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J. Mark Ramseyer & Eric B. Rasmusen

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Harvard Law School
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J. Mark Ramseyer
Harvard Law School
Cambridge, MA 02138
ramseyer@law.harvard.edu

Eric B. Rasmusen
Kelley School of Business
Indiana University
Bloomington, IN 47405
erasmuse@indiana.edu

Comparative Litigation Rates

**By
J. Mark Ramseyer & Eric B. Rasmusen***

We know the stereotype: People around the world see American citizens as eager to sue and American judges as powerful shapers of the social order. Yet we find it hard to measure the magnitude of that eagerness and power. In this article we examine some of the problems involved in quantitatively measuring how the courts' role in America compares to other nations. We suggest that the notoriety of the U.S. does not result from the way citizens and judges handle routine disputes, which (different as it may be in developing countries) is not very different from in other wealthy, democratic societies,. Instead, American notoriety results from the peculiarly dysfunctional way judges handle disputes in discrete legal areas such as class actions and punitive damages

* Mitsubishi Professor of Japanese Legal Studies, Harvard Law School; Dan R. and Catherine M. Dalton Professor, Kelley School of Business, Indiana University.

I. Introduction

Let us begin with some stories.

McDonald's Coffee. Stella Liebeck ordered coffee at a McDonald's drive-through and promptly spilled it on her lap. Because of the absorbent sweat pants she wore, she suffered severe burns. She sued, and a jury awarded her \$2.86 million, cut by the judge to \$650,000. Eventually, Liebeck and McDonald's settled out of court.¹

Spill, sue, go home with \$2.86 million. The courts-as-demented-slot-machines story shocked most readers, and the case's eventual settlement got buried in the back pages of the newspapers. As odd as the bizarre verdict, however, was the positive press it earned among legal professionals. Predictably, the trade association for the plaintiffs' bar (formerly the American Trial Lawyers Association; now pleasantly refurbished as the American Association for Justice) celebrated the award as a victory for truth and justice. More curiously, even prominent law professors found good things to say about \$2.86 million for a coffee spill.²

Chipotle's Wheelchair. Maurizio Antoninetti wheeled himself into a Chipotle Mexican Grill and complained about the service-line counters. Set at a height convenient for those who could walk, wheelchair-bound Antoninetti found the counters too high. The restaurant said it would happily show him the food in cups or at a private table, but Antoninetti would not have it. He sued. The Americans with Disabilities Act entitled him to "reasonable accommodation," he argued, and a special viewing at a special table did not suffice. He wanted the full "Chipotle experience." For that, the franchise needed to install lower counters.

In 2010 the 9th Circuit found for Antoninetti, and granted injunctive relief. The chain was required to install lower counters -- counters convenient for wheelchair customers and inconvenient for everyone else. And because the District Court had awarded Antoninetti only \$136,537 in attorney's fees, the Circuit Court remanded the case to give him more.

Since immigrating to the United States in 1990, Antoninetti had sued more than twenty businesses over purported service quality. Only once had he ever returned to an establishment afterwards, but the Court declared that point irrelevant. The restaurant owed wheelchair customers lower counters whether he would ever eat there again or not.³

¹ Liebeck v. McDonald's Restaurants, P.T.S., Inc., No. D-202 CV-93-02419, 1995 WL 360309 (Bernalillo County, N.M. Dist. Ct. August 18, 1994).

² See Marc Galanter, "Oil Strike in Hell: Contemporary Legends about the Civil Justice System," Arizona Law Review, 40 (1998) 717-52, at 731; Richard Lempert, "Why Do Juries Get a Bum Rap-Reflections on the Work of Valerie Hans," DePaul Law Review, 48 (1998-1999) 453, at 459; Arthur R. Miller, New York University Law Review 78 (2003) 982 at 987; William Haltom and Michael J. McCann, "Java Jive; Genealogy of a Juridical Icon," pp. 183-226 of Distorting the law: Politics, Media, and the Litigation Crisis, University of Chicago Press (2004). On the other side, see Ted Frank, "Urban legends and Stella Liebeck and the McDonald's Coffee case," Overlawyered, October 20, 2005, <http://overlawyered.com/2005/10/urban-legends-and-stella-liebeck-and-the-mcdonalds-coffee-case/>.

³ Antoninetti v. Chipotle Mex. Grill, Inc., 9th Circuit 08-55867, http://www.ca9.uscourts.gov/opinions/view_subpage.php?pk_id=0000010681.

Milberg Weiss's Filings. In 1999, the class-action-specialty law firm of Milberg, Weiss, Breshad, Hynes & Lerach LLP filed a racketeering and unfair-competition class-action. Its target: Nintendo and several other game firms, including 4Kids. These firms sold Pokemon cards. Of course, children could trade these cards only if they bought them first. Concluded Milberg Weiss, the children had to "pay to play." Some of the card packets included rare (and thus, more valuable) cards. And the firms added these rare cards only randomly. Ergo, argued Milberg, in selling the cards the firms ran an illegal gambling operation.⁴

Within a few days Milberg withdrew from the suit. Apparently, it had not realized that 4Kids had been one of its corporate clients, missing that in its internal conflict-of-interest check. "Had" was key, though. As the American Lawyer magazine put it: "Quicker than a Charmander can sling a Geodude, 4Kids fired Milberg Weiss as its corporate counsel and the firm withdrew from the Pokemon class action" (quoted in Ridiculous, 2000; Bauder, 1999).

Never fear, Milberg always had more class actions to file. A few years later, it negotiated a settlement of one such suit with a Florida power company. The company paid Milberg \$375,000 to thank it for bringing the suit. It paid the shareholders -- Milberg's ostensible clients -- nothing.⁵ Lawyers do not always get away with these tricks. Here the judge blocked the settlement. He explained:⁶

This action appears to be the class litigation equivalent of the 'squeegee boys' who used to frequent major urban intersections and who would run up to a stopped car, splash soapy water on its perfectly clean windshield and expect payment for the uninvited service of wiping it off.

For his litigation tactics in other cases, Milberg name-partner William Lerach eventually went to prison. Here too, however, the legal professoriate reacted in a peculiarly American way. When Lerach eventually emerged from prison, UC-Irvine Law School dean Erwin Chemerinsky did not excoriate him for his criminal litigation strategies; he invited Lerach to teach a course on "The Regulation of Free Market Capitalism." Lerach said that the course "would include a strong ethical component."⁷ The judge blanched at the idea of giving Lerach community service credit for teaching ethics to law students. But the dean was happy to have him do it.

⁴ Bauder, Don, "Law Firm Discovers It Sued Own Client in Pokemon Case," Union Tribune, Sept. 24, 1999, http://www.phaster.com/unpretentious/lawyers_and_pokemon.html. "Ridiculous Lawsuits of the Year 2000," Civil Justice Association of California, Dec. 28, 2000. <http://www.cjac.org/newsandresearch/press-releases/i-was-only-ruined-twice-in-my-1/>.

⁵ Robert Trigaux, "Class-Action 'Squeegee Boys' Get Comeuppance," St. Petersburg Times, Apr. 28, 2002. http://www.sptimes.com/2002/04/28/Columns/Class_action__squeegee.shtml.

⁶ "Judge Compares Class Action Lawyers to 'Squeegee Boys'," Overlawyered, Apr. 18, 2002. <http://overlawyered.com/early-years/april-2002-archives-part-2/>.

⁷ Memorandum of Points and Authorities in Support of William S. Lerach's Motion for Order Permitting Community Service at University of California Irvine Law School, Aug. 9, 2010, http://www.politico.com/static/PPM170_100803_lerachucsvcmotn.html.

Mississippi's Cigarettes. In the 1990's, Mississippi plaintiffs' lawyer Richard "Dickie" Scruggs sued cigarette companies on behalf of 46 states. By convincing consumers that smoking was safe, he explained, the companies had increased the Medicare bills that state governments had to pay. How anyone in the last half century could have thought smoking safe is a mystery. So too is how smoking could have raised Medicare bills when it killed its users before they reached retirement age.

But never mind those questions. Under the 1998 Tobacco Master Settlement Agreement, the companies agreed to restrict their marketing and lobbying and to pay \$246 billion dollars over 25 years (and \$900 million to Scruggs's law firm).⁸ One could characterize this as a "regulatory" outcome that circumvented democratically instituted regulatory process. But the intellectual class cheered. The New York Times applauded the settlement and lamented only that the regulatory strictures were not harsher still.⁹

A reader might think Americans use litigation in place of legislation and regulation. He might think judges wield enormous and capricious power. He might think litigants unpredictably manipulate the power of the state by using (or abusing) a judicial branch immune from any democratic checks. He might also think that for American businesses, law is as important as commerce. Making a good product at low cost is all well and good, of course. But retaining a top-flight law firm to protect the firm's assets against those would judicially expropriate them would seem a sensible first priority.

By most accounts, this need to protect one's firm from judicially sanctioned theft is a distinctively American exigency. It is not a story one hears about other wealthy western democracies. What is more, the instinctive impulse among intellectuals to defend these outcomes is itself distinctively American. No doubt courts in other countries issue bizarre opinions from time to time too -- idiocy knows no boundaries. But "tort reform" to stop unreasonable judicial decisions is a peculiarly American debate.

We took our task in this essay to be that of quantifying the use of courts across countries. In short order, however, we realized that such an effort could not measure what really matters, both for theoretical and for empirical reasons. The theoretical problems lie in identifying measurable phenomena that accurately reflect the impact of courts. The empirical problems stem from the high aggregation level of the data available.

That said, we start by outlining selected facts about the use of the courts within the U.S. and abroad (Section II). We explain which questions these facts answer, and which they do not. For most routine contract, tort, and property disputes, we find that the American courts perform about as well as those in other wealthy democracies. The notoriety of the U.S. legal system stems not from routine disputes. It stems instead from disputes in several discrete legal areas where U.S. courts perform abysmally (Section III).

⁸ Master Settlement Agreement, http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/MSA%20with%20Sig%20Pages%20and%20Exhibits.pdf/file_view. For the history, see Wikipedia, "Tobacco Master Settlement Agreement," http://en.wikipedia.org/wiki/Tobacco_Master_Settlement_Agreement (31 May 2010).

⁹ "Holes in the Tobacco Settlement," New York Times, June 27, 1997. <http://www.nytimes.com/1997/06/27/opinion/holes-in-the-tobacco-settlement.html>.

II. Comparative Litigation Statistics:

A. Conclusion as Introduction:

1. The results. -- We begin by examining several plausible proxies for the use of the courts across six wealthy democracies (Table 1). We start with the basic index of court usage: the number of suits filed per capita. We discuss this measure at considerable length (Sec. B), and then turn to several alternative proxies (Secs. C-E): judges per capita, lawyers per capita, the cost of prosecuting a contract claim, and motor insurance premia.

Two conclusions suggest themselves. First, the numbers do not correlate with each other very closely. The variables may all plausibly measure court usage, but among this group those countries that score high on some measures score low on others. The U.S. has about a quarter more suits per capita than does the U.K., but 3.3 times as many as Canada. It has fewer judges per capita than France, but nearly four times as many as the U.K. It has 17 times as many lawyers per capita as Japan, but the same number as Australia. It has more than twice the motor vehicle insurance costs of Australia, but lower costs than Canada.

Table 1: Various Measures of Litigation

	Australia	Canada	France	Japan	U.K. or England	USA
Suits filed (per 100,000 people)	1,542	1,450	2,416	1,768	3,681	5,806
Judges (per 100,000 people)	4.00	3.3	12.47	2.83	2.22	10.81
Lawyers (per 100,000 people)	357	26	72	23	251	391
Motor insurance (%GDP)	0.81	1.35	0.93	0.72	0.93	1.45
Motor insurance (US\$ per car)	664	1,574	786	754	927	1,464
Cost of contract action (% of value)	20.7	22.3	17.4	22.7	23.4	14.4

Sources: Various --- see later sections of this chapter.

Notes. Explanations of these numbers are important and are discussed later in the chapter. The top three rows are for England, and the bottom three for the United Kingdom, since Scotland and Northern Ireland have separate legal systems.

