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THE THREE-LEGGED PIG: RISK REDISTRIBUTION AND ANTINOMIANISM IN AMERICAN LEGAL CULTURE*

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A. The Jaundiced View of Civil Justice

Law may be viewed as a device for redistributing risk. The civil justice system attempts to reduce certain risks, like the risk of not getting paid, or indirectly, the risk of injury from another's intentional or negligent action. In doing so, it increases the probability of other events that some actors consider a risk-for example, the risk of being sued or inspected or forced to hire lawyers. So the legal system redistributes risks, reducing some and enlarging others. Actors modify their expectations and their actions in the light of their estimation of these new conditions.

These estimations and revised expectations are formed not directly by what happens in the legal system, but by what people think happens there—that is, by people's perceptions of what happens as framed by their judgments about what normally and typically happens there. I shall present evidence that in the American case, the gap between perceptions and reality is more than a matter of random error or frictional distortion, but is substantial and systematic. Further, the resulting screen of misperception is itself a significant influence on the uses and workings of civil justice.

I focus particularly on one component of this screen: the vast and persistent overestimation by influential segments of American society of the degree to which accountability is imposed and enforced by the legal system. A wide stream of disillusionment with the civil justice system emerged in the 1970s.[1] Since it does not really have a name, let me supply one. I call it the "jaundiced view." By this I refer to a set of beliefs and perceptions about the legal system summed up in the observation that the United States is suffering a horrendous "litigation explosion" in which people are suing each other indiscriminately about the most frivolous matters, and juries capriciously award immense sums. The "jaundiced view" displaced an earlier indictment of the legal system for failure to supply justice to all. In the course of a decade the prevailing critique of legal institutions shifted from "not enough justice" to "too much law."[2]

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1. Perhaps the earliest major marker of this "turning away from law" was the 1976 "National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice" (known as the "Pound Conference") organized by Chief Justice Warren Burger. The proceedings of the Conference are published at 70 F.R.D. 79 (1976). *See* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (noting the emergence and rise of this stream of criticism).

2. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994), and Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 288-89 (2002).

This "jaundiced view" is particularly prevalent among business, media and political elites. Corporate spokesmen and their political allies mournfully recite the woes of a legal system in which Americans, egged on by avaricious lawyers, sue too readily, and irresponsible juries and activist judges waylay blameless businesses at enormous cost to social and economic well-being. The legal system, we are told, is arbitrary, berserk, crazy and demented. It has "spun out of control." The resulting "litigation explosion" is unraveling the social fabric and undermining the economy.

These assessments are grounded in a pervasive folklore of horror stories and anecdotal evidence. Everyone is familiar with-and almost as many believe-a long series of legends about the American legal system: the old lady who obtained millions of dollars from McDonald's after she spilled hot coffee on herself;[3] the United States being home to seventy percent of the world's lawyers;[4] excessive litigation and parasitic lawyers undermining the American economy. The last was especially popular a decade ago, when critics of the American civil justice system noted that "number one" Japan had few lawyers and little litigation. Although the Japan item has lost its appeal, the general point of law and lawyers as a drag on the economy still enjoys popularity.[5]

Of course, there are grains of truth in the jaundiced view. The expectations of protection and remedy that people bring to law are higher and these have elicited some responsiveness from the legal system, curtailing somewhat the leeways and immunities of society's managers and authorities. But overall, there has been no diminution in the position of the dominant economic actors in American society. A summary measure is provided by looking at the cost of liability to corporate actors. An insurance industry survey annually computes the total cost of liability (insurance costs plus retained losses) for a large number of companies of all sizes throughout the United States. Fluctuation from year to year reflects both changing cost levels and changes in the identity of the companies that participate in the survey. But it is clear that there is no upward trend line. If we take the latest available data on the cost of liability and compare it with earlier years at five-year intervals, we see that cost in 1998 is the lowest in the series.

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3. *See* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731-33 (1998) (discussing the McDonald's case and other horror stories).

4. *See* Marc Galanter, *News from Nowhere: the Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77, 77-83 (1993) (reporting on the curious history of the seventy-percent legend).

5. Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities, in* TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE, 127 (Peter H. Schuck, ed., 1991); W. Kip Viscusi and Michael J. Moore, *Rationalizing the Relationship between Product Liability and Innovation, id.* at 103. On the persistent belief in, and absence of evidence for, the drag on the economy story, *see* Galanter, *supra* note 4; Galanter, *supra* note 3.

