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BAD DOCTORS: NAMING AND BLAMING IN A WORLD WITH MUCH LESS CLAIMING

*David A. Hyman**

“If it hadn’t been for Donowitz that guy would be going home tomorrow. Now, if he lives, it’ll be weeks. And if he knew about this, it would be Malpractice City.”

At this thought the [medical students] . . . wanted to tell the patient so he could sue.

“It won’t work,” said Fats, “‘cause the worse the Private, the better the bedside manner, and the higher the patient’s regard. If a doctor buys the TV illusion of ‘the doctor,’ so does the patient. How can the patient know which are the ‘Double O’Privates? No way.”

“‘Double O’?” I asked.

“Licensed to kill,” said Fats.¹

“Mr. Bond, they have a saying in Chicago:

‘Once is happenstance.

Twice is coincidence.

The third time it’s enemy action.’”²

INTRODUCTION

Everyone has a story about bad doctors. Did you hear about the doctor who got his patients addicted to painkillers so he could have sex with them?³ Or the doctor who told his patients they had cancer—even though they didn’t—so he could get paid for giving them chemotherapy?⁴ Or the doctors who implanted hundreds of unnecessary stents in patients that didn’t need them?⁵ And let’s not forget the neu-

* Professor, Georgetown University Law Center. I appreciate the helpful comments of Michelle Mello, David Studdert, and Michael Saks.

1. SAMUEL SHEM, *HOUSE OF GOD* 47 (1978).

2. IAN FLEMING, *GOLDFINGER* 136 (1959).

3. CHARLES SILVER & DAVID A. HYMAN, *OVERCHARGED: WHY AMERICANS PAY TOO MUCH FOR HEALTH CARE* 229 (2018) (“At his trial, evidence was presented that [Dr. Jacques Roy] had gotten two patients hooked on prescription drugs so he could have sex with them.”).

4. *Id.* at 169 (“[Dr. Farid] Fata told healthy patients that they had cancer so he could make money by giving them chemotherapy they didn’t need. Fata reportedly ‘gave one of his patients 155 chemo treatments over two-and-a-half years—even though the patient was cancer-free.’”).

5. *Id.* at 93–100.

rosurgeon who killed and maimed so many patients that he was criminally prosecuted—and is currently serving a life sentence.⁶

Bad doctors have been featured in books,⁷ TV,⁸ radio,⁹ magazines,¹⁰ newspapers,¹¹ blogs,¹² and medical journals.¹³ The Veterans Health Administration (VHA) seems to have a particular affinity for bad doctors, since it knowingly hires physicians with significant malpractice and disciplinary records—and compounds the problem by failing to report their misdeeds while they are at the VHA.¹⁴

6. Travis M. Andrews, *Texas Neurosurgeon Nicknamed “Dr. Death” Found Guilty of Maiming Woman During Surgery*, WASH. POST (Feb. 16, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/02/16/texas-neurosurgeon-nicknamed-dr-death-found-guilty-of-maiming-woman-during-surgery/?utm_term=.1e21b28071a6; see also Saul Elbein, *Anatomy of a Tragedy*, TEX. OBSERVER (Aug. 28, 2013), <https://www.texasobserver.org/anatomy-tragedy/> (“Physicians who complained about Duntsch to the Texas Medical Board and to the hospitals he worked at described his practice in superlative terms. They used phrases like ‘the worst surgeon I’ve ever seen.’ One doctor I spoke with, brought in to repair one of Duntsch’s spinal fusion cases, remarked that it seemed Duntsch had learned everything perfectly just so he could do the opposite. Another doctor compared Duntsch to Hannibal Lecter three times in eight minutes.”); Saul Elbein, *Licensed to Kill*, TEX. OBSERVER (May 1, 2014), <https://www.texasobserver.org/licensed-kill/>.

7. See generally PETER LENS & GERRIT VAN DER WAL, *PROBLEM DOCTORS: A CONSPIRACY OF SILENCE* (1997).

8. See, e.g., Rode Alejandra, *License to kill—George O’Malley*, YOUTUBE (Mar. 31, 2015), <https://www.youtube.com/watch?v=55-Rxd1MwLg>. For the full version, see Norah Sams, *IxI George O’Malley is 007*, YOUTUBE (Mar. 31, 2015), <https://www.youtube.com/watch?v=krdDx1Loqs8>.