Second, the U.S. does not look special. From the litigation stories that dominate the newspapers -- \$2.86 million coffee spills, Pokemon class actions, and \$246 billion tobacco settlements -- the U.S. courts do look odd. Yet most litigation involves nothing like those disputes and, in turn, these bizarrely exceptional disputes do not skew data like suits filed or the number of judges. Ordinary litigation involves car crashes and broken contracts. These disputes dominate the courts. All wealthy democracies use courts to resolve this kind of routine dispute, and those courts resolve them similarly. In the process, they help insure the stability of property rights and facilitate efficient levels of investment. Indeed, a central reason these countries are wealthy lies in the way courts insure that stability and investment.

2. Their significance. -- Table 1's level of aggregation tells us, at best, about what we might call "first-order law": the typical disputes over automobile accidents and contract claims. Countries differ in how well their courts handle these mundane disputes. Even among wealthy democracies some courts handle them more efficiently than others. But compared to developing economies, even the least efficient wealthy democracy maintains reasonably good courts. Developed-country courts maintain a bewildering array of organizations and procedures, but generate outcomes that are similar enough that these empirical measures -- even granting all the flaws that we discuss below -- have a hard time distinguishing them.¹⁰

The notoriety of the U.S. stems instead from what we might call "second-order law": the McDonald's coffee spill, the Pokemon claims, and the tobacco settlement. These cases generate controversy, make trial lawyers rich, and provoke relentless calls for reform. Some are shareholder derivative suits. Others involve class actions, sexual harassment claims, or medical malpractice. They can profoundly affect the social relations and economic structure within a country, but not because they are common or because they protect property rights. They affect social relations and economic structure because -- despite their scarcity -- they discourage investment and cause firms to take precautions of little social value.

The U.S. is exceptional not in the way it handles first-order law (the rest of this Sec. II), but in the way it handles second-order law (Sec. III, below). In the typical accident or contract claim, U.S. courts do reasonably well. They may face somewhat more litigation than other rich democracies, but not much. In the second-order cases, however, the U.S. courts entertain claims that courts in other well-functioning economies would dismiss in short order. In the process, they necessarily create a drag on American business. Thus, we may say, as M.A. Peterson did in 1986 (quoted in Markesinis (1990)):

¹⁰ In this regard, the data has not improved since the articles of Marc Galanter in 1983 in the UCLA Law Review and Basil Markesinis in 1990 in the Cambridge Law Journal.

Increasingly, the civil justice system seems to be two different systems. One is a stable system that provides modest compensation for plaintiffs who claimed slight or moderate injuries in automobile and other accidents that have been the major source of litigation for 50 years. The second is an unstable system that provides continually increasing awards for claims for serious injuries in any type of lawsuit, and for all injuries, serious or not, in product liability, malpractice, street hazards and workplace accidents.

B. Suits per capita:

1. Introduction. -- When someone claims that the U.S. is exceptionally "litigious," what evidence might he cite to support the claim? What might a skeptic cite to dispute it? What does such a claim even mean? To explore these questions, turn first to the number of civil suits filed.

2. The United States. -- Although most litigation in the U.S. occurs in state (not federal) courts, data on state court litigation are maddeningly elusive. The court systems themselves differ widely. Some states use small-claims courts, to take one example, while others do not. Some states use subject-specific courts, while others route all suits to a single court. Those states that do use the small-claims courts employ widely varying jurisdictional cut-offs.

Faced with such disparate systems, the National Center for State Courts (the NCSC) does the best it can, but about 10 percent of the states return its surveys with only incomplete data. Another 10 percent report the wrong data.

Subject to the resulting caveats about quality, the NCSC finds that plaintiffs filed about 7.9 million suits in state courts of unified and general jurisdiction in 2006. They filed another 10.2 million suits in limited jurisdiction courts (e.g. small claims courts). The two figures suggest a total state court caseload of about 18 million (Strickland, 2007: tabs. 1, 2). On a U.S. population of 310 million, the number comes to 5,806 filings per 100,000 population.¹¹

Additionally, plaintiffs filed 272,000 new civil suits in federal District Courts. They filed 34,000 contract claims, 4,000 real property claims, and 77,000 tort claims (15,000 of them relating to asbestos -- see Sec. III, below). The rest of the claims were statutory: 53,000 prisoner petitions, 32,000 civil rights cases, 19,000 labor law cases, 13,000 social security claims, and 11,000 intellectual property disputes.¹²

Within the state courts, case composition varies widely. Kansas reported that 89% of its cases concerned contract disputes and 5% small claims, while Wisconsin reported 16% contracts disputes and 64% small claims. The Wisconsin breakdown more closely approaches the 68% small claims cases (with size limits variously defined) in states with

¹¹ Population of US: 301.621 million. US Stat. Abst. 2010, p. 52. <http://www.census.gov/compendia/statab/2010/tables/10s0052.pdf>

¹² 2007 data from U.S. Dept. Commerce, Statistical Abstract of the United States, 2010 Tab. 323 (Washington, D.C.: Bureau of the Census, 2010). <Http://www.census.gov/compendia/statab/2010edition.html>.

courts of general jurisdiction. Among seven states reporting detailed composition data, tort cases ranged from 1.5% to 8.0% of the total (CSP-2007, p. 2). In 2006:

Small claims ... made up 44 percent of incoming civil cases in these [unified] court systems. General civil cases -- tort, contract, and real property cases not filed as small claims -- constituted a combined 37 percent of incoming cases. The vast majority of incoming general civil cases in these systems were contract cases, whereas tort cases represented just 6 percent of the incoming civil caseload. (Civil Caseloads, at 21)

The federal government surveyed state filings that went to trial in 2005. In the states that reported this trial data, the parties settled or abandoned the vast majority of cases: "trials collectively accounted for about 3% of all tort, contract, and real property dispositions in general jurisdiction courts." But of the cases that the parties did take to trial, 61% were tort cases. Apparently, tort disputes comprise a small fraction of cases filed, but a much larger fraction of cases actually tried. Consistent with the phenomenon of "the vanishing trial" that has been the subject of a small literature in academia,¹³ in the nation's 75 most populous counties the number of general civil cases disposed of by trial declined 50% from 1992 to 2005: from 22,000 to 11,000 (Langton and Cohen).

3. Japan. -- In 2008, disputants filed 2.3 million civil cases in the Japanese courts at all levels.¹⁴ Divide by the 127 million population of Japan and one obtains the 1,773 per 100,000 population figure in Table 1.

Disputants filed a majority of these claims in summary courts. These courts have jurisdiction over claims of less than 1.4 million yen (Courts Act, Sec. 32; in Aug. 2010, \$1.00 = 85 yen). Of all claims filed, the summary courts heard 1.4 million.

Many of these "cases" involved petitions for various orders in insolvency or other specialized proceedings. Of the 2.3 million newly filed cases, Japanese courts catalogued only 828,000 as "litigation suits." And within the district (as opposed to summary) courts, only 222,000 involved "litigation suits."

The most recent court statistics do not break down litigation by the subject matter of the dispute. Note, however, that in 1994 the Japanese district courts heard 146,392 "litigation suit" claims. Of these, 35,220 involved loans and credit transactions, 33,447 involved real estate, and 6,360 involved traffic accidents (Tab. 23, Shiho tokei, 1994). In the summary courts, 195,240 out of the 244,131 suits involved loans and credit transactions, 4,623 involved real estate, and 1,215 involved traffic accidents (id., at tab. 10). Additionally, note that besides the 2.3 million new "civil" cases in 2008, Japanese filed 766,000 domestic relations suits in family courts.

4. England and Wales. -- In England and Wales, plaintiffs filed 2.01 million civil suits in county courts in 2007 (Table 2). In addition, they filed 127,664 family law cases.¹⁵ On a

¹³ See, for references, Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *Journal of Empirical Legal Studies*, 1 (2004) 459–570.

¹⁴ Japanese court filing data from the Shiho tokei nempo, etc.

¹⁵ U.K. Ministry of Justice, *Judicial and Court Statistics 2007*, Tables 4.1 and 5.1.

population of 54 million, they thus filed 3,681 proceedings per 100,000. As in the U.S. and Japan, the bulk of the suits involved "money claims."

Table 2: The Breakdown of Cases Filed in England and Wales, 2000-2007

Year	Money claims	Recovery of land	Return of goods	Other non-money claims	Insolvency	Total
2000	1,558,187	263,213	14,305	116,099	25,076	1,976,880
2001	1,438,224	259,281	14,806	103,402	26,477	1,842,190
2002	1,352,733	258,676	11,734	131,760	29,556	1,784,459
2003	1,314,048	243,962	9,929	164,375	30,733	1,763,047
2004	1,332,621	251,865	8,880	135,591	38,279	1,767,236
2005	1,579,160	280,478	9,127	103,419	51,875	2,024,059
2006	1,720,297	289,278	9,908	100,777	66,966	2,187,226
2007	1,555,486	284,381	8,470	99,636	66,945	2,014,962

Source: U.K. Ministry of Justice, Judicial and Court Statistics 2007, table 4.1.

 5. Canada. -- In the year ending 2009, plaintiffs filed 324,015 general civil cases (including small claims) in the seven Canadian provinces of Nova Scotia, Ontario, Alberta, B.C., Yukon, Northwest Territories, and Nunavut. They filed another 175,628 family law cases. On a population for these provinces of about 22 million, this yields 1,450 general civil cases per 100,000 population.

An English colony, a common-law legal system, a north-American neighbor -- yet Canada has but a quarter of the litigation in the U.S. Indeed, it has less litigation even than the famously "non-litigious" Japanese. Consider the heavily urban Ontario province. With 121,806 suits filed in a population of 13 million, it has still less litigation: 930 general civil cases per 100,000 population.¹⁶

6. Australia. -- Like the U.S. and Canada, Australia maintains a federal structure for its courts. It couples one federal (i.e., national) court system, with separate court systems in each of its eight states. We were able to obtain data on court filings for six of the eight, an area with about 90 percent of the Australian population. Plaintiffs in these states filed 302,000 suits (allocating the federal filings by population). Given Australia's 21 million population, and adjusting upwards as if the two missing states had rates the same as the others, they filed 1,542 suits per 100,000 population -- a result close to Canada's.¹⁷

¹⁶ <http://www.slaw.ca/wp-content/uploads/2010/03/Civil-Court-Survey-Statistics-2005-2006-to-2008-2009.pdf>

¹⁷ Based on annual reports filed by the various courts, and available from their websites.

7. France. -- France has four kinds of specialized trial courts. In 2006 plaintiffs filed 943,597 new cases in the Tribunaux de grande instance (general law, large suits), 614,480 in the Tribunaux d'instance (general law, small suits), 3,294 in the Tribunaux paritaires des baux ruraux (rural areas), 198,455 in the Conseils de prud'hommes (employment disputes), and 193 534 in the Tribunaux de commerce (commerce). This yields a total of 1,953,360 suits, of which 422,790 were family law cases. The remaining 1,530,570 non-family civil suits, divided by a population of 63 million, yield a litigation rate of 2,416 per 100,000 people.¹⁸

8. Qualifications. -- We enter these calculations in the first row of Table 1. The numbers reflect with reasonable accuracy what they purport to measure: the number of times people file non-family civil suits in court. They only haphazardly proxy for the role courts play in society. Although the number of filings might seem to measure that role, consider the following three complications.

a. Small-claims courts. We include small claims. Given that the jurisdictional rules for small-claims courts differ widely, excluding them would result in different definitions of "suit" for different jurisdictions. If one were interested in the extent to which people use the courts to resolve economically substantial disputes, however, one might want to exclude the very smallest claims. And if one wanted to measure the role courts played in society, a small suit obviously should count for less than a large one. Since states and countries differ in their cutoffs, however, omitting small-claims courts could be highly misleading; one country's figure might still include mostly petty disputes while another's did not.

b. The definition of "case". Even with size held constant, a case is not a case. More specifically, analogous categories of disputes do not generate the same number of "countable" cases in every country. Take divorce. Focusing as we do on the enforcement of property rights, we exclude family disputes. This is a questionable decision, of course: family disputes often concern significant disputes over property, and can be among the most traumatic disputes people ever face.