Year	Average liability cost per $100 of revenues
1978	33 cents
1983	29 cents
1988	No data collected
1993	32.9 cents
1998	24.3 cents

Source: Cost of Risk Survey 1995: 47; RIMS Benchmark Survey 1999: 171.

There is fluctuation from year to year, so any single year may not be a reliable indicator. But if we take periods of five years, we find that the overall cost of liability to U.S. companies was lower for the most recent five-year period than for any five-year period since collection of this data commenced in 1977.

Nor, in spite of the pronouncements of some eminent economists, is there any evidence that American civil justice has had deleterious effects on the economy. Indeed the best evidence suggests that comparative economic growth is not hampered by high populations of lawyers or by tort litigation.[6]

B. Explaining the Perceptual Screen

What produces and sustains the glaring contrast between the actual and imagined contours of the civil justice system? Some of the sources of this gap are endemic to social life. The literature of cognitive psychology catalogs a number of factors that lead to biased inferences and judgments about uncertain events.[7] For example, decision makers often ignore relevant information about baseline frequencies, misattributing representative characteristics to data. The frequency of easily remembered events is exaggerated, leading to overestimation of risk from publicized hazards relative to less visible ones.[8] "Vivid information, that is, concrete, sensory and personally relevant information, may have disproportionate impact on beliefs and inferences."[9] Furthermore, biased receptiveness to confirming evidence makes people excessively confident in the accuracy of their knowledge.[10] In other words, the way our minds are built inclines us to think we know more than we do.

And in this case, we don't know very much. The scope for cognitive distortion is enlarged by the derelict state of the knowledge base about civil justice. Even though we have accumulated a great deal of data and insight during the past

6. Frank B. Cross, *Lawyers, The Economy, and Society*, 35 AM. BUS. L. J. 477 (1998).

7. ROBERT E. NISBET AND LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT (1980); Kahneman and Tversky, *On the Psychology of Prediction*, 80 PSYCHOL. REV. 237 (1973); Kahneman and Tversky, *Subjective Probability: A Judgment of Representativeness*, 3 COGNITIVE PSYCHOL. 430 (1972). Much of this literature is usefully assessed in Elizabeth F. Loftus and Lee Roy Beach, *Human Inference and Judgment: Is the Glass Half Empty or Half Full?*, 34 STAN. L. REV. 939 (1982); Amos Tversky and Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 COGNITIVE PSYCHOL. 207 (1973); Tversky and Kahneman, *Belief in the Law of Small Numbers*, 76 PSYCHOL. BULL. 105 (1971).

8. Loftus and Beach, *supra* note 7, at 944-45.

9. Nisbett and Ross, *supra* note 7, at 190.

10. Loftus and Beach, *supra* note 7, at 946.

twenty years, we simply don't have a fund of systematic social knowledge about the working of the civil justice system.[11] Court statistics are rudimentary: for example, they do not record the detailed subject matter of cases, the characteristics of the parties, or the events in the case; information about settlements is not officially collected and is often shrouded in secrecy, with the support of courts. Even actors who are repeatedly involved in litigation may not be in a position to give an analytic account of their experience.[12] No one has seen fit to invest in the continuous collection of the basic information. Lawyers, typically uninterested in aggregates and empirical verification,[14] have tolerated a situation in which anecdotes and surmises have filled the void of genuine inquiry.[14]

These create opportunities for professional aggrandizement and careerism. Business people concerned about liability are surrounded by retainers and entrepreneurs with strong incentives to intensify that concern. For example, Edelman, Abraham and Erlanger found that "personnel professionals and practicing lawyers have a shared interest in constructing the threat of wrongful discharge in such a way that employers perceive the law as a threat and rely upon those professions to curb the threat."[15] A host of professionals, consultants, and publicists thrive by magnifying the sense of crisis and touting their ability to exorcize the menace of enhanced liability. These messages are amplified by a small industry of corporately-supported think tanks, lobbyists, consultants and "grass roots" groups that attempt to generate political support for "reforms" of the civil justice system.[16] Politicians and organizational entrepreneurs, in turn, echo the jaundiced view in order to cultivate financial support and garner votes.