9. See, e.g., Saul Elbein, *Messing With The Bull*, THIS AM. LIFE (June 3, 2011), <https://www.thisamericanlife.org/437/old-boys-network/act-one-0>.

10. Charlotte Hilton Andersen, *6 Signs Your Doctor Is a Keeper (And 5 Signs They’re Not!)*, READER’S DIG., <https://www.rd.com/health/wellness/good-doctor-bad-doctor/> (last visited Oct. 12, 2018); Rachel Rabkin Peachman, *What You Don’t Know About Your Doctor Could Hurt You*, CONSUMER REP. (Apr. 20, 2016), <https://www.consumerreports.org/cro/health/doctorsand-hospitals/what-you-dont-know-about-your-doctor-could-hurt-you/index.htm>; John Fauber et al., *Prescription for Secrecy*, J. SENTINEL (Feb. 28, 2018), <https://projects.jsonline.com/news/2018/2/28/is-your-doctor-banned-from-practicing-in-other-states.html>.

11. See, e.g., Saul Elbein, *Intent To Harm*, TEX. OBSERVER (Mar. 7, 2011, 4:48 PM), <https://www.texasobserver.org/intent-to-harm/>; Saul Elbein, *Bad Medicine*, TEX. OBSERVER (Nov. 10, 2011, 8:47 PM), <https://www.texasobserver.org/bad-medicine/>.

12. See, e.g., Whitney Cummings, *How I Learned To Break Up With Bad Doctors*, LENNY (Oct. 3, 2017), <https://www.lennyletter.com/story/whitney-cummings-how-i-learned-to-break-up-with-bad-doctors>.

13. See, e.g., Lucian L. Leape, *When Good Doctors Go Bad: A Systems Problem*, 244 ANNALS SURGERY 649 (2006); Lucian L. Leape & John A. Fromson, *Problem Doctors: Is There a System-Level Solution?*, 144 ANNALS INTERNAL MED. 107 (2006); James W. Jones et al., *Who Should Protect the Public Against Bad Doctors?*, 41 J. VASCULAR SURGERY 907 (2005).

14. Donovan Slack, *VA Knowingly Hires Doctors with Past Malpractice Claims, Discipline for Poor Care*, USA TODAY (Dec. 3, 2017, 1:18 PM), <https://www.usatoday.com/story/news/politics/2017/12/03/usa-today-investigation-va-knowingly-hires-doctors-past-malpractice-claims-discipline-poor-care/909170001/>. See generally GOV’T ACCOUNTABILITY OFFICE, GAO-18-63, *VA HEALTH CARE: IMPROVED POLICIES AND OVERSIGHT NEEDED FOR REVIEWING AND REPORTING PROVIDERS FOR QUALITY AND SAFETY CONCERNS* (2017).

Popular attention to bad doctors is not the same thing as doing something about the problem. We need sensible policies for identifying them, preventing them from doing further harm, and addressing the havoc that they have caused. This Article explores some of the complexities of designing those policies.

In one of the classic articles in the Law and Society tradition, Professors Felstiner, Abel, and Sarat describe the transformation of disputes into legal proceedings as a process of “naming, blaming, and claiming.”¹⁵ Almost twenty years later, Professor Sarat presented a paper with a similar title applying his framework to the depiction of these themes in popular culture as part of the Sixth Annual Clifford Symposium.¹⁶ My Article bears a title inspired by both of these earlier works—although in fairness, I am using “naming” and “blaming” to mean something different than Felstiner, Abel, and Sarat.¹⁷

I. NAMING

The first challenge with bad doctors is to identify them (i.e., “naming”). There are multiple potential sources of information that could be used to inform the naming process. Potential sources include:

- patient complaints;
- complaints by other health care professionals;
- medical malpractice filings, settlements, and verdicts;
- privileges determinations by individual hospitals; and
- disciplinary proceedings of state licensing boards.

Obviously, each of these potential sources vary in their availability and informational value. For example, online ratings are available everywhere, but many physicians are not listed, and the quality of the available information leaves much to be desired. Information on paid medical malpractice claims has much greater validity than Yelp ratings, but physician-specific data is available in only a few states. Some specialties have much higher base rates of malpractice claiming than others. And so on.