Yet countries differ in the extent to which divorces generate court cases. In the U.S., a divorce will almost always lead to a "countable" case. To divorce, a couple generally must file a suit in court. Whether bitterly estranged or still friendly, they need to report to a court. By contrast, in Japan most divorces never enter court records. To part ways, a couple simply goes to city hall and enters a divorce on the "family registry." Only when the two cannot agree on the terms of the divorce will they appear in family court. In 2008, 251,000 Japanese couples divorced. Only 12 percent of the couples filed in court, and only 1 percent actually went to trial (Kosei, 2009: 21).

Or suppose John Doe borrows on his credit card, but does not pay. If the lender wants to force Doe to pay it will need to file suit. It may try a variety of extra-legal harassing tactics first, but to get at Doe's bank account or paycheck, the lender will need to sue. If instead A borrows at a pawn shop and does not pay, the lender merely keeps

¹⁸ Population of France: 63,329,000 in 2006. U.S. Census Bureau, Statistical Abstract of the United States: 2008 table 1298. <http://www.census.gov/prod/2007pubs/08abstract/intlstat.pdf>

(and eventually sells) the pawned object. The dispute becomes a case only if the borrower wants to force the lender to return the object pawned. As a result, the number of cases filed in court will depend on the relative prevalence of credit-card and pawnshop finance in the consumer credit market -- and that, of course, will vary from country to country.¹⁹ Pawnshops do not make the headlines, but they matter to aggregate statistics; a 1988 study of yellow pages listings found 6,853 pawnshops in the United States, with an estimated 35 million loans per year. The number of class actions suits is trivial compared with the number of security interests transferred in pawnshops.

Take Japan. In 1955, the country had over 21,000 pawn shops. Since then, per capita income and the financial services sector have boomed. Credit cards, real estate mortgages, and unsecured consumer credit have grown, while pawn shops have all but disappeared. Barely 700 remain in Tokyo.²⁰ Today, Acom is one of the leading consumer credit firms in Japan. In the late 1970s it pioneered the provision of loans 24-hours-a-day through ATMs, and since 2008 has constituted part of the Mitsubishi-UFJ Financial group. It began in the late 1940s, however, as a simple pawn shop.²¹ The number of suits per capita in Japan may have increased since 1955 -- but part of that growth reflects neither an institutional change in the courts nor a psychological change among citizens. Instead, it reflects a contractual change in the structure of consumer finance.

The point is not that pawn shops determine litigation rates; the point is that very similar court systems will generate dramatically different litigation rates under different organizations of credit markets. Under one arrangement, the aggrieved contract party sues the breacher to recover damages. Under the other, he uses self-help and the alleged breacher sues to contest the self-help. Which arrangement protects property rights most effectively depends on many things, including the quality of the courts. Crucially for our inquiry, however, the two arrangements will generate very different numbers of law suits even if court organization, the clarity of the law, court fairness, and judicial impartiality were identical.

c. Predictability. The logic. How often plaintiffs sue will also turn on the predictability of the courts. Recall the standard model of litigation and settlement.²² (e.g., Landes, 1971; Posner, 1973). Litigation is more expensive than settlement, so disputants do best if they settle their quarrels out of court, all else equal. Suppose they know what a court will do. If so, they can settle their dispute by that expected litigated outcome and pocket the fees they would otherwise have paid their lawyers. The point is simple: if they know what a judge will do, they have no reason to ask him.

Under this model, disputants primarily litigate rather than settle only when they each hold optimistic estimates of their prospects in court. Because they face higher

¹⁹ John P. Caskey, "Pawnbroking in America: The Economics of a Forgotten Credit Market," *Journal of Money, Credit, and Banking*, 23 (1991) 85-100.

²⁰ Kosei rodo sho, *Kosei hakusho [Public Health White Paper]* (Tokyo: Kosei rodo sho, 1956), <http://www.lufimia.net/sub/pawn/history.htm>.

²¹ <http://sss888.net/acom/tire/under.html>; <http://www.acom.co.jp/company/outline/history>

²² William M. Landes, "An Economic Analysis of the Courts," *Journal of Law and Economics*, 14 (1971) 61—xxx; Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies*, 2 (1973) 399-xx.

expenses if they litigate than if they settle, that cost difference creates a "settlement window." So long as the difference in their estimates of the litigated outcome is smaller than that settlement window, they both gain by settling.

For a potential plaintiff, his net recovery in court (court award less his attorney fees) represents a fall-back option: he can always sue and obtain at least that much. As a result, he will rationally not settle for any amount that leaves him less than what he could obtain by suing. For a potential defendant, his gross outlay (court award plus his attorney fees) similarly represents a fall-back: he can always let the plaintiff sue and limit his losses to that amount. He will not rationally settle for any sum that costs more than he would pay in court.

If the two parties each estimate their litigated prospects optimistically enough, they will not be able to settle. The plaintiff will expect a large recovery in court, and demand a correspondingly large settlement. The defendant will expect to pay very little in court, and offer only a modest payment. The plaintiff demands a large amount, the defendant offers very little, and the parties have no choice but to fight in court.

By contrast, if the two parties estimate the probable litigated outcome similarly, both benefit by settling out of court. The plaintiff expects to obtain what the defendant expects to pay. Rather than take their dispute to court, they both gain by settling out of court by the amount they expect the court to decree. The defendant pays, the plaintiff drops his claim, and the two pocket what they would otherwise have paid their lawyers.

We thus come to the problem of what we wish to measure. If we want to measure court activity, then we do want the number of filings and trials rather than the amount of claims asserted in the shadow of the law. A country with more erratic courts (*e.g.*, the United States with its civil juries) will have more litigation than a country with predictable courts (*e.g.*, Japan with its bureaucratic judges). On the other hand, if we want to measure the amount of wealth transferred according to legal rules, then we would instead like to include settlements. For example, we might define "litigious" citizens to include disputants who extract damages by asserting their legally protected rights even if they rationally and self-interestedly settle their claims. Under that definition, a country might be "litigious" even with few suits or judges per capita.

Predictability: The application. Take two countries, A and B. In A, the courts adopt rules that specify clearly the way they will adjudicate a given type of dispute. In B, the courts follow individualized inquiries that rely heavily on the discretion of the fact-finder. Perhaps they even use complete novices (*i.e.*, juries) to find the facts. Given these environments, the parties are far more likely to agree on the expected litigated outcome in A than in B. Necessarily, they will settle more of their disputes in A than in B.

Crucially, however, in both A and B, the parties will structure their affairs by the law. Although B will have a much higher litigation rate than A, people in both countries will plan their activities by the rules their courts enforce. To be sure, they spend more on attorneys in B. Taxpayers more heavily subsidize the courts in B. Yet whether in A or in B, people structure their lives by the rules they expect judges to enforce in courts.

Traffic accidents in Japan. The course of traffic accident disputes in Japan illustrates this dynamic. As Japan emerged from the devastation of World War II, very few people owned cars. By the 1960s, however, the economy was growing at double-digit rates each

year. Increasingly, Japanese chose to spend what they earned on automobiles. As they did, they increasingly killed each other on the roads. Accidents boomed, and so did litigation (even without a change in the court system, to recall our earlier point).

Dan Foote (1995) recounts how Japanese courts responded. After traffic accident cases began to increase rapidly, the Tokyo District Court established a special traffic section in 1962. The new panel immediately found itself swamped.

Quickly, the traffic section realized it had to routinize its treatment of cases. At first, it kept its formulas internal to the courts. It published handbooks for judges detailing its "rules of thumb for damages" (*id.*, at 27) and standards on comparative negligence. From time to time, the traffic section conferred with other judges about how to handle accident disputes. When in 1968, the judges found that courts in Osaka awarded more than those in Tokyo and Nagoya, the Tokyo and Nagoya judges adopted the more generous damage formula of their Osaka colleagues.

In time, however, the Tokyo traffic section took its dissemination efforts beyond the courts. It began announcing its rules to the bar and the public. The culmination came with what Foote describes as "a special 161-page issue of [one of the principal legal journals] in 1975 consisting entirely of explanations of the compensation and comparative fault standard used by the courts" (*id.*, at 29).

Table 3 traces what happened. From 1964 to 1968, the number of suits filed in district courts over traffic accidents more than doubled, from 2,378 to 5,514. As a fraction of all civil suits, they rose from 3 to 7 percent. When the Tokyo and Nagoya District Courts adopted the higher Osaka compensation standards, the number of traffic suits jumped from 5,514 to 10,416 in one year.

Table 3: Litigation in Traffic Accidents in Japan

	A	B		C	
	Traffic Accidents	<u>District Court Suits Filed</u>			
	Deaths	All	Traf Acc	C/A	C/B
1964	16,764	72,314	2,378	0.14	.03
1965	16,257	72,148	2,697	0.17	.04
1966	17,979	71,758	3,675	0.20	.05
1967	17,492	74,879	4,916	0.28	.07
1968	18,454	81,324	5,514	0.29	.07
1969	20,547	94,439	10,416	0.51	.11
1970	21,535	86,353	11,620	0.54	.13
1971	21,201	76,834	11,118	0.52	.14
1972	20,494	76,299	10,535	0.51	.14
1973	19,068	71,800	8,832	0.46	.12
1974	15,448	74,157	7,275	0.47	.10
1975	14,206	74,907	5,808	0.41	.08
1976	13,006	81,075	4,843	0.37	.06
1977	12,095	89,544	4,127	0.34	.05
1978	12,030	91,545	3,733	0.31	.04
1979	11,778	93,732	3,591	0.30	.04
1980	11,752	105,559	3,484	0.30	.03
1981	11,874	113,253	3,325	0.28	.03
1982	12,377	117,280	3,474	0.28	.03
1983	12,919	99,037	3,235	0.25	.03

Sources: J. Mark Ramseyer & Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," J. Legal Stud., 18 (1989) 263; Saiko saibansho, ed. Shiho tokei nempo [Judicial Statistics Annual] (Tokyo: Saiko saibansho, various years); traffic deaths from Japanese Ministry of Health & Welfare.

After 1971, the number of traffic suits began to fall. Plaintiffs filed 11,118 traffic claims that year (14 percent of all suits). By 1975, they filed only 5,808 (8 percent of all suits), and by 1980 only 3,484 (3 percent of all suits). Indeed, writes Foote (1995: 30), by the end of the decade the judges in the Tokyo traffic section found themselves "at loose ends due to lack of work. Beginning in 1978, [they] began handling workers'

compensation cases, as well as automobile cases, since there was no longer enough traffic accident litigation to keep [them] busy."

Did it just take time for the Japanese to learn how to drive? To be sure, the roads became safer. With better highways, automatic stoplights, additional sidewalks, and safer cars, the number of deaths from traffic accidents (a proxy for serious injuries more generally) plummeted from 21,535 in 1970 to 11,752 in 1980 -- a 45 percent drop. Yet the number of cases filed fell faster still. From 11,620 in 1970, traffic cases fell in a single decade to 3,484 -- a 70 percent drop. Civil litigation in general did not fall, only civil litigation over traffic accident. In 1970, plaintiffs filed 74,733 (= 86,353 - 11,620) non-traffic suits; by 1980, they filed 102,075 (= 105,559 - 3,484).

The Japanese of today litigate their traffic disputes more than they did in 1980, but they still litigate much less than Americans. In Table 4, we give the number of traffic accident deaths (again, a proxy for serious accidents) and the number of suits filed in traffic accidents for selected states in 2004. We take the data from [source]; these are the only states for which that source provides traffic fatality and claim data.

In these American states, the ratio of traffic suits to traffic fatalities ranged from 3.10 in Mississippi to 50.03 in New Jersey. For the group as a whole, the ratio was 12.01. By contrast, in 2004, 10,480 people died from traffic accidents in Japan and victims filed 10,980 suits -- giving a ratio of 1.05. The figure is much higher than the comparable ratio in the 1970s (Col. C/A in Table 3), but it remains far lower than in any U.S. state.