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11. Galanter, *supra* note 4, at 99-103; Marc Galanter, Bryant Garth, Deborah Hensler, and Frances Kahn Zemans, *How to Improve Civil Justice Policy,* 77 JUDICATURE 185 (1994).

12. *See* Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes,* 1998 WIS. L. REV. 237 (1998) (for a heightened suspicion that the "in the dark" hypothesis cannot be dismissed); Herbert M. Kritzer and Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring It into View,* 1998 WIS. L. REV. 157 (1998) (discussing their aborted attempt to survey corporations on their punitive damages experience suggests either that they are unwilling to share such information or that they are simply in the dark themselves).

13. The same indifference to verified factual patterns pervades legal scholarship. As Philip Shuchman observed twenty years ago "a persuasively stated argument by a well-known law teacher published in a prestigious law journal, though it be based largely on anecdote, will be uncritically accepted as though it contained true statements about the effects of the legal system on society and business firms." P. SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP A-12 (1979).

14. If fables about law circulate so readily among lawyers and legal academics it is not surprising that even normally scrupulous sources can stumble when it comes to assessing information about law. Perhaps the high water mark of scientific respectability attained by jaundiced view folklore was the appearance in SCIENCE in late 1989 of a standard recitation of punitive damages lore. R. Mahoney and S. Littlejohn, *Innovation on Trial: Punitive Damages versus New Products,* 246 SCIENCE 1395 (1989); *see* STEPHEN DANIELS AND JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 206-210 (1995) (for an extended analysis of the rhetoric of the preceding article).

15. Lauren B. Edelman, Steven E. Abraham, and Howard S. Erlanger, *Professional Construction of Law: The Inflated Threat of Wrongful Discharge,* 26 L. & SOC'Y REV. 47, 77 (1992).

16. *See* DANIELS and MARTIN, *supra* note 14, at chs. 1,2,7; Stephen Daniels and Joanne Martin, *Punitive Damages, Change, and the Politics of Ideas: Defining Public Policy Problems,* 1998 WIS. L. REV. 71(1998); Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship,* 42 AM. U. L. REV. 1637 (1993). *Cf.* (discussing the account of Neal Cohen of Apco Associates, a specialist in creating spurious "grassroots" tort reform organizations, who gained notoriety when it was disclosed that he exhorted fellow lobbyists about "the importance of keeping the public in the dark about who the clients really are" Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda Building,* 52 LAW & CONTEMP. PROBS. 269 (1989); Jane Fritsch, *Sometimes, Lobbyists Strive to Keep Public in the Dark,* NEW YORK TIMES, Mar. 19, 1996, at A1; "Grassroots & weeds need to be clipped, say angry activists," O'Dwyer's PR Services Report (June 1996) at 1.

Such self-promotion is reflected and fed by a persistent media bias that features "David beats Goliath" communiqués and filters out the "haves come out ahead" story. Steven Garber reported the results of a study of newspaper coverage of verdicts in 351 product liability cases against automobile manufacturers, decided from 1985 to 1996.[17] Two hundred fifty-nine (73.8%) of these verdicts were in favor of the defendant; only 92 (26.2%) were in favor of the plaintiff.[18] Newspapers reported nine (3.5%) of the defense verdicts and 38 (41.3%) of the plaintiff's verdicts.[19] In other words, a verdict for the plaintiff is twelve times more likely to be reported than is a defense verdict. Consequently, a conscientious and omnivorous newspaper-reader would have been exposed to 47 reports, of which some 80.9% were verdicts in favor of the plaintiff over three times as great as the actual percentage. Other studies confirm the disproportionate reporting of plaintiff victories[20] and high awards.[21] Skewed media coverage reflects and feeds widespread overestimation of the amount of litigation, the frequency of jury trials, the portion of plaintiff victories, and the size of jury verdicts. Such overestimation is not confined to the unsophisticated, but is, if anything, more pervasive among elites, including lawyers. Generally, lawyers' aggregate perceptions about litigation and liability are wide of the mark.[22] In a study comparing South Carolina lawyers', doctors', and legislators' assessments of tort litigation patterns, lawyers overestimated the portion of awards for plaintiffs and the size of awards and were only marginally more accurate than other elite respondents.[23]

17. Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 275.

18. *Id.* at 275-76.

19. *Id.* at 277.