Assume (counter-factually) that all of this information is publicly available. If so, it could be used to “name” a cohort of “questionable doctors.”¹⁸ Part III turns to the next step: sorting out which of these

15. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 L. & SOC’Y REV. 631 (1980–1981).

16. Austin Sarat, *Exploring the Hidden Domains of Civil Justice: “Naming, Blaming, and Claiming” in Popular Culture*, 50 DEPAUL L. REV. 425, 426–29 (2000).

17. I credit Professor Michael Saks for calling me on this one.

18. Sidney M. Wolf, *Questionable Doctors Online: Disciplined Doctor Resource Debuts on Public Citizen Web Site in June*, HEALTH LETTER, June 2002, at 1, 1. “Questionable doctors” was the term used by Public Citizen in its list of physicians who had been disciplined. *Id.* In 2002,

doctors should be “blamed,” rather than exonerated or deemed to be just unlucky.

II. BLAMING

Now that we have generated a list of questionable doctors, what should we do with it? There are some obvious problems with taking all of the sources relied on to generate the list at face value—let alone weighting them equally.

Let’s start with patient complaints. They may be overstated, biased, or based on factors not within the control of the physician. Patients may not understand that exemplary care can still result in a horrific outcome—and vice versa. Indeed, truly awful care combined with a good bedside manner may get high ratings from patients, as the first epigram to this Article makes clear.¹⁹ Stated differently, patients may weigh interpersonal skills more heavily than technical competence in deciding whether to complain, to pursue medical malpractice litigation, or both—while most physicians would take the opposite approach.

Any law professor who is strongly inclined to take patient complaints as a facially valid measure of professional competence should re-read their teaching evaluations and maybe look themselves up at ratemyprofessors.com. Or, go read Professor Sarat’s reviews at the same website. Below, I have reproduced in their entirety the two written evaluations of Professor Sarat from ratemyprofessors.com for a class Professor Sarat taught in April 2015:

Sarat has a wonderful style in class. He really invests in his students and is clear and really interesting. Every professor should be like him. Rating: 5.0 (Awesome)

Worst professor I have ever had. Utterly terrible in every regard. Disrespectful to students. Rating: 1.0 (Awful)²⁰

In fairness, it is unlikely that the class had only two students. Professor Sarat has a total of 52 ratings from 2003–2015, and he has an overall rating of 3.6. But for every two rave reviews, there is someone that is clearly hoping Professor Sarat will be hit by a truck on his way to class.

they launched a website (which now appears to be defunct) allowing users to search for individual physicians. *Id.*; see also Erin Marcus, *List of Questionable Doctors Compiled*, WASH. POST (June 29, 1990), https://www.washingtonpost.com/archive/politics/1990/06/29/list-of-questionable-doctors-compiled/606d6fbd-a244-44e7-8b2a-19acad81d836/?utm_term=.E3cbac4bd913.

19. See SHEM, *supra* note 1, at 47.

20. Law64 & Law624, *Austin Sarat at Amherst College*, RATE MY PROFESSORS (Apr. 16, 2015), <http://www.ratemyprofessors.com/ShowRatings.jsp?tid=15812>.

More importantly, raw complaints are just that. They have not been screened or subjected to any process of fact-finding—let alone full blown adversarial proceedings. To be sure, there is solid empirical evidence that patient complaints correlate with future medical malpractice claims.²¹ After negligence has been established with other evidence, patient complaints might reasonably be used to inform a judgment of whether there is a pattern or practice of misconduct.

But even here, caution is required. Research has indicated that online ratings for physicians with “clean” records are only modestly better than for physicians who are on probation for disciplinary offenses.²² Other studies have found that online rankings do not correlate with the quality of care that is actually rendered,²³ and most doctors get favorable ratings from online reviewers.²⁴ These points counsel for caution in the use of online ratings and complaints from patients when deciding who is a bad doctor.

Complaints from other health care professionals and hospital privileges determinations should reflect a more sophisticated understanding of the complexities of delivering medical care. However, they may also be infected with less savory motivations, including personal animus and professional rivalry. Physicians have been known to get in fistfights with one another, and stories about bullying are commonplace.²⁵

What about the medical malpractice and disciplinary systems? The former is beset with both under-claiming and over-claiming. Paid

21. Gerry B. Hickson et al., *Patient Complaints and Malpractice Risk*, 287 JAMA 2951, 2953–54 (2002).

22. Gregory P. Murphy et al., *Web-Based Physician Ratings for California Physicians on Probation*, 19 J. MED. INTERNET RES. e254 (Aug. 22, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5585591/>.