**Table 4: Litigation in Traffic Accidents
in Selected US States and Japan, 2004**

	A Traf Accid Deaths	B Suits Filed Traf Acc	B/A
Arizona	989	8,599	8.69
Colorado	594	3,438	5.79
Connecticut	277	11,599	41.87
Florida	2,927	21,894	7.48
Hawaii	128	835	6.52
Iowa	356	2,520	7.08
Michigan	1,055	9,904	9.39
Mississippi	786	2,440	3.10
Missouri	1006	5,782	5.75
New Jersey	692	34,622	50.03
New Mexico	439	2,211	5.04
New York	1,370	41,006	29.93
North Carolina	1,402	6,384	4.55
Puerto Rico	464	1,758	3.79
Rhode Island	78	1,699	21.78
Wisconsin	722	4,928	6.83
Japan	10,480	10,980	1.05

Sources: Here and above, Japanese figures are Health Ministry figures, not police. The police report the number of deaths within 24 hours of an accident; the Health Ministry report deaths within one year of an accident. <http://www.nmt.ne.jp/~cosmos99/iti.pdf>

Crucially, the parties to the traffic accidents in Japan settled their quarrels by the law. Although they increasingly took their disputes out of the courts during the 1970s, they still settled them by the expected court outcome. To test this proposition, Ramseyer and Nakazato compare (i) the mean amounts paid by automobile insurers in wrongful death claims, with (ii) the mean amounts awarded the heirs to the accident victims in court.²³ They find that in virtually all cases where heirs would have had legal claims against drivers, they demanded (and obtained) compensation from the drivers' insurer. Out of court, they collected mean amounts that closely tracked the mean amounts the courts would have awarded.

Thus, cases filed per capita do not provide a good measure even of first-order law, if by that we mean the extent to which the courts are influential in resolving first-order disputes. They provide a somewhat better measure of how much the courts decide

²³ J. Mark Ramseyer and Minoru Nakazato, "The Rational Litigant: Settlement Amounts and Verdict Rates in Japan," *The Journal of Legal Studies*, 18 (1989) 263-90.

directly rather than indirectly, but even then they do not provide a good measure of the importance of the wealth transfers.

C. Judges per Capita:

1. The numbers. -- As an alternative index to the role courts play in society, take the number of judges. Provided judges perform similar amounts of work in all countries, the number of judges per capita would index the amount of work they do in each society. In turn, the number might also index the authority they wield. This would also address to some extent the problem of suits varying in importance, since more important suits require more time from judges.

In the U.S., the state courts employed 29,379 judges in 2004 (CSP, 2004). The federal government employs 875 constitutionally authorized judges (2009; "Article III" judges with life tenure).²⁴ Under statutory authorization, it hires another 352 people to work as Bankruptcy Judges, 567 as Magistrate Judges,²⁵ and 1,422 as Administrative Law Judges.²⁶ Total the federal and state judges, and the number of U.S. judges hits 32,595. Per 100,000 population, the result is 10.81.

In 2010, the Japanese courts employed 15 Supreme Court Justices, 8 High Court Presidents (chief judges), 1,782 (trial and intermediate appellate) Judges, 1,000 Assistant Judges (judges in their first ten years of employment), and 806 Summary Court Judges (not all of them legally trained). These numbers total 3,611.²⁷ Per 100,000 population, they yield 2.83.

In 2008, England and Wales employed 110 High Court judges, 653 Circuit Judges, and 438 District Judges. These judges total 1,201.²⁸ Per 100,000 population, the number comes to 2.22.

The courts in England and Wales use other adjudicators as well, but whether to include them is problematic. The High Court judges hear criminal appeals and difficult civil cases. Circuit Judges and District Judges staff the County Courts and hear family and most civil cases. The Crown Courts do not hear civil cases, but they do use Circuit Judges. In addition, there were 1,305 Recorders and 29,419 Justices of the Peace. Recorders are part-time judges -- they sit 2 percent of the judge-days in High Courts, 22

²⁴ Office of the U.S. Courts, "Federal Judgeships," <http://www.uscourts.gov/JudgesAndJudgeships/FederalJudgeships.aspx>.

²⁵ p. 36, Administrative Office of the United States Courts. *2009 Annual Report of the Director: Judicial Business of the United States Courts*. Washington, D.C.: U.S. Government Printing Office, 2010. <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport.aspx>

²⁶ p. 2, Vanessa K. Burrows "Administrative Law Judges: An Overview," Congressional Research Service, April 13, 2010, <http://towmasters.files.wordpress.com/.../administrative-law-judges-an-overview.pdf>

²⁷ Saiban sho shokuin teiin ho [Act Authorizing the Number of Employees in the Courts], Law No. 53 of 1951, as amended March 31, 2010. <http://law.e-gov.go.jp/htmldata/S26/S26HO053.html>

²⁸ Ministry of Justice, *Judicial and Court Statistics 2007*, Table 9.1. (Useful supplements to the cited documents are: Wikipedia: http://en.wikipedia.org/wiki/Courts_of_England_and_Wales, http://en.wikipedia.org/wiki/Judiciary_of_England_and_Wales)

percent in County Courts, and 3 percent in County Courts. Rather than adding a percentage of them, we omit them entirely. Justices of the Peace are lay magistrates who handle minor criminal cases, and we omit them as well. Typically, they lack legal training. Although not full judges, however, they do handle cases that judges would handle in the United States.

Given its federal structure, Canada employs judges in both its federal (national) and provincial courts. It had about 80 federal judges, and 1,100 state judges. On a population of about 33 million, these 1,180 judges come to 3.3 per 100,000 population.²⁹

Australia similarly employs judges and magistrates in both federal and state courts. It has about 100 federal judges, and about 740 state judges. Per 100,000 population, these 840 judges come to 4.00.³⁰

The French courts employ 7,896 Magistrats de l'ordre judiciaire.³¹ Per 100,000 population, this number is 12.47.

2. Qualifications. Our discussion of the individual countries shows that measuring the number of judges is not as simple as it seems, since “judge” is an ambiguous term when several different levels of adjudicators exists. Moreover, we lightly passed over the problem that judges deal with criminal as well as civil cases, and the ratio between the two cases differs between countries. As with the number of suits filed, however, the problem with the number of judges lies less in the numbers themselves than in their significance. From time to time, observers use the number of judges to proxy for the demand for judicial services. Implicitly, they suggest that governments appoint the judges they do because people file the lawsuits they do. In fact, however, causation just as plausibly runs the other way. People may file the suits that they do because of the number of judges the government has appointed.

Hypothetically, governments in wealthy democracies might meter the use of the courts with filing fees and subsidies. After all, litigation creates both positive externalities (e.g., clearer property rights and enforceable contracts) and negative (e.g., judicial salaries and court-house rents). By imposing a fee or subsidy the government could obtain the level of litigation that maximized social welfare.

Governments do not do this. Rather than meter litigation explicitly through fees, they meter it implicitly through queues. They then adjust the length of the queue by employing larger or smaller numbers of judges.

The logic, as George Priest explained in 1989, is straightforward. Suppose a community hires more judges. The courts will decide more cases, and average delay will fall. That reduced delay, however, will make litigation more attractive, and disputants will file more suits. The additional suits they file, in turn, will undo some of the reduction in delay that the additional judges might otherwise have provided.³²

²⁹ <http://www.fja.gc.ca/appointments-nominations/judges-juges-eng.html>.

³⁰ Compiled from annual reports for the various courts, available on the official web sites.

³¹ INSEE, Moyens en personnel de la Justice, http://www.insee.fr/fr/themes/tableau.asp?ref_id=NATnon05317®_id=0.

³² George L. Priest, “Private Litigants and the Court Congestion Problem,” Boston University Law Review, 69 (1989) 527--xxxx.

As a result, the relationship between the number of suits filed and the number of judges hired is reciprocal. On the one hand, democratic governments may hire more judges when citizens file more suits. Constituents express their demand for judicial services by litigating; politicians respond by staffing the courts. On the other hand, however, politicians may curry favor with their constituents by hiring more judges; those constituents may then respond to the shorter queue by filing more suits.

In Table 5, we illustrate these dynamics with 2004 data from the U.S. state courts. We regress (a) the number of cases filed in the state (incoming civil cases) and (b) the ratio of cleared cases to filed cases (outgoing/incoming cases) on (c) the number of judges in the state. In the first two columns, we report the results of the regression on all courts in a state. In the last two columns, we report results using only the courts of general jurisdiction.

The regressions show two phenomena. First, the number of judges and the number of suits filed are correlated. The coefficient on the number of judges is significant and positive in both the first and third columns. This result does not explain the direction of the causation -- it shows only that states with many suits employ many judges. States may hire more judges when plaintiffs file more suits, or plaintiffs may file more suits when states hire more judges. The data do not say.

Second, the ratio of cases cleared to cases filed does not depend on the number of judges. The coefficient on the number of judges is insignificant in the second and fourth columns. Again, the result does not explain any causation. It shows only that the ratio of cleared to filed cases does not depend on the size of the bench. Perhaps, states hire more judges when the backlog becomes very large and leave vacancies empty when it becomes very small. On the other hand, perhaps disputants file more suits when the backlog becomes very small and settle out of court when it becomes very large. Once again, the data do not say.

**Table 5: Explaining Caseloads by the Number of Judges,
U.S. State Courts, 2004**

<i>Dependent Variable:</i>	Incoming Civil Cases	Outgoing/Incoming Cases	Incoming Civil Cases	Outgoing/Incoming Cases
Constant	6,036.63 (3,666.08)	-14.77 (10.75)	-9,308.58* (5338.60)	-50.09* (28.02)
Judges	564.55*** (94.11)	.29 (.27)	962.89*** (121.43)	.96 (.63)
Observations.	82	82	36	36
R ²	.30	.01	.63	.06
Courts:	All	All	General Jurisdiction	General Jurisdiction

Note: Judges, Incoming Civil Cases, and Outgoing Civil Cases are measured per million population in the state. Standard errors are in parentheses beneath coefficients and stars indicate significance at the 1% level (***) and 10% level (*)

D. Lawyers per Capita:

1. The numbers. -- The number of lawyers per capita varies widely. We offer it as yet another index of the role of the judicial system.

In 2009, 1,180,000 lawyers practiced in the U.S., or 380 per 100,000 population.³³

Japan had 29,000 lawyers in 2010, or 23 per 100,000 population.³⁴

England and Wales had 136,000 solicitors in 2006 and about 12,000 barristers, a combined total of 277 per 100,000 population.³⁵

Canada had about 95,000 lawyers, plus 3,500 notaries in Quebec, 292 per 100,000 population.³⁶

Australia had about 58,000 lawyers, 259 per 100,000 population.³⁷

³³ American Bar Association, National Lawyer Population by State, http://new.abanet.org/marketresearch/PublicDocuments/2009_NATL_LAWYER_by_State.pdf

³⁴ "Membership JFBA," http://www.nichibenren.or.jp/ja/jfba_info/membership/index.html

³⁵ "Number of lawyers in CCBE Member Bars" http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/table_number_lawyers1_1179905628.pdf

³⁶ Federation of Law Societies of Canada. <http://www.flsc.ca/en/about/about.asp>.

³⁷ Considerable variation exists by state in Australia, in the regulation of the bar. Questioned by the Japan Federation of Bar Associations, the Law Council of Australia estimated the number of lawyers in Australia in 2006 at 58,000. <http://www.nichibenren.or.jp/en/directory/data/Australia.pdf>. However,

France had 46,000 lawyers in 2006, or 70 per 100,000 population.³⁸

2. Qualifications. -- As often discussed,³⁹ the number of lawyers captures the social importance of law only imperfectly at best. Country A may have more lawyers than Country B, but that need not mean that law and courts play a greater role in A. In many societies, lawyers sell services only tangentially related to the law and unrelated entirely to courts. In other societies, a wide variety of non-lawyers sell law- and court-related services.

Some lawyers do litigate, of course. In Japan, until recently they seldom did anything else. Because the government recognized their monopoly only on litigation-related services, they focused on litigation. In the U.S., only a minority of lawyers actually litigate. And in the U.K., barristers traditionally litigated, while solicitors never did.

Other lawyers counsel. In Japan traditionally lawyers rarely gave business advice, while in the U.S. most lawyers do routinely. In the U.K. traditionally solicitors gave business advice, while barristers did not.

And some lawyers do nothing legal at all. Many American lawyers abandon their legal practice within a few years. Elsewhere, most lawyers stay with their profession their entire life.