20. Daniel Bailis and Rob MacCoun conducted a study of coverage of tort issues in five national magazines from 1980 to 1990. During that period, product liability and medical malpractice cases, taken together, were some 11% of tort filings and led to 13% of tort trials, but they were 74% of the suits reported on in the five magazines. A series of earlier studies showed the rate of verdicts in favor of the plaintiff is about 50% for all torts and somewhat less for medical and product liability cases; reports in the five national magazines portrayed 85% plaintiff victories. Donald S. Bailis and Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 L. & HUM. BEHAV. 419, 436 (1996). The five magazines were *Time, Newsweek, Fortune, Forbes,* and *Business Week.*

21. *See id.* at 426 (reporting that their "media sample includes 43 distinct reports of specific jury awards, with a mean of $5,861,097 and a median of $1,750,000, about four and five times the size of the largest mean and median [actual] court estimates, respectively, and 14 and 34 times the size of the smallest estimates"); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 771-74 (1995) (comparing newspaper coverage of personal injury awards in New York with actual awards, discovered even larger discrepancies). Stories of jury awards to winning personal injury plaintiffs in two metropolitan dailies (the *New York Times* and *New York Newsday*) from 1986 to 1992 were compared with awards to plaintiffs recorded in the *New York Jury Verdict Reporter*. In the not unrepresentative year 1992, the average jury award reported in the *New York Times* was some 16.5 times as large as the average award recorded in the *New York Jury Verdict Reports* for all of New York State and 15.4 times as large as awards recorded in the New York metropolitan area. The disparity in median verdicts was slightly greater. In *Newsday*'s reports, the average award reported was about 6 times as high as those throughout the state, and the median award reported was about 9 times as high. *Id.* at 771-73. This bias is not confined to newspapers. Deborah Jones Merritt and Kathryn Barry, studying tort awards in Franklin County, Ohio, found that "commercial [jury reporting] services appeared more likely to report verdicts that favored plaintiffs and, among successful plaintiffs, to include higher recoveries." Deborah Jones Merritt and Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 326 (1999).

22. On the deficiencies of lawyer knowledge about jury awards, *see* Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, 80-86 (Robert E. Litan, ed., 1993); 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 (1988). *Cf.* Cary Coglianese, *Assessing Consensus: the Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

23. Songer, *supra* note 22, at 597.

After exposure to accurate information about the level of litigation and size of awards, lawyers' responses (along with those of doctors and legislators) did not become appreciably more accurate.[24] In a study of litigation against governmental units in various cities in Kansas, Missouri, and Nebraska, Charles Epp found "little significant increases and, in some jurisdictions, actual decreases in expenditures on legal services . . . [but that] administrators *believe* their governments to be the subject of much litigation that imposes heavy costs."[25]

Corporate actors are not just the passive recipients of biased information, but major disseminators of it. Corporate investment in projecting an image of unrestrained litigiousness and rampant overclaiming may have the paradoxical effect of increasing the level of claiming. Researchers studying contingency fee law practice found that:

> One of the impacts of the now twenty-year campaign of corporate America and the insurance industry to convince the American populace that we are in the midst of a litigation explosion is to *increase* the calls that lawyers receive. This is probably most evident in the medical malpractice area. . . . The effect of this rhetoric is to make people think that if anything goes wrong they can get significant compensation. The result is that lawyers spend many hours explaining to potential clients that this is simply not true . . . .[27]

Furthermore, the incessant projection of these images of runaway litigation may induce corporate functionaries to overestimate the threat and to make settlement and business decisions that cannot be accounted for in terms of prediction of the propensities of juries and judges. As in the case of chemical weapons, it is hard for those who launch media distortions to keep them away from their own troops.

American legal culture carries multiple and inconsistent messages. There is broad popular awareness that the legal process reflects differences in wealth and power and individuals do not fare well in comparison with organizational actors in the legal arena. But, people (including sophisticated academics) are eager to be reassured that the system is responsive to the little guy, which resonates with the repeated "David beats Goliath" stories in the press, movies, television, etc. To these, the jaundiced view has added a third theme: that the legal system is being abused and exploited by outsiders and opportunists, most frequently to victimize corporations or establishment institutions.

One component of the indictment of the civil justice system is its complicity with, and encouragement of, claims of victimization. A minor literature laments

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24. Songer, *supra* note 22, at 600.

