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MEETING THE ENEMY

Stephen C. Yeazell*

INTRODUCTION

Only those who deeply understand popular culture can legitimately critique such engaging papers. Unable to claim such understanding, I invoke two experts in the field, both of whom offer pertinent comments. The late Walt Kelly, the cartoonist behind Pogo,¹ supplies a frame of reference for Professors Gary Fine and Patricia Turner's legends of corporate malfeasance,² and Marc Galanter's jokes about conniving claimants and lawyers.³ As Pogo once stated, "we have met the enemy and he is us."⁴ The jokes and legends strike chords because we recognize in them our own fears and impulses; were "we" not recognizable in them, there would be no startle of recognition. The second comment comes from Russell Baker, for many years the New York Times' resident satirist, who was once asked why so many of his newspaper columns on public affairs were funny.⁵ Baker explained that the things he wrote about were much too important to be treated seriously.⁶ These two papers make the same point: they deal with truths about ourselves that are too deep to be dealt with in the cold light of day, truths that are acceptable only when wrapped in legend and humor.⁷ Nevertheless, my charge as a commentator requires a descent from the land of smiles and knowing nods to the business of analysis. That analysis involves two observations and one question.

II. JOKES, LEGENDS, AND SOCIAL BOUNDARIES

The legends and jokes remind us of something we know equally well from law and society studies, that blaming and claiming are in-

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1. See WALT KELLY, *OUTRAGEOUSLY POGO* (1985).

2. Gary Alan Fine & Patricia Turner, *Contemporary Legend and Claims of Corporate Malfeasance: Race, Fried Chicken, and the Marketplace*, 50 DEPAUL L. REV. 635 (2000).

3. Marc Galanter, *The Conniving Claimant*, 50 DEPAUL L. REV. 647 (2000).

4. See KELLY, *supra* note 1, at 114.

5. RUSSELL BAKER, *RUSSELL BAKER'S BOOK OF AMERICAN HUMOR* 576 (1993).

6. See *id.*

7. Fine & Turner, *supra* note 2; Galanter, *supra* note 3.

tensely social phenomena. Both papers explore the cultural roots of that truth, laying bare its implications.⁸ More precisely, the papers explore the borderlands between blaming and claiming.⁹ They ask and explain, in the oblique way jokes and legends pose and answer questions, why some claims are brought and others are not.¹⁰

The United States legal system is intensely permeable, and therefore, in a constantly roiled state. The decline of fact pleading, the flowering of the contingency fee, the abundant supply of lawyers, the persistence of the civil jury, the tradition of judicial review, and the relatively effective enforcement of damage awards, all mean that to an extent greater than in any other legal system in a developed economy, the system allows a magnificent variety of claims to come before its courts.¹¹ The United States legal system lies closer to the centers both of political power and of the popular heartstrings than its peers.¹² It seems implausible to imagine that if a civil rights movement were to begin in France or Japan, it would start in the court system.¹³ It seems similarly unlikely that widespread German concern about unsafe products would first manifest itself in lawsuits, rather than the *Bundestag* or in the *Amt*.¹⁴

This permeability has consequences. For our purposes, the most salient consequence is that we are prone to both over- and under-claiming in ways that appear random, unless one considers the cultural factors explored in these two papers. Consider two examples, both involving the intersection of law and medicine. Paul Weiler's splendid analysis of the medical practice draws on careful medical studies to demonstrate that patients "under-blame," bringing medical malprac-

8. Fine & Turner, *supra* note 2; Galanter, *supra* note 3.

9. Fine & Turner, *supra* note 2; Galanter, *supra* note 3.

10. Fine & Turner, *supra* note 2; Galanter, *supra* note 3.

11. See Donald L. Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1265-66 ("American culture [is] so peculiarly suffused with legalism that . . . [i]t is not surprising that such people should experience high rates of litigation . . .").

12. See *id.* at 1266 ("[T]he boundaries between the [American] legal system and the political and social systems should be . . . permeable.").

13. See Louis M. Avcoïn, *Judicial Review in France: Access of the Individual under French and European Law in the Aftermath of France's Rejection of Bicentennial Reform*, 15 B.C. INT'L & COMP. L. REV. 443, 443-44 (1992) ("[u]nderlying the philosophy of legislative supremacy . . . has characterized the French legal system since the French Revolution."); Jahirih V. Lee, *Review Essay: Contemporary Scholarship on Global Law in the People's Republic of China*, 94 AM. J. INT'L L. 439, 441 (2000) (Even in Britain and Japan . . . difficulties arise in implementing policy through law . . .").