23. Kanu Okike et al., *Association Between Physician Online Rating and Quality of Care*, 18 J. MED. INTERNET RES. e324 (Dec. 13, 2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5192234/>.

24. Bassam Kadry et al., *Analysis of 4999 Online Physician Ratings Indicates That Most Patients Give Physicians a Favorable Rating*, 13 J. MED. INTERNET RES. e95 (Nov. 16, 2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3222200/>.

25. See Amar R. Chadaga et al., *Bullying in the American Graduate Medical Education System: A National Cross-Sectional Survey*, 11 PLOS ONE e0150246 (Mar. 16, 2016), <https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0150246&type=printable>; Joint Comm’n, *Bullying Has No Place in Health Care*, QUICK SAFETY, June 2016, at 1, https://www.jointcommission.org/assets/1/23/Quick_Safety_Issue_24_June_2016.pdf; Delthia Ricks, *Without Naming Names, Hospital Confirms Doctors’ Fistfight*, ORLANDO SENTINEL (Feb. 5, 1994), http://articles.orlandosentinel.com/1994-02-05/news/9402050664_1_florida-hospital-orlando-cardiovascular-surgeons-doctors; Rick Weiss, *Doctors Who Fight Over Patients—Literally*, WASH. POST (Dec. 21, 1993), https://www.washingtonpost.com/archive/lifestyle/wellness/1993/12/21/doctors-who-fight-over-patients-literally/d3b8e5ff-1402-4dc9-a2ec-6c522555dfee/?noredirect=ON&utm_term=.9d85154fecbf.

medical malpractice claims are a better (but still mixed) signal.²⁶ The disciplinary system has its own problems, including considerable state-by-state variation in the rate at which physicians are disciplined and serious questions about whether the licensing authorities are pursuing the right type of cases.

The result is that even with comprehensive information, reasonable people will disagree on how best to identify bad doctors. In many cases, that problem is likely compounded by hindsight bias.²⁷ Worse still, there is no shortage of instances where individual physicians are blamed for what are, in fact, systematic problems.

At the same time, everyone who is involved in this policy space knows that there are bad doctors out there who are causing real harm to patients. So even if we can't do a perfect job of identifying bad doctors until after they caused significant harm, there ought to be a way to flag the worst offenders—preferably sooner rather than later.

One obvious strategy for moving from naming to blaming is to use the outputs of both the medical malpractice and disciplinary systems to identify a small subset of physicians who are targets of both systems. This “Hall of Shame” approach side-steps many of the problems associated with using the other sources of information outlined in Part II.

In ongoing research, we use this approach to identify the physicians with the worst records of paid claims and disciplinary sanctions in Illinois and Indiana.²⁸ Table 1 shows the basic results, for physicians with both a disciplinary sanction and paid medical malpractice claims.

26. David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024, 2027–28 (2006) (finding that 28% of medical malpractice claims where there was no evidence of an error closed with payment and 27% of medical malpractice claims where there was an error closed without payment).

27. See generally Doron Teichman, *The Hindsight Bias and the Law in Hindsight*, in OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 354 (Eyal Zamir & Doron Teichman eds., 2014).

28. David A. Hyman et al., *Medical Malpractice and Physician Discipline: The Good, the Bad and the Ugly* (Working Paper) (on file with author); Jing Liu & David A. Hyman, *Targeting Bad Doctors: Lessons from Indiana, 1975-2015* (Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2994529.

TABLE 1. Distribution of Paid Medical Malpractice Claims and Disciplinary Sanctions Among Illinois and Indiana Physicians.

No. of Paid Medical Malpractice Claims	State			
	Illinois		Indiana	
	No. with Discipline	All	No. with Discipline	All
0	1,491	72,567	359	27,129
1	318	4,564	72	2,070
2	126	1,248	21	460
3+	143	759	35	280
All	2,078	79,138	487	29,939

As Table 1 makes clear, only a small number of physicians have 2 or more paid medical malpractice claims, and even fewer have 3 or more. If we further limit ourselves to those with disciplinary sanctions, the numbers shrink even more. For those who prefer their results in percentage terms, Table 2 presents the share of the 79,138 active licensed physicians in Illinois and the 29,939 active licensed physicians in Indiana with various combinations of medical malpractice claims and disciplinary sanctions.