25. Charles R. Epp, Litigation Stories: Official Perceptions of Lawsuits Against Local Governments 1 (unpublished paper presented at the 1998 Annual Meeting of the Law and Society Association, Aspen CO, June 4-7, 1998) (on file with the author) (emphasis in original).

27. Herbert M. Kritzer, *Contingent Fee Lawyers as Gatekeepers in the American Civil Justice System,* 81 JUDICATURE 22 (1997).

the multiplication of victim claims-at least those by individuals claiming they are victimized by abuse on grounds of race, sex, disability, and so forth.[28] But, the corporate actors against whom many of these claims are brought are themselves deeply implicated in the victim game,[29] envisioning themselves as unjustified victims of "lawsuit abuse" by opportunistic claimants or overzealous regulators.

Thus, an insurance company advertisement describes product liability law as follows:

> an undisguised wolf who has entered corporate headquarters everywhere. . . . The American public seems intent on going to court. "Sue the bastards" used to be a joke. Now it's a battle cry. With the help of eager attorneys, plaintiffs are not only quick to demand justice, but "extra" justice because their chances of success are great.[30]

Similarly, the head of the National Association of Manufacturers warned his flock:

> Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business. *Literally*. The number of product liability suits and the size of jury awards are soaring . . . .
>
> Product liability suits have brought a blood bath for U.S. businesses and are distorting our traditional values. We're now the most litigious country on earth one of every fifteen Americans filed a private civil suit last year. The judicial system is so clogged with cases, delays, continuances, appeals and legal shenanigans that it's slugging its way through a perpetual traffic jam.[31]

The general counsel of Motorola agreed:

> America is awash with lawyers who make mischief . . . . They are forced to innovate, to develop new legal products so they can usefully fill their time, that usually means thinking of ways to separate American corporations from their money. . . . The drain on corporate assets and energy is tremendous. . . . While cases are being litigated, corporate America often can't do anything innovative because executives are too absorbed in and exhausted by the legal process.[32]

This sense of corporate victimization is the backwash of the rising level of expectations in society. As the risks of everyday life have declined dramatically for most people, there is a widespread sense that science and technology can produce solutions for at least many of the remaining problems.[33] (Of course, this is

28. *See,* e.g., CHARLES J. SYKES, A NATION OF VICTIMS: THE DECAY OF THE AMERICAN CHARACTER (1992); John Taylor, *Don't Blame Me: the New Culture of Victimization,* [S.F. CHRON.] *The World,* Aug. 18, 1991, at 7-10.

29. Sally Power, *They Did It!,* BUSINESS ETHICS (Sep.-Oct. 1993) at 22-27.

30. *The Product Liability Menace,* WALL ST. J., Dec. 9, 1976.

31. Robert F. Dee, *Blood Bath,* ENTERPRISE 10:3 (1986).

32. Ronald E. Yates, *Lawyers Not Exempt from Quality Crusade,* CHI. TRIB., Dec. 1, 1991 (Business) 1.

33. LAWRENCE M. FRIEDMAN, TOTAL JUSTICE (1985).

illusory inasmuch as people are capable of identifying or inventing problems as quickly as they are solved.) But as more things are capable of being done by human institutions, the line between unavoidable misfortune and imposed injustice shifts. The realm of injustice is enlarged. Once, having an incurable disease was an inalterable misfortune; now a perception of insufficient vigor in pursuing a cure can give rise to a claim of injustice. As the scope of possible interventions broadens, more and more terrible things become defined by the incidence of that intervention. Thus famine or social subordination or a flawed appearance is not inalterable fate, but a matter of appropriate interventions. What *was* seen as fate may be seen as inappropriate policy.[34] Advances in human capability and rising expectations result in a moving frontier of injustice. Like medicine, law and policy enlarge both the supply of answers and the supply of unanswered questions. For the most part the advances in human capability and control that drive the justice frontier are located in or managed by corporate or governmental actors. They produce new claims of injustice not because they are bad guys, but because they are good guys doing their thing. Claimants use the civil justice system to stake claims for increased protection and remedy as entitlements; increased risk (or even old levels of risk that are now avoidable) is seen as an injustice. To corporate actors and authorities, these higher expectations seem to impose a new accountability that intrudes on the privileges and immunities to which their station and/or accomplishments and contributions entitle them. To the extent that legal institutions are seen as the incubator and sponsor of this onerous new accountability, they are suspect to the very establishment groups that are their greatest beneficiaries.

