263</sup> Yet, one author asserts that it is not so much actual litigation costs that increase insurance premiums but the irrational fear of lawsuits: insurers insist on excessive reserves and products are not produced,<sup>264</sup> rates increase, and market opportunities are lost. Furthermore, insurance companies control pricing to their benefit and, when addressing claims, engage in tactics that increase animosity and delay settlement. These also increase litigation and insurance costs. Self-managing litigation risk, however, much like opting for a higher deductible to obtain a lower insurance rate, can save money by accurately placing money on risk. Doing so also redirects dollars to satisfying low-end claims and maintaining good will,<sup>265</sup> which, in the long run, may be a better self-maximizing strategy for the company.

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

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<sup>262</sup> Cf. Brown, *supra* note 20, at DS1 (consumer litigation causes insurance rates to increase). (consumer litigation leads to “increase[d] insurance rates”); see Saks, *supra* note 2, at 1157-58 (insurers insist on excessive monetary reserves to protect against possibility of lawsuit); but see Joey Bunch, *Mississippi Lawyer Says Medical Malpractice Problem Lies in Insurance Industry*, Sun Herald, July 3, 2002 (stating that caps do not lower insurance rates, quoting Melvin Cooper, President of Magnolia Bar Association).

<sup>263</sup> Third-party insurance is to protect oneself against liability for judgments. Coleman, *supra* note 229, at 205.

<sup>264</sup> In other words, business has fallen prey to its own rhetoric. See Saks, *supra* note 2, at 1157-58; Brown, *supra* note 262, at DS1 (consumer litigation leads to “increase[d] insurance rates”).

<sup>265</sup> Scalet, *supra* note 15, at 64. “As a rule, it’s cheaper for companies to make confidential settlements than to defend themselves.”

<sup>266</sup> For an analysis of impact of anchoring on judgments, see Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich, *Judging By Heuristic, Cognitive Illusions in Judicial Decision-Making*, 86 *Judicature* 44 (July-August 2002).

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

## C. EMPIRICAL CONCERNS

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

The little empirical evidence that exists, however, does not support a hypothesis that syndi-court viewers are any different from television viewers generally.<sup>269</sup> Cultivation researchers have noted that most people who watch more of any particular type of program, such as syndi-court, “watch more types of programs” overall.<sup>270</sup> Hence, frequent viewers of syndi-court are likely frequent viewers of television as a whole.<sup>271</sup> Moreover, this paper does not argue that syndi-court is the sole explanatory factor in social litigiousness. Rather, it suggests that syndi-court plays a role in developing litigious attitudes in

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

<sup>269</sup> Friedman, *supra* note 109, at 555.

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

<sup>270</sup> Gerbner et al., *supra* note 120, at 45.

<sup>271</sup> Nevertheless, even as cultivation researchers debate genre effects, there is some agreement that a particular type of program may exert a heightened or “focused” effect on viewers. *Id.*

some individuals and reinforces pre-existing attitudes in others.<sup>272</sup>

## VI. CONCLUSION

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

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<sup>272</sup> See Podlas, *supra* note 152, at 14, 22. Furthermore, education level may provide an alternate explanation for the data. (prior experience with justice system did not appear to explain views about judicial behaviors and implications of judicial silence). *Id.* Some authors have positively correlated claims consciousness with education level, though others have suggested litigious individuals represent lower socio-economic status. *Id.* Sotirovic, *supra* note 108, at 9. Though education level per se was not analyzed here, the results of the Eligibles Study offer some indication of the potential impact of education on litigious attitudes. Unlike the Juror respondents whose education level was unknown, but reasonably certain to include several individuals without college experience, respondents in the Eligibles group each had completed at least 1 semester of college education. Therefore, when contemplating education as a potential explanatory factor, these respondents may be used for some degree of comparison. At least with regard to viewership and propensity toward pro se representation, frequent and non-viewer student respondents expressed views in line those of frequent and non-viewer juror respondents, but they did so in higher proportions. In other words, it seemed that individuals with some college experience were more inclined to dispute or consider disputing. Other research has suggested a positive correlation between education and/ or experience with the legal system and propensity to dispute. See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *Law & Soc'y Rev.* 525, 551 (1980-81). Additionally, the reason for the likelihood toward disputing has, itself, been disputed. *Id.* Some believe it represents power, others intelligence, and still other access. *Id.* See MacFarlane, *supra* note 4, at 686 (access to legal system along with personal knowledge).