Some countries may have few licensed lawyers, while a wide variety of non-lawyers sell legal services. Again, take Japan. Among the countries in Table 1, it has the fewest lawyers: less than a tenth the number in the U.S., England and Wales, Canada, or Australia, and less than half the number in France. It has so few for a simple reason: for most of the post-war period, the government set the pass-rate on the bar-exam equivalent at 1 to 3 percent. Even when they could not afford (or even find) a lawyer, however, consumers could buy legal services. They could turn to licensed tax agents for tax advice. They could consult licensed patent agents on intellectual property. They could obtain wills and corporate charters from notary publics. And firms could obtain their corporate and contract advice by hiring unlicensed graduates of the many university law departments.

Given these objections, some scholars look not at licensed legal practitioners, but at university graduates with legal training. By this metric, Japan has more legal experts even than the U.S. Using this approach, Kevin Murphy, Andrei Shleifer, and Robert Vishny index the amount of rent-seeking in a society by the size of university law departments.⁴⁰ Averaging across a large number of countries, both developed and

Australian Bureau of Statistics found that in 2008 the legal services industry "employed" (apparently including non-lawyers) 99,696 persons. Australian Bureau of Statistics, 8667.0 - Legal Services, Australia, 2007-08. <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/8667.0Main%20Features32007-08?opendocument&tabname=Summary&prodno=8667.0&issue=2007-08&num=&view=>

³⁸ "Number of lawyers in CCBE Member Bars," http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/table_number_lawyers1_1179905628.pdf

³⁹ Including by us; see Minoru Nakazato, J. Mark Ramseyer and Eric B. Rasmusen, "The Industrial Organization of the Japanese Bar: Levels and Determinants of Attorney Income," *Journal of Empirical Legal Studies*, 7 (2010) 460--xxx.

⁴⁰ Kevin M. Murphy, Andrei Shleifer and Robert W. Vishny, "The Allocation of Talent: Implications for Growth," *Quarterly Journal of Economics*, 106 (1991) 503--xxx.

developing, they find that the more law graduates in a society, the slower its GDP will grow. Conversely, the more engineering students it graduates, the faster that GDP will grow. The example of Japan versus the United States shows that this approach is fraught with peril: having an undergraduate law degree can be as loose an indication of whether someone practices law as having a history degree indicates he has become a historian.

E. Ease of Doing Business:

In its well-known "Doing Business" studies, the World Bank tries to measure the difficulty of performing various small business tasks in different countries. The methodological problems are obvious enough that we will not dwell on them, but the specificity of the tasks measured is an attractive feature of the approach. Table 6 shows the results the Bank obtained for the difficulty of enforcing a contract.⁴¹ According to the Bank, firms in our six wealthy democracies require similar numbers of procedures to enforce a deal. They will spend 300-400 days in all of the countries except Canada, and consume 14-24 percent of the money at stake.

We include sub-Saharan Africa to show how first-order measures do differ between developed and developing countries. The region includes primarily dysfunctional economies and the legal framework in the area reflects (and contributes to) the dysfunction. A sub-Saharan firm that tried to enforce a contract in court would file nearly 40 procedures, spend over 600 days, and consume nearly half of its claim.

Table 6: The Difficulty of Enforcing Contracts

Country	Procedures (number)	Time (days)	Cost (% of claim)
Australia	28	395	20.7
Canada	36	570	22.3
France	29	331	17.4
Japan	30	360	22.7
United Kingdom	30	399	23.4
Sub-Saharan Africa	39	644	49.3
United States	32	300	14.4

Contract disputes are an important area of first-order disputes. A very different way to measure the efficiency of the courts, at least for developed countries, is through insurance data. Take two countries, A and B. In country A, the courts handle first-order disputes efficiently. The courts send clear signals about liability and damages. Victims, drivers, and insurers can readily ascertain whether a driver owes money and, if he does, how much. In country B, the courts do much worse. They send only confused signals. If the parties try to learn the driver's liability in court, they find that litigation entails high costs and the result is unpredictable. Suppose that drivers in the two countries cause the

⁴¹ World Bank, Doing Business project, "Enforcing Contracts," <http://www.doingbusiness.org/ExploreTopics/EnforcingContracts/>.

same number of accidents, and that the courts value human life at the same level. Given the higher administrative costs involved, insurance will cost more in B than in A. If country B's courts also consistently overestimate the extent of liability and damages, insurance costs will be still higher.

In Table 7, we give the OECD's estimates of the mean automobile insurance costs in various countries. Among the 22 countries, only in Canada and Ireland do drivers face higher costs than in the U.S. Where American drivers pay \$1,464 per car, British drivers pay \$924. French drivers pay only \$786, Japanese pay \$754, and Australians \$664. The data suggest American courts handle first-order disputes quite badly. But they do that only if we ignore the distinctive driving habits of Americans.

Table 7: Motor Insurance Costs

Country	Automobiles (per 1,000 people)	Motor Insurance (US \$ per car)	Motor Insurance (% of GDP)
Australia	545	664	0.81
Austria	511	332	0.38
Belgium	471	834	0.91
Canada	372	1,574	1.35
Czech Republic	414	456	1.12
Denmark	370	1,334	0.87
Finland	483	634	0.66
France	498	786	0.93
Germany	566	792	1.11
Greece	429	467	0.72
Hungary	300	425	0.92
Ireland	437	1,582	1.15
Italy	601	830	1.40
Japan	325	754	0.72
Korea, Rep.	248	949	1.09
Netherlands	441	903	0.84
Norway	458	1,103	0.61
Spain	485	785	1.19
Sweden	465	1,001	0.94
Switzerland	524	1,131	1.05
United Kingdom	463	927	0.93
United States	451	1,464	1.45

Source: OECD, *Insurance Statistics Yearbook 1998-2007*, 2007 data. Exchange rates, population, and GDP used in the calculations are from the World Bank, [WorldDataBank](http://databank.worldbank.org/ddp/home.do), <http://databank.worldbank.org/ddp/home.do>.

The numbers in Table 7 are misleading. Insurance rates are high in the U.S. because American drivers have more accidents. In Table 8, we take those Table 7 countries for which we were able to locate accident data. Table 7 tells us that within this group American insurance rates are second only to Canada's. Look at the last three columns of Table 8. The number of traffic deaths per car in the U.S. is also second highest. The number of traffic accidents per car in the U.S. is second highest. And the distance travelled per car in the U.S. is the very highest.

Table 8: Traffic Safety

Country	Insurance Per Car	Traf Deaths	Traf Accid's	Km Traveled	Deaths/Car	1000*Accid Per Car	Km/Car
Australia	664	1,617		208	140		18,088
Belgium	834	1,067			213		
Canada	1,574	2,892	144,885	328	235	11.80	26,719
Czech Republic	456	1,222			286		
Denmark	1,334	406			201		
France	786	4,620	81,272	525	150	2.64	17,031
Germany	792	4,949	335,845	668	106	7.21	14,340
Italy	830	5,131	238,124		144	6.67	
Japan	754	6,639	832,454	763	160	20.01	18,341
Korea	949	6,166			511		
Netherlands	903	709	25,819	125	98	3.57	17,283
Norway	1,103	233			108		
Spain	785	3,823			175		
Sweden	1,001	471	18,548	67	110	4.36	15,750
Switzerland	1,131	384			97		
United Kingdom	927	3,059	18,8105	461	108	6.66	16,323
United States	1,464	41,059	178,5000	4,794	302	13.14	35,315

Sources: OECD, International Traffic Safety Data and Analysis Group (IRTAD),
<http://www.internationaltransportforum.org/irtad/>.

If one regresses insurance costs per car on the number of traffic deaths per car, accidents per car, distance travelled per car, and a dummy for the U.S., the coefficients on

the first two variables are insignificantly negative (admittedly, most likely because of the small sample--- one reason we do not set out the regression in a table). The coefficient on distance per car is significant and positive (90.3 with a t-statistic of 2.18), and that on the U.S. is significantly negative (-679.8 with a t-statistic of 2.08). Regression tells the same story as simply looking at Table 8: Given how far Americans drive their cars, how many accidents they have, and how many people they kill, insurance premia do not seem out of line.

As a final measure of litigation, we mention -- but do not endorse -- the analysis of tort costs by the consulting firm Towers-Perrin-Tillinghast (now part of Towers-Watson). This firm is well known for its measurements of tort costs over time in the United States. For its annual U.S. estimates, still coming out each year, it uses the extensive data on insurance premiums collected by A.M. Best for sale primarily to businesses, with adjustments for such things as self-insurance. Its reports describe its methodology clearly, and break down the data into categories that allow its workings to be understood. For its international studies, however, the latest report, in 2006, does not describe its methodology or data sources.⁴² Aside from the OECD data that we used for the discussion of motor insurance earlier, we are not aware of international data sources that would be available, so we are skeptical of the reliability of the estimates. Also, as the report itself points out, these figures are not estimates of the transaction costs of the court system. Instead, they give the amount of the total expenditures, which includes transfers from winners to losers. Nonetheless, because they are so well-known, we reproduce them below.

Table 9: The TTP Estimates of Litigation Costs

Country	2000	2001	2002	2003
Belgium	1.00%	1.08%	1.01%	0.96%
Denmark	N/A	0.44	0.48	0.58
France	0.75	0.75	0.76	0.74
Germany	1.25	1.25	1.19	1.14
Italy	1.75	1.72	1.70	1.70
Japan	0.79	0.80	0.81	0.80
Poland	N/A	N/A	0.60	0.59
Spain	1.04	1.03	1.01	1.04
Switzerland	0.63	0.69	0.81	0.75
UK	0.53	0.64	0.66	0.69
U.S.A.	1.82	2.03	2.22	2.23

Source: U.S. Tort Costs and Cross Border Perspectives: 2005 Update, p. 12. Towers Perrin Tillinghast, 2006.

⁴² The report says on p. 12, "To estimate tort costs in 10 other countries, we used a methodology similar to the one we used to estimate U.S. tort costs. ... The data available in the analyses of non-U.S. tort costs, particularly the self-insurance component, are limited."

III. American Dysfunction

A. Introduction:

Most of the measures we examined above suggest that America is not that unusual. In suits per capita, the ratio between the US and the UK is less than that between the UK and Canada. Americans do have more judges per capita, but fewer than the French, and “judge” is hard to define anyway. Americans have the most lawyers per capita, but not many more than Australians. And Americans seem not to find contracts especially hard to enforce, or to face unusually high automobile insurance premia.

Why, then, the American notoriety? It does not result from the way the legal system handles routine disputes. Instead, it derives from the peculiarly dysfunctional way courts handle several discrete types of disputes. We will look at two as examples: securities class actions, and asbestos cases. Although aggregate quantitative measures suggest that litigation in the U.S. does not differ substantially from litigation in other wealthy democracies, aggregation over a myriad of myriads can hide a myriad of sins. In several discrete areas, American courts function in a manner one can only describe as disastrous.

B. Securities Class Actions:

1. The mechanism. -- Within the U.S. legal system, class actions are a particular scourge. Although but a small fraction of the total number of suits, they wreak havoc out of all proportion to their numbers. As a form of group litigation, they have antecedents in colonial times. As “class actions,” they date to Rule 23 of the 1938 Federal Rules of Civil Procedure. But in their modern, rampantly abused form they date to the 1967 revisions to Rule 23.

In theory, the drafters of the modern class action designed a mechanism that would let victims cost-effectively prosecute claims for wrongs that impose large losses on the community as a whole but only trivial damages on any one victim. Suppose a firm negligently pollutes and causes damages of \$1 million to the land nearby. If one neighbor owns all of that adjoining land, he will hold the firm to account for the full \$1 million. With damages that large, he can cost-effectively prosecute his claim. With a credible threat to sue, he can demand \$1 million in settlement out of court.

Suppose now that the firm has not one but 1,000 neighbors. They each own identical pieces of land and have each suffered identical injuries. The firm has caused the same aggregate injury to the community as when one man owned all the surrounding land. Yet where that one neighbor had a cost-effective claim for the \$1 million loss, the 1,000 neighbors do not. No one can cost-effectively recover on a \$1,000 pollution claim in American courts. Since none of the 1,000 can cost-effectively sue, none can credibly threaten to sue. Unable to threaten credibly, none will recover anything out of court.

Suboptimal precautions will result. If the firm faced one neighbor, it would pay for any negligence, and therefore would adopt efficient precautions against pollution. Facing 1,000 neighbors, it escapes liability for its negligence, and neglects those precautions. The class-action suit imposes on the potential wrongdoer the incentives it would face if its victims were one rather than 1,000.