TABLE 2. Percentage of Illinois and Indiana Physicians with Paid Medical Malpractice Claims and Disciplinary Sanctions.

No. of Paid Medical Malpractice Claims	State			
	Illinois		Indiana	
	Discipline			
	No	Yes	No	Yes
0	89.81%	1.88%	89.42%	1.20%
1	5.37%	0.40%	6.67%	0.24%
2	1.42%	0.16%	1.47%	0.07%
3+	0.78%	0.18%	0.82%	0.12%

Of course, these two states might not be representative. Using nationwide data from the National Practitioner Databank (NPDB), Studdert et al. find that only 1% of physicians have 2 or more paid medical

malpractice claims—but they are studying a much shorter time period.²⁹ When we studied a longer time period using the same dataset as Studdert et al., we found percentages consistent with those reported in Table 2.³⁰ In that work, we find that having a single prior claim in the preceding five years roughly triples the risk of a claim in the next five years. We also found that even after controlling for specialty, the odds of having two paid claims solely due to chance is extraordinarily unlikely.

Once again, reasonable people can disagree on where exactly the dividing line should be drawn between physicians that are bad doctors versus those that are just unlucky, but 3 or more paid medical malpractice claims seems like an excellent place to start.

Of course, once we've engaged in naming and blaming, the question is: What should we do next? For physicians, a judicious combination of graduated carrots and sticks seems like the most sensible strategy—starting with education and mentoring, then proceeding through financial penalties, suspension, permanent loss of the privilege to practice medicine, and (in truly exceptional cases, like Dr. Duntsch,) incarceration.

It also makes sense to dramatically increase the sanctions for entities that help contribute to the problem of bad doctors by turning a blind eye to their misdeeds—or worse still, by encouraging them to move on in exchange for a clean reference. Maybe hospitals should be subject to automatic enterprise liability for the misdeeds of bad doctors. Maybe everyone who participates in structuring an arrangement for “passing the trash” should be subject to severe financial and professional penalties.³¹ Regardless of the specifics, the starting point to addressing this problem is to say “enough already.”

29. David M. Studdert et al., *Prevalence and Characteristics of Physicians Prone to Malpractice Claims*, 374 *NEW ENG. J. MED.* 354, 356 (2016). Studdert et al. used ten years of NPDB data, while we have data for 35 years (Illinois) and 41 years (Indiana).

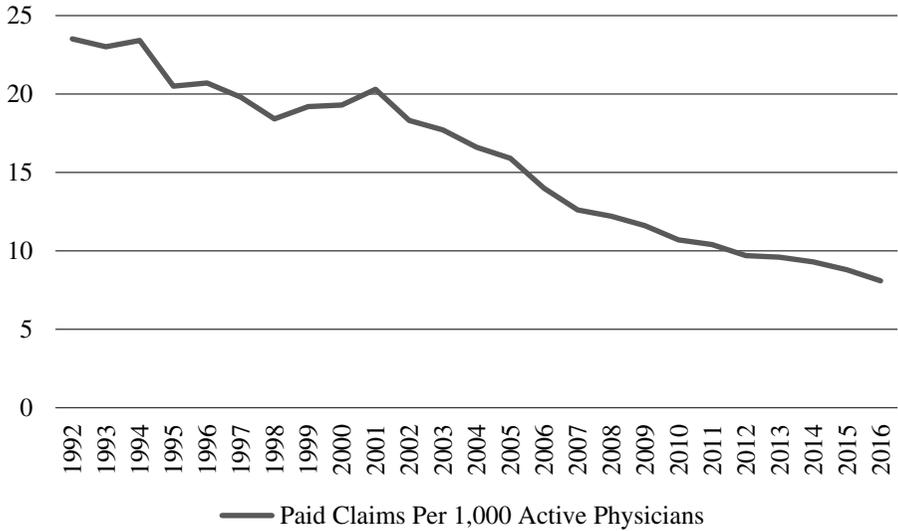
30. Bernard Black, David A. Hyman, & Joshua Lerner, *Physicians with Multiple Paid Medical Malpractice Claims: Are They Bad or Just Unlucky?* (Working Paper, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3201919.