14. See generally Hartwin Bungert, *Compensating Harm to the Defective Product Itself—A Comparative Analysis of American and German Products Liability Law*, 66 TUL. L. REV. 1179 (1992).

tice claims for only about two percent of the instances where physicians would ascribe an outcome to suboptimal practice.¹⁵ In terms of over-claiming, we find, in Peter Huber's polemic on junk science, an account of the era when physicians believed that cancer could be caused by external trauma, with the reported result that one can find cases from the first half of this century in which damage awards were made on the basis of what we would now find fanciful causality.¹⁶ Seventy-five years ago, people brought, and courts validated, claims that now look silly.¹⁷ Today, in spite of heated rhetoric suggesting over-claiming in medical malpractice, we find patients suing in far fewer cases than one might expect.¹⁸ Only the social context from which these claims arise, or fail to arise, can explain these phenomena.¹⁹ Both papers, by reminding us of our captivity to culture, illuminate the distribution of claims.²⁰

Marginal social groups frequently hold outlier views of society.²¹ Even when these groups do not hold such views, almost by definition, they are believed by others to hold such views.²² At the turn of the century, when Jews were a marginal and often despised class, we find jokes expressing the belief of the majority in the Jewish propensity to bring unfounded claims.²³ "Ordinary" Americans of the 1930s were prepared to believe that a streetcar accident could produce a tumor.²⁴ Americans were also prepared to believe that the Jewish immigrants aboard that streetcar were likely to bring suit whether or not they had been harmed.²⁵ Galanter's jokes thus tell us what "we" thought and

15. PAUL C. WEILER ET AL., *A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION* 73 (1993).

16. PETER HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 98-99 (1988). Huber reports that "[c]ourt dockets were soon crowded with claims that a blow received . . . had caused cancer some time later." *Id.* The notes to this assertion cite medical and legal articles but not cases. *Id.* at 240.

17. *See id.* at 98-99 (discussing the legal field's interest in "traumatically induced cancer" during the early to mid-1900's).

18. *See WEILER, supra* note 15, at 139-141.

19. *See* Marc Galanter, *An Oil Strike In Hell: Contemporary Legands About the Civil Justice System*, 40 *ARIZ. L. REV.* 717, 744-47 (1998) (media has caused society to perceive an overestimated amount of medical malpractice claims).

20. Fine & Turner, *supra* note 2; Galanter, *supra* note 3.

21. *See* J. BUTTON, *BLACKS AND SOCIAL CHANGE* 236-41 (1989) (unconventional politics are important in mobilizing and making visible the claims of disadvantaged groups).

22. *See* KATHERINE TATE, *FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS* 33-38 (1994) (noting that race is often associated with differing views across a broad range of issues).

23. Galanter, *supra* note 3.

24. *Jarvis v. Metropolitan St. Ry. Co.*, 72 N.Y.S. 829 (1901) (discussing New York jury verdict in favor of a plaintiff alleging injuries suffered in a streetcar accident cause his tumor).

25. Galanter, *supra* note 3.

think about “them,” and incidentally, who “we” and “they” were and are.²⁶

Marginal groups, scorned and made the butt of jokes, seek to explain their oppressed position, even if they do not believe that the law can help.²⁷ At the bottom of the social ladder, a person who is scorned and denigrated by many others may feel that there are powerful, shadowy forces arrayed against her. In a society that allowed the Tuskegee subjects to languish with untreated syphilis,²⁸ an African-American need not be paranoid to suppose that some people in places of power bear him ill will. How this ill will is manifested, the use of profits to fund oppression (the Crown air freshener story),²⁹ or the theft of valuable intellectual property from employees (one of the Kentucky Fried Chicken stories),³⁰ matters less than the perception that powers are thus arrayed. Moreover, for those interested in civil litigation, these legends reveal as much in what they do not say, as in what they do say. In Fine and Turner’s legends, race determines whether the injured will merely blame or whether she will also claim.³¹ The legends also tell us about race in a market economy.³² In the world of the legends, those who bite into a Kentucky Fried Rat will successfully claim.³³ In this case, the person’s status as a consumer, not one’s race, is the critical factor. The market can dissolve racial boundaries. However, race sometimes makes a difference. For example, in the legendary account of the Kentucky Fried Chicken chicken recipe stolen from an African-American servant, there is no claim and no settlement (blame yes, claim no).³⁴ When the legendary African-American inventor contemplates use of the legal system in such a case, the odds are daunting. Only when race is subsumed within the broader category of the consumer, does folk wisdom imagine a successful claim. These legends do not envision the legal system as a form of redress for racially directed harms. Black consumers recover simply as consumers when they bite into the Kentucky Fried Rat, but they do not recover as victims of racial bias when socially dominant whites finance the Klu Klux Klan or steal intellectual prop-