So far, so good, but the problem isn’t solved just by allowing the victims to sue jointly. Someone has to initiate the suit. Under the U.S. system, a lawyer with an eye for an opportunity masterminds the class-action suit. He identifies a legal wrong and locates

several of the victims. He suggests that they retain him to sue on behalf of them and all others "similarly situated." They and the others have the right to "opt out" of the litigation and pursue their claims independently. Should they not opt out, they will find themselves bound by whatever outcome the lawyer obtains: the suit has "claim preclusive" effect on all plaintiffs. The clients are too scattered to control the lawsuit, so they happily or unknowingly delegate this to the lawyer, and as an incentive for this task he collects compensation.

The class action mechanism is a creature almost exclusively of the American legal system. As Thomas Rowe put it (2001: 157-58), "Only a few other nations have adopted the class action device even to a limited extent; and in many countries, particularly the civil law systems of continental Europe, resistance to the class action is strong" Although some European countries have considered adopting the class action, the only principal venues that have implemented it are a few Canadian provinces, Australia, and Brazil (Rowe, 2001: 159).⁴³

2. Problems. -- Agency problems plague the attorney-client relationship in the best of situations, but in class actions they plague them with a vengeance. Because each plaintiff has only a small stake in the litigation, no one monitors the lawyer. He operates as an autonomous actor: independently, unmonitored, and largely in his own interests. As the pre-eminent class-action lawyer (and, for his litigation tactics, now convicted felon) William Lerach once infamously bragged, "I have the best practice in the world. I have no clients."

The class-action attorney's misaligned incentives particularly skew settlements. Given the trivial size of their claim, few victims pay any attention to what the attorney does. Because the aggregate claim of the class as a whole is so large, however, the defendant firms often gain by negotiating settlements skewed toward compensating the lawyer at the expense of his clients. The defendant agrees to pay a handsome fee to the attorney. The attorney agrees to take a much smaller recovery for his clients, perhaps taking it "in-kind" as free samples of the defendant's product instead of as cash. The plaintiffs do not notice, much less complain in court.

The class-action rules do require the judge to review any settlements that the defendant firm and the class attorney propose, but the review does not work. Because the attorneys for both sides favor the settlement, usually no one will criticize it in court. Accustomed to an adversarial system in which they seldom take initiative, judges defer. They are busy people. And anyway, in many state courts they face retention elections for which the local attorneys provide their campaign war-chest.

3. Securities class actions. -- Even within class actions, securities claims are notorious. For these cases, attorneys pick firms whose share price has fallen. They then argue that the firms (or the firms' officers, whom the firms will typically indemnify) caused the fall through their misconduct. The firm's officers may have mismanaged the firm. They may have hidden a conflict of interest. They may have misstated the firm's financial status.

⁴³ Thomas D. Rowe, Jr., "Foreword: Debates over Group Litigation in Comparative Perspective: What Can We Learn from Each Other," Duke Journal of Comparative and International Law, 11 (2001) 157--xxx.

To recover the loss in the firm's market capitalization, the attorneys sue the firm or its officers on behalf of all shareholders.

By pegging their clients' alleged damages to the total market capitalization of the firm (the stock price times the number of shares), the attorneys give themselves a massive claim. Toward that end, attorneys specializing in securities class actions regularly monitor stock prices. Until the mid-1990s, judges named a firm to the lucrative "lead attorney" role if it filed the first claim. Filing first, asking questions later, attorneys raced to the court-house when share prices fell, and looked for misconduct later.

Nominally, the 1995 Private Securities Litigation Reform Act changed all this. The Act instructed judges generally to pick as lead plaintiffs those with the largest financial claims rather than those who file first. According to Stephen Choi and Adam Pritchard (2009: 113-15), however, the basic corruption remained. For the large claims, the trial lawyers simply switched their effort from racing to the courthouse to courting institutional investors. For the small claims, the courthouse race remained: "Practice in smaller cases appears to be little changed from the pre-PSLRA regime." For the most part, commercial mutual funds, despite holding large amounts of stock that regularly rises and falls in price, wanted no part in any of this. Instead, reflecting the politicized corruption involved (of which more below), attorneys mostly recruited government-sponsored funds and labor union pension plans.

By focusing on firms whose stock price fell, attorneys avoided the need to search widely for misconduct. Suppose a firm has lost a substantial fraction of its market capitalization, whether by mischance or misconduct. By suing for the amount of that lost market value, the attorneys could force a board that wanted to contest the claim to bet the company. Should the board's directors contest the claim and lose, for all practical purposes they have lost the firm. As Choi & Pritchard (2009: 105) put it:

The enormous potential damages in securities fraud class actions under [the federal anti-fraud rules] have another important implication: Plaintiffs' attorneys may be willing to file a lawsuit even if they anticipate a relatively low probability of recovery. ... A law suit that alleges \$500 million in damages to the class members may well be worth bringing, even if the lawyer assesses his likelihood of recovery as only 10 percent. The expected value of the suit is \$50 million, and under these circumstances the defendant company is likely to see the logic of settling the case for some nontrivial sum.

Unfortunately, any gain to investors from even a successful suit is minimal at best. Suppose the firm in Choi & Pritchard's example settles for \$30 million--- a third to the attorneys and two thirds to the plaintiffs. Because the firm pays the settlement, its market value falls even more. In effect, the firm's current shareholders pay the damages. Because the settlement goes to the shareholders at the time of the alleged misconduct (many of whom still own their shares in the firm), those former shareholders receive cash. The settlement

- (a) reduces the value of the stock held by one group of investors,
- (b) increases the cash held by an overlapping group of investors, but by one third less, and

(c) enriches the law firm that engineered the transfer.

Again, Choi & Pritchard (2009: 104) explain the point nicely:

To the extent the perpetrator of the fraud is the corporation (through the statements of its agents), the corporation will pay the compensation to its investors. However, the corporation's residual claimants are its shareholders. ... Thus, the economic effect of requiring the corporation to pay compensation may be simply to move money from investors' one pocket to the other. Such a transfer is largely pointless, but, worse yet, it is expensive. Plaintiffs' attorneys will take a cut of this transfer, ranging from 20 to 33 percent of the word.

4. Magnitudes. -- The small number of securities class action suits have large consequences. Table 10's first column shows how many federal securities class actions are filed each year. Except in 2001, the number never exceeded 300, and in 2006 it was only 131. Recall that in a typical year plaintiffs in the United States file 272,000 federal suits and 18 million state suits. Securities class actions are a wart on a whale.

Table 10: Securities Class Actions

Year	Total Filings ¹	Mean Sett Value ²	Mean Sett Value ³	Median Sett Value ⁴	Total Atty Fee & Exp's ⁵
1996	135	8	8	3.7	298
1997	202	10	10	4.5	321
1998	276	12	12	5.9	350
1999	242	15	15	5.0	296
2000	238	39	11	4.8	402
2001	514	16	16	4.5	528
2002	285	22	22	5.1	597
2003	246	25	25	6.1	664
2004	254	20	20	5.3	463
2005	187	71	27	7.5	1,245
2006	131	80	25	7.0	1,043
2007	196	60	34	9.2	1,649
2008	248	41	31	8.0	884
2009	221	13	42	9.0	963

1: Total filings in federal court.

2. Mean settlement value, in \$ millions.

3. Mean settlement value, in \$ millions, excluding settlements over \$1 billion and very small settlements.

4. Median settlement value, in \$ millions, excluding very small settlements.

5. Aggregate plaintiffs' attorney fees and expenses, in \$ millions.

Source: Milev, Jordan, Robert Patton, Stephanie Pnacich & Svetlana Starykh. 2010. Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High. NERA Economic Consulting. Figures 1, 18, 19, 20.

Yet to settle these few suits firms pay dearly. It is not that the firms lose in court. They do not, for virtually no suits stay in court. Of 238 filed in 2000, by mid-2010 the parties had settled 146 (61 percent) and judges had thrown out 85 (36 percent). Of the remaining 7, only 4 had gone to trial -- and the parties had settled all 4 before the verdict. More generally, since the 1995 PSLRA, plaintiffs have filed over 3,400 securities class actions in federal courts. Of those 3,400, only 27 went to trial, about 1 in 1,000. Of the 27, plaintiffs won 6 and obtained a mixed verdict in 5. The point is crucial: of the 3,400 securities class actions filed since 1995, plaintiffs won anything at all in court in only 11 (NERA, 2010: 16, 19, Fig. 13).

Notwithstanding the absence of plaintiff victories, firms have paid out -- and continue to pay out -- massive amounts. Plaintiffs file 200 to 300 suits per year. In 60 percent of cases, the defendants settle. And according to Table 10's second column, they settle most for 20 to 60 million dollars. The result is a transfer from one set of investors to an overlapping set of investors of several billion dollars per year. Some settlements are even larger. As Table 11 shows, each of the largest 10 settlements transferred over \$1 billion.

**Table 11: The Ten Largest Securities Class Action Settlements
(as of July 26, 2010)**

Rank	Company	Settlem't Year	Total Settlement Value (\$million)
1	Enron Corp	2010	7,242
2	WorldCom	2005	6,158
3	Cendant	2000	3,561
4	Tyco International	2007	3,200
5	AOL Time Warner	2006	2,650
6	Nortel Networks	2006	1,143
7	Royal Ahold	2006	1,100
8	Nortel Networks	2006	1,074
9	McKesson HBOC	2008	1,043
10	AIG	2010	1,010

Source: Milev, Jordan, Robert Patton, Stephanie Pnacich & Svetlana Starykh. 2010. Trends 2010 Mid-Year Study: Filings Decline as the Wave of Credit Crisis Cases Subsides, Median Settlement at Record High. NERA Economic Consulting. Table 2.

The few other countries with class action provisions manage to avoid these large transfers. Australia introduced class actions in 1992. In no year since have attorneys filed more than 6 securities class actions.⁴⁴ Some Canadian provinces have offered class actions since 1978. Attorneys did not file the first securities class action until 1997, however, and in no year have attorneys filed more than 9.⁴⁵

American securities class actions are not simple transfers from one group of investors to another. The plaintiffs' bar imposes a massive toll charge on the transfer. Table 10's last column gives the total amounts paid plaintiffs' attorneys. For engineering the transfers from one set of investors to another, they charge over \$400 million a year. In each of the years 2005, 2006, and 2007 they took over \$1 billion.

5. Politics. -- The U.S. has 250 securities class action suits per year that shuffle billions of dollars among overlapping groups of investors but provide no noticeable benefit to the very class of people it recruits as plaintiffs. There are no adversarial lawyers to alert judges to abuse. The country spends up to one billion dollars per year to finance these. An obvious question is why Congress and the courts let this happen.

The answer lies in the politics of the bar. Attorneys in all sectors give heavily to the Democratic Party. In 2008, attorneys with the large Chicago law firm of Sidley & Austin gave \$1.4 million to politicians, 81 percent to Democrats. Sidley was, to be sure, the scene of the 1980's romance between Barak and Michelle Obama, but most other large firms gave heavily to Democrats too. Sidley's prime Chicago rival, Kirkland & Ellis, gave \$1.3 million, 76 percent to Democrats. The large New York corporate firm of Skadden Arps gave \$1.7 million, 82 percent to Democrats, and even the more traditional Sullivan & Cromwell -- the quintessential "Wall Street establishment" firm -- gave \$1.2 million, 75 percent to Democrats.⁴⁶

The trade association for the plaintiff's bar gives more, and more overwhelmingly to Democrats. That group -- long called the American Trial Lawyers Association, but recently renamed the American Association for Justice -- in 2008 gave over \$3 million to politicians, 95 percent to Democrats.⁴⁷ The group lobbies hard against tort reform of all kinds and particularly hard against reform of the securities class action. By all odds, it was because of the pressure from ATLA that Bill Clinton vetoed the 1995 PSLRA, only to find himself over-ridden by the heavily Republican Senate.⁴⁸

⁴⁴ Greg Houston, Svetlana Starykh, Astrid Dahl & Shane Anderson. 2010. Trends in Australian Securities Class Actions: 1 January 1993-31 December 2009. NERA Economic Consulting.

⁴⁵ Mark L. Berenblut, Bradley A. Heys & Svetlana Starykh. 2009. Trends in Canadian Securities Class Actions: 1997-2008. NERA Consulting.