31. In teaching, the analogous problem is referred to as the “dance of the lemons” or “passing the trash.” Peter Schweizer, *The Dance of the Lemons*, *HOOVER INST.* (Jan. 30, 1999), <https://www.hoover.org/research/dance-lemons> (“Often, as a way to save time and money, an administrator will cut a deal with the union in which he agrees to give a bad teacher a satisfactory rating in return for union help in transferring the teacher to another district. The problem teacher gets quietly passed along to someone else. Administrators call it ‘the dance of the lemons’ or ‘passing the trash.’”).

III. DEALING WITH A WORLD WITH MUCH LESS CLAIMING

Paid medical malpractice claims have been declining steadily for almost two decades. Most physicians don't believe it—and insist that medical malpractice premiums spiked in 2000–2005 because of a spike in claiming. That claim is inconsistent with reality. Figure 1 presents the number of paid claims per 1,000 Active Physicians, using data from 1992–2016 from the NPDB.

FIGURE 1. Paid Medical Malpractice Claims Per 1,000 Physicians, 1992–2016.



In numerical terms, there were 23.5 paid claims per 1,000 Active Physicians in 1992, and only 8.1 paid claims per 1,000 Active Physicians in 2016. In other words, there was a decline of about 66% over this twenty-five year period. Tort reform advocates will be inclined to give credit for these declines to damage caps, since nine states enacted them during 2002–2005. But, the decline actually started in 1999, and there were similar declines in claiming in states that never had damages caps.³²

Of course, Figure 1 is just about the number of paid claims. Perhaps the amount paid per claim was rising dramatically. Wrong as well. Whether expressed in payout per physician or total payout as a share

32. Myungho Paik, Bernard S. Black, & David A. Hyman, *The Receding Tide of Medical Malpractice Litigation, Part I—National Trends*, 10 J. EMPIRICAL LEGAL STUD. 612, 626 (2013).

of health care spending, the direct cost of the tort system has been falling over the same time frame.³³

What does this dramatic reduction in “claiming” imply for the future of “naming and blaming” bad doctors? Since one of the inputs is paid medical malpractice claims, and the number of paid claims is declining, the likelihood is that we will have to work harder to find alternative inputs with which to first name and then allocate blame. This problem may be partially offset by the likelihood that plaintiffs’ lawyers will focus their efforts on medical malpractice cases that are easier to prove—and cases against bad doctors seem likely to meet that requirement.

CONCLUSION

There is broad agreement that we should do something about the problem of bad doctors. To do that we need to have a mechanism for identifying bad doctors. Then, we need to take appropriate steps to prevent them from doing further harm and address the wave of misery they leave in their wake.

How then should we proceed? One approach for identifying and targeting bad doctors is provided by Ian Fleming in the second epigram to this Article in words attributed to the notorious Bond villain, Auric Goldfinger.³⁴ If we are inclined to follow the advice of a notorious Bond villain, doctors with three or more paid medical malpractice claims (with or without disciplinary sanctions) should be first on the list for further scrutiny.

For those who think Goldfinger is being too forgiving, Oscar Wilde’s *Lady Bracknell* offers a more tough-minded approach: “To lose one parent may be regarded as a misfortune. To lose both looks like carelessness.”³⁵

You pay your money, and you takes your choice.

33. *Id.*

34. See FLEMING, *supra* note 2, at 136. According to the American Film Institute, Goldfinger was the most villainous of all Bond villains, although he only ranked 49th on the list of all-time movie villains. *AFI’s 100 Greatest Heroes & Villians*, AM. FILM INST. (Sept. 27, 2018), <http://www.afi.com/100years/handv.aspx>. Still, to make it on to the list, he beat out many other worthy contenders, including Ernst Stavro Blofeld and Emilio Largo. Apparently, there were no hard feelings about that. See *Saturday Night Live: Midday with Bond Villains*, (NBC television broadcast May 17, 1986), <https://www.nbc.com/saturday-night-live/video/midday-w-jennifer-hicks/2868047>.

35. OSCAR WILDE, *THE IMPORTANCE OF BEING EARNEST* 165 (1895).