26. *Id.*

27. *Id.*

28. Fine & Turner, *supra* note 2.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. Fine & Turner, *supra* note 2.

erty. Jokes and legends tell us who's in and who's out, and how that status will affect the results expected from the legal system.

III. LAWYERS AS CULTURAL BROKERS

Insiders believe outsiders are abusing the system, making false claims and using the system, not for redress, but rather, for profit. Outsiders believe insiders are using the system to abuse them, sounding like a form of incipient class warfare. Fortunately, however, we are saved by our perception of a common enemy, an enemy who is crafty, powerful, and mendacious. I speak, of course, of lawyers. As Marc Galanter has so wonderfully illustrated, lawyers have displaced Jews, Norwegians, people of color, and assorted other present or past marginal members of society as the object of scorn and fear to whom we can attribute mendacity and lawlessness.³⁵ How wonderful! A cohesive society achieved by driving the scapegoat out of the city and onto the hill. Beyond marveling at this social resourcefulness, what can one say?

First, one might note that contempt for lawyers is a durable social phenomenon. C.W. Brooks' book on the Sixteenth Century legal profession takes its title from a contemporary reference to lawyers: *Pettyfoggers and Vipers of the Commonwealth*.³⁶ However, just beyond this apparently eternal contempt lie some recent changes in the profession, changes that explain why we might shift our gaze from the claimants to the lawyers as the source of unfounded claims and jokes about lawyers. In the last fifty years, virtually all traces of resistance to the contingent fee have disappeared, and the plaintiffs' bar has become better capitalized and more legally sophisticated.³⁷ The plaintiffs' bar can bring and prosecute claims that no plaintiff's lawyer would have dreamed of at the start of this century.³⁸ In the recent asbestos class actions, plaintiffs' lawyers were described as holding "inventories" of cases, in much the same way that an auto manufacturer might have inventories of cars, except that in this case a large

35. Galanter, *supra* note 3.

36. C.W. BROOKS, *PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE "LOWER BRANCH" OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND* 139 (1986).

37. Marc Galanter, *Anyone Can Fall Down a Manhole: The Contingency Fee and its Discontents*, 47 DEPAUL L. REV. 457, 469 (1998); See also Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295, 310-13 (1990).

38. Stephen D. Sugarman, *Judges as Tort Law Un-makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 470 (1999).

inventory was better than a small one.³⁹ In some categories of cases, the sort Galanter's jokes describe, lawyers are the principal movers, and thus, the appropriate targets of such jokes.⁴⁰

Beneath these recent changes however, lies the more durable layer. For years Anglo-American society has viewed lawyers with suspicion because lawyers remind us of our divisions, and even worse, they profit from those divisions.⁴¹ Lawyers in our society often serve as brokers between social strata, especially in the types of cases that produce these splendid jokes.⁴² The jokes are not about secured transactions or mergers gone sour; they are about vertical litigation and individuals claiming, often wrongfully, against entities.⁴³ In such disputes, lawyers serve as cultural brokers, moving across economic and social lines to bring and defend claims between parties who ordinarily have little to say to one another. No one likes a broker, any broker. Stock brokers, real estate brokers, and claims adjusters do not have large fan clubs. As a result, we should not be surprised that lawyers, who serve as cultural brokers, have not attracted much applause from anyone other than themselves. Moreover, in a society that now pays at least lip service to social inclusion, it is much easier to blame excessive litigiousness on a profession rather than on a racial or ethnic group.