⁴⁶ <http://www.opensecrets.org/industries/contrib.php?ind=k01&cycle=2008>

⁴⁷ <http://www.opensecrets.org/industries/contrib.php?ind=k01&cycle=2008>

⁴⁸ Stephen J. Choi and A.C. Pritchard. Securities Litigation 9Austin, Wolters Kluwer, 2008).

For a sense of the color involved, consider a phone call one of us received in the mid-1990s. At the time, Ramseyer taught at the University of Chicago Law School. The call came from an associate at one of the well-known law firms specializing in securities class actions. The associate explained that the firm wanted to retain him in connection with a suit against a certain very large Japanese corporation. The law firm had filed the suit in an American state court, alleging misstatements in the firm's Japanese securities filings. "What had the firm misstated," Ramseyer asked. "We don't know," the associate answered. "That's why we want to retain you."

Apparently, the law firm monitored not just New York stock prices but those in Tokyo as well. The price of this firm's shares on the Tokyo Stock Exchange had fallen, so the firm sued in an American state court. Why this particular state? The associate never explained, but he had had fifty state courts from which to choose. To discover what Japanese-language misstatements the Japanese firm might have made in its Tokyo securities filings, the firm was trying to retain an American law professor who specialized in Japanese law.

In 2010 the U.S. Supreme Court apparently thought it could put a end to travesties of this sort. American lawyers were filing suit (nominally) on behalf of foreign investors against foreign firms for misstatements on foreign exchanges. The Court said no: The anti-fraud provisions of the U.S. securities laws did not apply to these "f-cubed" claims.⁴⁹

Or perhaps not. Within three weeks, Congress passed the Dodd-Frank financial reform bill. Buried in this statute was a provision to initiate a study on whether to re-introduce the f-cubed suits.⁵⁰ ATLA fights vehemently against attempts to reform medical malpractice law. Someone apparently fought the Supreme Court's attempt to reform the most egregious securities class actions as well.

C. Asbestos:

1. Introduction. -- Mississippi plaintiffs' attorney Richard F. "Dickie" Scruggs called them "magic" jurisdictions:

The trial lawyers have established relationships with the judges that are elected; they're State Court judges; they're populists. They've got large populations of voters who are in on the deal, they're getting their piece in many cases. And so, it's a political force in their jurisdiction, and it's almost impossible to get a fair trial if you're a defendant in some of these places. ... The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk in there and win the case, so it doesn't matter what the evidence or law is. (Boyer, 2008).

⁴⁹ Morrison v. National Australia Bank, Ltd., slip op. (June 24, 2010).

⁵⁰ E.g., <http://blog.riskmetrics.com/slw/2010/07/morrison-overturned-what-dodd-act-means-for-securities-class-actions.html>; <http://elink.allenoverly.com/getFile.aspx?ItemType=eAlert&id=d3e4e4e-9185-4782-8956-f6c94bcda364>.

Those courts were, he blithely explained, how he had made his fortune. Not uncoincidentally, they were where the major asbestos companies were driven into bankruptcy.⁵¹

Scruggs made his first millions suing the asbestos companies in "magic" courtrooms. He made his first hundreds of millions suing the tobacco companies in the same places. He made millions more suing State Farm over its Katrina payments. After the harm was done, for bribing two of the "magic" judges in the course of the asbestos and Katrina litigation, he went to prison in 2008.

Few fields of tort litigation cut a broader swath through the American economy than asbestos. The Towers Perrin consulting firm estimates the total cost (compensation, attorney fees, and administrative expenses) of the U.S. tort system in 2003 at \$246 billion. Of that amount, it attributes \$9 billion to asbestos (Towers, 2004: 2-3).

Asbestos had been a pervasive insulator. It did not conduct electricity. It did not burn. It absorbed sound. It did not react with most chemicals. Yet asbestos could also injure, and sometimes kill, particular in combination with tobacco smoke. When the fibers became airborne, they could scar a lung. After a 20- to 40-year latency period, they could cause diseases ranging from asbestosis and mesothelioma to lung cancer. In the case of mesothelioma and asbestosis, asbestos is a necessary but not sufficient condition. In the case of the much more common lung cancer, asbestos increases the likelihood. Given the long latency period and the uncertain etiology, estimates of the number of people asbestos killed range widely, from 40,000 to over 300,000 for 1965 to 2009.⁵²

Tort law is an odd vehicle for asbestos harm remediation, and in some ways profoundly inappropriate. The people hurt most severely by asbestos were those who encountered it at work. As the RAND Corporation (Carroll, 2005: 76) put it, "most claims are based on exposure to asbestos in the workplace."

Yet employers and employees negotiate with each other a contract. Generally, they do so on a competitive market. Employers choose to hire a given employee if he offers the right combination of attributes (talent, effort, experience) at the lowest price (wages, insurance, and other benefits). Employees choose to work for a given firm if it offers the best available mix of pay, environment, location, and other amenities. If an employer imposes a health risk, employees will agree to work there only if the firm promises a pay-and-amenity package that fully compensates for that risk.

As a result, employees injured on the job have already been paid for their injury. They demanded the pay in the compensation package the firm offered them *ex ante*. The point follows from simple logic: employees are not slaves; they choose the jobs to take, and in market economies choose from among a portfolio of available positions. If a given employee takes a job, he takes it only because he believes he is better off (better off considering all aspects of the job, whether the long hours, the high stress, or the risk of asbestosis) with the job than without.

Employers and employees do not always understand all the risks involved. Sometimes they do, and sometimes they do not. As in any other contract, the optimal

⁵¹ Peter Boyer, "The Bribe," *The New Yorker*, May 19, 2008, xxx.

⁵² Stephen J. Carroll, Deborah Hensler, Jennifer Gross, Elizabeth M. Sloss, Matthias Schonlau, Allan Abrahams and J. Scott Ashwood, *Asbestos Litigation* (Santa Monica: Rand, MG-162, 2005) at xix, 15-18.

legal rule is the one that induces them to invest cost-justified (but only cost-justified) resources in studying potential harms. The rule which does that best is the rule that holds them to their promises, that bans intentional false statements, and that lets residual harms lie where they fall.

It has long been known that asbestos injures health. It is commonly written that Pliny the Elder suggested the use of respirators and noted that purchasers of slaves who had worked in asbestos mines should be mindful of their reduced lifespan.⁵³ At least as early as 1918, insurance companies were declining life insurance coverage to asbestos workers.⁵⁴ Henry Johns, founder of the largest asbestos company, Johns-Manville, died in 1898 of “dust phthisis pneumonitis.”⁵⁵ The very name of the ailment “asbestosis,” coined in 1925, suggests that the danger was clear.⁵⁶ Workers may not have read Pliny, but surely they knew something of the dangers of breathing rock fibers. Indeed, the court concluded, in the 1973 leading case, that the plaintiff worker knew that his breathing of asbestos was bad for him, that workers frequently discussed the danger, and that the danger was well-known in the medical literature.⁵⁷

2. History. -- (a) Amounts. Asbestos litigation began with that 1973 case against manufacturers.⁵⁸ The plaintiff had installed asbestos insulation for three decades. When

⁵³ We repeat the Pliny story here, but it actually seems to be mythical, if omnipresent. Nobody gives a specific citation to Pliny’s work. See K. Browne and R. Murray’s letter, “Asbestos and the Romans,” *Lancet*, 336 (1990) 445; also, Malcolm Ross and Robert P. Nolan, “History of Asbestos Discovery and Use and Asbestos-Related Disease in Context with the Occurrence of Asbestos within Ophiolite Complexes,” (Geological Society of America, Special paper 373, 2003) <http://specialpapers.gsapubs.org/content/373/447.abstract>.

⁵⁴ In re Joint Eastern & Southern Dist. Asbestos Lit., 129 BR 710 - Dist. Court 1991, at 737.

⁵⁵ Asbestos.com, “New York Mesothelioma and Asbestos Exposure Risks,” September 30, 2009, <http://www.asbestos.com/states/new-york/>.

⁵⁶ It seems the term was coined by Oliver in 1925, not Cooke in 1927, contrary to the common belief. See P. W. J. Bartrip, “Review: History of Asbestos Related Disease,” *Postgraduate Medical Journal*, 80 (2004) 72-76.

⁵⁷ “Borel said that he had known for years that inhaling asbestos dust “was bad for me” and that it was vexatious and bothersome, but that he never realized that it could cause any serious or terminal illness.

A. Yes, I knew the dust was bad but we used to talk [about] it among the insulators, [about] how bad was this dust, could it give you TB, could it give you this, and everyone was saying no, that dust don’t hurt you, it dissolves as it hits your lungs. That was the question you get all the time.

Q. Where would you have this discussion, in your Union Hall?

A. On the jobs, just among the men.

...Although respirators were later made available on some jobs, insulation workers usually were not required to wear them and had to make a special request if they wanted one. Borel stated that he and other insulation workers found that the respirators furnished them were uncomfortable, could not be worn in hot weather, and ---“you can’t breathe with the respirator.”” At 1082. Also: “The defendant manufacturers either were, or should have been, fully aware of the many articles and studies on asbestosis,” at 1086. Borel v. Fibreboard, 493 F.2d 1076 (5th Cir. 1973).

⁵⁸ “No manufacturer ever warned contractors or insulation workers, including Borel, of the dangers” or “ever tested the effect of their products on the workers using them” Borel v. Fibreboard at 1086.

he found himself with asbestosis and mesothelioma, he sued the manufacturers of the material his employers had told him to install. He knew the dust was bad for him, but not how bad, he argued, and the manufacturers had a duty to find out, find him, and warn him of the dangers. The court agreed. The manufacturers were liable, under the doctrine of “strict liability” even though the jury found that the plaintiff was guilty of “contributory negligence.”⁵⁹

Asbestos litigation exploded. As of 2002, 730,000 plaintiffs had filed asbestos-related claims. They sued 8,400 firms, 80 of which have now filed for bankruptcy (including Johns-Manville). Through the course of the litigation, the defendants have paid (the Rand Corporation calculates) \$70 billion. Of that amount, they gave \$21 billion to their own lawyers, and \$19 billion to the plaintiffs' lawyers. The claimants themselves took only \$30 billion.⁶⁰

(b) Doctrine. Seventy billion dollars paid to deliver \$30 billion in compensation -- compensation for which the plaintiffs negotiated off-setting pay packages *ex ante* anyway: it is worth speculating about what went so badly wrong. Part of the cause lies in legal doctrine itself. Suppose defendants sell a legal product on a competitive market to commercial users. Those users can insist that the sellers insure them against injury, or they can choose to bear the risk of loss themselves. In the case of asbestos, the users chose to bear the risk. They bought the product (or, in most cases, their employers did), installed it, became ill, and sued. Declaring tort to have supplanted the essential contractual character of the relationship, courts held the manufacturers liable anyway.⁶¹ The manufacturers paid the lawyers \$40 billion, the victims \$30 billion, and filed for bankruptcy.

(c) Forum shopping. Part of the reason behind the disaster lies in the process by which the courts became Scruggs' "magic" jurisdictions. Often, the lawyers for the plaintiffs can chose the forum in which to litigate. Because large corporations operate over the entire U.S., they have close enough contact with each state to subject them constitutionally to jurisdiction anywhere.

A sensible legal system would limit venue shopping. U.S. state and federal law does not. Instead, Mississippi (for example), can enforce a joinder rule under which an

⁵⁹ Borel v. Fibreboard at 1106.

⁶⁰ Caroll (2005: xxv-xxvii, 6, 70-71, 79, 109ch. 5) (73 bankrupt firms); White (2003: 2) (600,000 claimants).