C. Visible Costs and Invisible Benefits

To these elite groups the costs and discomforts of law are increasingly palpable. And frequently, critics who attempt to estimate these costs exaggerate them by confounding transfers with costs to society. That is, the assets transferred by the legal system as damage awards may represent costs to losing parties, but they are not a cost to the society. The same assets still exist, but are now in different hands—in hands with a greater entitlement under the going rules. There may be objections to those rules and concern about the transaction costs of effectuating those transfers. But those are distinct problems. Nor should social expenditures on law be identified as deadweight losses, for the legal system that consumes them generates social benefits.

These benefits are frequently underestimated or overlooked entirely. In contrast to costs, the benefits conferred by the legal system-the routine performance of obligations, the safer products and practices, the proliferation of transactional templates, the reduction in transaction costs-are so common and expected that they attract no notice. Of course, the legal system cannot be credited with the full benefit of each of these good things, but it makes significant contributions by reinforcing and stiffening other controls and occasionally serving as the primary

34. JUDITH SHKLAR, THE FACES OF INJUSTICE (1990) (discussing the great famine).

control. Occasionally legal control is visible, but in many instances when law works most effectively, it disappears from view.

Several studies suggest that a flourishing legal system, amply staffed by lawyers,[35] is associated not only with promotion of significant non-market benefits such as civil liberties and political democracy, but also promotes efficient allocation by helping to internalize externalities and by facilitating transactions among dispersed, interdependent, productive units.[36] In such a setting, Ron Gilson argues, business lawyers create value by acting as "transaction cost engineer[s]."[37] In a pioneering field study of business lawyering, Mark Suchman and Mia Cahill found that:

> Silicon Valley lawyers both absorb uncertainty and increase the efficiency of venture capital financing by promoting the elaboration of community norms. Through their distinctive inter-organizational position, lawyers help to create, transmit, sustain and enforce the social structure of the Silicon Valley venture capital market.[38]

The social usefulness of law is more starkly evident, if even harder to measure, in settings where infirm legal systems make us aware of the absence of such legal infra-structure.[39]

So American elites' appreciation of the dynamic and adaptive legal system within which they function reminds me of the farmer who took a visiting dignitary to see his prize pig, housed in a special pen in a gleaming new barn. The visitor noticed that the massive, well-groomed pig had a wooden leg. Before he could ask about it, the farmer was in the middle of recounting the pig's exploits. "If it weren't for this pig," he told his visitor, "I wouldn't be here today. A year ago my tractor tipped over and I was pinned under it. Somehow the pig heard me yelling, figured out a way to get out of his pen and unlock the barn door, came into the field and pushed that tractor right off me. Not only that, six months ago that pig saved the whole family. We had a fire in the house when we were all asleep and somehow the pig got out of the barn and into the house, pulled the children outside one at a time, woke me up and even dragged out the computer with all my records. We'd be wiped out if it wasn't for that pig." "Amazing," said the visitor, "but tell me, how come the pig has a wooden leg?" "Ohhh," said the farmer, "a pig like that you don't eat all at once."[40]

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35. Mark C. Suchman and Mia L. Cahill, *The Hired Gun as Facilitator: Lawyers and the Suppression of Business Disputes in Silicon Valley*, 21 LAW & SOC'Y INQUIRY 679 (1996).

36. Cross, *supra* note 6.

37. Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239 (1984). *Cf.* Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275 (1992).

38. Suchman and Cahill, *supra* note 35.

39. E.g., Kathryn Hendley, Law and Development in Russia: A Misguided Enterprise, American Society of International Law, Proceedings of the 90th Annual Meeting, Washington, D.C., March 20-27, 1996.; Kathryn Hendley, et al., *Observations on the Use of Law by Russian Enterprises*, 13 POST-SOVIET AFFAIRS 19 (1997); JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX (New York: Oxford University Press, 1991).

40. PAUL DICKSON, JOKES: OUTRAGEOUS BITS, ATROCIOUS PUNS, AND RIDICULOUS ROUTINES FOR THOSE WHO LOVE JESTS, 97 (1984). I recall hearing this joke from Prof. Stephen Diamond, now of the University of Miami, in the early 1980s. The story, which is known throughout the English-speaking world, appeared in print by 1984.