IV. WHERE ARE THE CONTRACTS?

Focusing on the brokering role of lawyers also allows us to ask a question about these jokes and legends: where are the promises and the contracts? Whatever the popular images, we know that contemporary civil litigation is heavily contractual.⁴⁴ Small claims dockets are heavily weighted toward debt collection actions, and the general civil docket is almost equally divided between tort and contract.⁴⁵ But the jokes and legends do not reflect this statistical world. Rather, the jokes almost exclusively come from the world of torts. Even in the subcategory of false insurance claims (where the asserted liability is

39. Kutak Symposium: *Professional Responsibility and the Corporate Lawyer*, GEO. T. J. LEGAL ETHICS 344 (2000), citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 598 (1997).

40. Galanter, *supra* note 3.

41. Joseph D. Jamail, *Advocacy and Lawyers and Their Role*, Speech Delivered at the Inauguration of the Matt Dawson Endowed Lecture Series (Feb. 14, 1995), in 47 BAYLOR L. REV. 1159, 1162 (1995).

42. Note, *Lawyering for Social Change*, 27 FORDHAM URB. L.J. 1969 (2000).

43. See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes and Political Discourse*, 66 U. CIN. L. REV. 805, 828 (1998).

44. See, e.g., BRIAN OSTROM, ET AL., *EXAMINING THE WORK OF STATE COURTS, 1995: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT* 8 (1996).

45. *Id.*

contractual), the claim is fraudulent and there is no disagreement about the meaning of contract because it is a repudiation of the whole premise of contract.⁴⁶ Why does this disproportion exist?

The trait is not inherent. Promises can be the content of myth and legend. At least two of the world's religions are founded on the idea of a covenant.⁴⁷ Why then are the jokes and legends not about broken promises? A tentative answer may lie in the boundary-crossing role of contract. Contract, in theory, and sometimes in fact, enables people to cross boundaries created by different values.⁴⁸ Indeed, contract thrives on differential valuation because such differences create the impetus to contract.⁴⁹ Only when we do not see things quite the same way, or value the object identically, can we "bargain" (a term derived from an Old French word whose meanings include "dispute" and "hesitate").⁵⁰ Dispute and hesitate are two things that we do when we encounter the unknown. However, when a contract works, it eliminates the differences, gaps, and surprises that make jokes funny.

A joke depends on misunderstanding.⁵¹ If we negotiate an agreement about what we will do, and I intentionally fail to do it, that is not a joke. Such a scenario is a lie, or maybe worse, but it is not funny. Contracts are about identifying and compromising divergent frames of reference, synchronizing expectations, and overcoming differences.⁵² With those differences overcome, however, we lack the space for social misunderstanding, for cultural divides that produce the sudden, the unexpected, and the funny. To put matters hyperbolically, contract destroys the urban legend and the joke about claimants because it brings the parties into frames of reference close enough that divergence may cause anger rather than laughter.

V. CONCLUSION

What shall we make of this? Legends are about shared understandings. Jokes are about not-quite shared understandings. Since civil liti-

46. 7 GEORGE J. COUCH, *COUCH CYCLOPEDIA OF INSURANCE LAW* § 35:108 (2nd ed. 1985).

47. Joseph Allegretti, *Lawyers, Clients, and Covenant: A Religious Perspective on Legal Practice and Ethics*, 66 *FORDHAM L. REV.* 1107, 1117 (1998).

48. Kermit L. Hall, *LAW, ECONOMY AND THE POWER OF CONTRACT* ix (1987).

49. Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 *HARV. L. REV.* 917, 947 (1974), reprinted in Kermit L. Hall, *LAW, ECONOMY, AND THE POWER OF CONTRACT*, 207, 237 (1987).

50. *THE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY* 75 (C.T. Onions ed., Oxford University Press 1966).

51. See John W. Cooley, *Joke Structure: A Source of Creative Techniques for Use in Mediations*, 32 *U.S.F. L. REV.* 85, 88 (1998).

52. Horwitz, *supra* note 49, at 237.

gation in the United States is so deeply embedded in our culture, in our shared understandings and misunderstandings, and since lawyers, particularly claimants' lawyers, play such important roles in brokering and exploiting gaps in understandings, we ought not be surprised when the customers turn on the brokers, accusing them of creating the gaps. By the same token, successful brokerage results in shared understandings, and shared understandings are not funny. Stories of healed misunderstandings, bridged gaps, and promises fulfilled are part of our culture. Nevertheless, they are parts that move us beyond the world of jokes and popular legends, and into land of myth and religious faith.