⁶¹ See William L. Prosser, “The Assault upon the Citadel (Strict Liability to the Consumer) ,” Yale Law Journal, 69 (1960) 1099-xxx; “The Fall of the Citadel (Strict Liability to the Consumer),” Minnesota Law Review, 50 (1966) 791-xxx.. Although only in the United States has asbestos litigation become a major business, the possibility has existed in other countries too. In Japan, the Osaka District Court let plaintiffs recover against the national government, on the theory that the government caused the injury by not regulating asbestos more expeditiously. See “Sekimen higai de kuni ni baisho meirei [Compensation Order to Country for Asbestos Damages],”⁴⁷ News, May 19, 2010. For a comparison of various countries, see Nicholas Roenneberg, Asbestos: Anatomy of a Mass Tort, Munich Re, http://www.munichre.com/publications/302-06142_en.pdf.

attorney can "file a single case that involves a Mississippi resident suing an out-of-state defendant and then join thousands of out-of-state claims to the original case."⁶²

Attorneys for asbestos plaintiffs migrated to the jurisdictions offering the most magic. As of mid 1990s, three counties in Texas accounted for 25 percent of all new state-court suits. Within a few years, two counties in Mississippi joined the list. Over 1998 to 2000, plaintiffs filed nearly 20,000 asbestos cases (10 percent of total) in those two counties (Carroll, 2005: 63). Their lawyers constituted a small group. As of 1995, ten law firms represented three-quarters of all new asbestos suits (Carroll: 2005, 24). Economist Michelle White (2003: 3) estimates that by trying a case in one of the magic jurisdictions a plaintiff increased his judgment by \$1.7 to \$2.6 million.

3. Litigation. -- (a) The Stakes. In part, Scruggs won the settlements that he did by raising the stakes against the defendants. Scruggs was not the only one to do so. As in securities class actions, the asbestos bar extracted settlements by threatening overwhelmingly massive liability. The RAND Corporation estimates that from 1993 to 2001, the 730,000 plaintiffs litigated only 526 trials. For those trials, their lawyers selected the cases they could win, to provide public examples they could point to for private settlements.

And the plaintiffs did win. Of the cases that went to trial, they won 64 percent. Conditional on earning some damages, they recovered mean compensatory amounts of \$812,000. They collected punitive damages in 17 percent of the cases. Conditional on receiving punitive damages, they recovered mean punitive damages of \$1.4 million (Carroll, 2005: xxii, 35, 49-53; White, 2003: 13).

The plaintiffs' bar used these examples of possible losses to settle the rest of their portfolio. They pushed their clients with mesothelioma and other serious injuries to trial, and used the threat of that litigation to settle the rest of their cases. In 2002, for instance, plaintiffs asserted only 1,856 mesothelioma claims. They asserted 50,112 claims involving no malignancy -- many of which, according to some observers involved no impairment at all (Carroll, 2005, 49-53, 76). Observed RAND (Carroll, 2005: 76): "Several more-recent studies have found fractions of unimpaired claimants ranging from two-thirds to up to 90 percent of all claimants"

Scruggs himself acquired his plaintiffs by bank-rolling them. Where most lawyers accepted only clients with medical evidence of the disease, Scruggs offered to pay their diagnostic costs (Boyer, 2008). In time, he would represent some 4,200 clients, and serve as co-counsel for another 6,000.⁶³

Having attracted his clients, Scruggs then pooled them. Toward that end, he convinced a local state judge to try the cases in phases. He began the trial by litigating the defendant's liability -- an initial determination that would apply to all the plaintiffs. By aggregating the liability trials, he raised the stakes to the defendants and induced them to settle.

⁶² Michelle J. White, "Understanding the Asbestos Crisis," Unpub'd, May 2003, <http://www.law.yale.edu/documents/pdf/white.pdf>.

⁶³ "Who's Afraid of Dickie Scruggs?" Newsweek, Dec. 5, 1999. <http://www.newsweek.com/1999/12/05/who-s-afraid-of-dickie-scruggs.html>.

"Scruggs's innovation helped to open the litigation floodgates in Mississippi," recalled The New Yorker (Boyer, 2008). "Mississippi has an elected judiciary, and, as settlement money rolled in, the plaintiffs bar began investing it in the campaigns of plaintiff-minded judges. Lawyers would then shop for friendly jurisdictions." Indeed, continued The New Yorker, "Jefferson County (pop. 9,740) became so attractive to the tort bar that seventy-three mass-action lawsuits, representing more than three thousand plaintiffs, were filed there in 2000.

To Scruggs, it was "magic" -- and a magic he himself had helped create. On behalf of his asbestos clients, he recovered \$300 million. For himself, he collected another \$25 million (Who's Afraid, 1999). Recalling our earlier figures, note that he indeed was the most efficient processor of asbestos litigation, a very good deal for his clients.

After asbestos, Scruggs turned to tobacco. Rather than represent the smokers themselves, he represented 46 states. The tobacco firms, he argued, had caused them to incur higher Medicaid costs. On their behalf, he then obtained \$246 billion. On behalf of his law firm, he negotiated \$900 million. Of that \$900 million, he personally took home a third (Who's Afraid 1999).

(b) Expert witnesses. Although Scruggs himself noted that the asbestos recovery turned in part on the populist pressure on the courts, it also turned on fraud. Sometimes the fraud involved witnesses. In 2008, The Wall Street Journal reported that one doctor in Michigan litigation had diagnosed over 7,300 claimants with asbestos-related diseases.⁶⁴

Defendants presented evidence that Dr. Kelly was neither a radiologist nor a pulmonologist and had failed the test that certifies doctors to read X-rays for lung disease. They also showed that the overwhelming majority of hospital radiologists who had reviewed Dr. Kelly's patients found no evidence of disease. An outside panel of radiologists who looked at Dr. Kelley's work found abnormalities in only 6 of 68 patients; Dr. Kelley had found abnormalities in 60 of those 68.

For each diagnosis, the plaintiffs' lawyers paid Kelly \$500.

In 2005, Texas federal judge Janis Jack uncovered a bigger scam still. Presiding over silicosis suits,⁶⁵ she noticed a sudden and massive increase in silicosis claims. The epidemiological increase coincided -- just happened to coincide -- with the shift in focus at several plaintiffs' law firms from asbestosis to silicosis. Jack observed (398 F. Supp. 2d at 580):

All told, the over 9,000 Plaintiffs who submitted Fact Sheets were diagnosed with silicosis by only 12 doctors. ... Rather than being connected to the

⁶⁴ "Colombo the Asbestos Sleuth," Wall Street Journal, Dec. 23, 2008, <http://online.wsj.com/article/SB122999900768229123.html>. "Michigan Malpractice," Wall Street Journal, Nov. 10, 2008, <http://online.wsj.com/article/SB122628156208212443.html>.

⁶⁵ In re Silica Products Liability Litigation, 398 F. Supp. 2d 563 (S.D. Tex. 2005); see The Silicosis (2009).

Plaintiffs, these doctors instead were affiliated with a handful of law firms and mobile X-ray screening companies.

Jack then noted that silicosis and asbestosis looked very different in an X-ray, and that a patient almost never had both diseases (398 F. Supp. 2d at 595):

Because asbestosis and silicosis have such different appearances on an X-ray, in a clinical setting, "confusion between silicosis and asbestosis does not occur." ... [And while] it is theoretically possible for one person to have both silicosis and asbestosis, it would be a clinical rarity.

Curiously, Jack's plaintiffs seemed to have had both diseases. To explain the odd phenomenon, Jack focused on one Dr. Harron (398 F. Supp. 2d at 607-08):

[A]fter December 31, 2000 (when [the law firm] N&M changed its focus from asbestos to silica litigation), Dr. Harron found "P", "Q" and "R" opacities (consistent with silicosis) in 99.69% of the 6,350 B-reads he performed for MDL [multi-district litigation] Plaintiffs. But prior to December 31, 2000 (when N&M was focused on asbestos litigation), Dr. Harron performed B-reads on 1,807 of the same ... Plaintiffs for asbestos litigation, and he found some combination of only "S", "T" and/or "U" opacities (consistent with asbestosis but not silicosis) 99.11% of the time.

Jack reasoned (398 F. Supp. 2d at 607-08):

[W]hen Dr. Harron first examined 1,807 Plaintiffs' X-rays for asbestos litigation (virtually all done prior to 2000, when mass silica litigation was just a gleam in a lawyer's eye), he found them all to be consistent only with asbestosis and not with silicosis. But upon re-examining these 1,807 MDL Plaintiffs' X-rays for silica litigation, Dr. Harron found evidence of silicosis in every case.

In short, concluded Jack (398 F. Supp. 2d at 633):

Twelve doctors diagnosed all 9,083 Plaintiffs. This small cadre of non-treating physicians, financially beholden to lawyers and screening companies rather than to patients, managed to notice a disease missed by approximately 8,000 other physicians -- most of whom had the significant advantage of speaking to, examining, and treating the Plaintiffs.

(c) Prosecution. After hurricane Katrina became news, Scruggs turned to State Farm Insurance. The insurer had unfairly denied claims brought by Gulf Coast residents, he argued. On behalf of 640 clients, he then negotiated \$80 million. For the attorneys, he negotiated \$26.5 million.

How Scruggs induced State Farm to pay illustrates the ties between litigation and local politics. In this case, the method is: buy an attorney general, use him to threaten criminal charges against your civil defendant, and have him agree to drop the criminal

investigation if the defendant pays what you want to your clients. In Mississippi, Scruggs was a major benefactor of the state attorney general, Jim Hood. "In the 40 days before Election Day," reported one source, "Scruggs, a close associate, and two lawyers contributed \$472,000 to the Democratic Attorneys General Association, which in turn gave \$550,000 to attorney general Hood's campaign."⁶⁶

While Scruggs brought his civil suits against State Farm, Hood launched a criminal investigation of the insurer. At a 2007 meeting, Hood's deputy insurance commissioner recalled, Hood announced that if "they don't settle with us, I'm going to indict them all, from [State Farm CEO] Ed Rust down." Only if State Farm agreed to compensate Scruggs and his clients in the civil suit would he drop his criminal investigation.⁶⁷

But the ties between litigation and politics go deeper still. With such enormous fees at stake, Scruggs and his fellow attorneys fell into bitter disputes. To obtain a ruling in his favor against a co-counsel in the Katrina litigation, Scruggs tried to bribe a judge for \$50,000. The judge went to the FBI, the U.S. Attorney prosecuted Scruggs, Scruggs pleaded guilty, and in 2008 he was sentenced to five years in prison.

Soon Scruggs found himself prosecuted for trying to bribe a second judge, in asbestos litigation. In exchange for ruling his way, Scruggs had offered to recommend the judge for a federal court appointment. Trent Lott, the Republican Senate Whip, was not only in a position to influence federal bench appointments, he was also married to Patricia Lott, sister to Scruggs's wife Diane, who had lent Patricia \$1.5 million loan in 2003 (Boyer, 2008). Here too Scruggs pleaded guilty, and the court sentenced him to seven years in prison.⁶⁸

IV. Some Implications

Coffee spills, Pokemon class actions, tobacco settlements. American courts have made a name for themselves as a wild lottery and a money machine for a lucky few lawyers. At least in part, however, the reputation is unfounded. American courts seem to handle routine contract and tort disputes as well as their peers in other wealthy democracies.

More generally, Americans do not file an unusually high number of law suits. They do not employ large numbers of judges or lawyers. They do not pay more than people in comparable countries to enforce contracts. And they do not pay unusually high prices for insurance against routine torts.

⁶⁶ Roger Parloff, "The Siege of State Farm," (2008), http://money.cnn.com/2008/04/09/news/newsmakers/parloff_scruggs.fortune/index/htm.

⁶⁷ Parloff, 2008. Alan Lange, "Anatomy of a Shakedown: Dickie Scruggs' Mighty Fall. Y'all," *Politics*, Dec. 24, 2008. www.yallpolitics.com/index.php/yp/post/13431/.

⁶⁸ In 2005-06, Scruggs made political contributions totalling \$41,400. His son, his daughter, and his wife also donated funds, generally to the same candidates. The family as a whole donated \$117,900. Of that amount, they gave \$6,000 to Scruggs' brother-in-law Trent Lott, \$500 to Republican Roger Wicker, and the rest to Democratic candidates and organizations. <http://www.opensecrets.org/indivs/search.php?name=scruggs&state=MS&zip=38655&employ=&cand=&c2010=Y&c2006=Y&sort=N&capcode=sq5kh&submit=Submit>

Instead, American courts have made the bad name for themselves by mishandling a few peculiar categories of law suits. In this article, we use securities class actions and mass torts to illustrate the phenomenon, but anyone who reads a newspaper could suggest alternatives.

The implications for reform are straightforward: focus not on the litigation as a whole; focus on the specifically mishandled types of suits.

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