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MEDIA REPORTING OF JURY VERDICTS: IS THE TAIL (OF THE DISTRIBUTION) WAGGING THE DOG?

Robert J. MacCoun

INTRODUCTION

Several decades back, a series of articles and books by the newly emerging law-and-economics community articulated the principles of rational litigation behavior.¹ Litigation involves a series of decisions. First, potential defendants have to decide whether to take actions that could expose them to future litigation. Second, plaintiffs who believe they have been injured by such actions have to decide whether to file a lawsuit. Third, defendants have to decide on a settlement offer. Finally, plaintiffs have to decide whether to accept that offer or go to trial. Law-and-economics models of these four decisions share a common parameter: The expected value of a jury verdict if a lawsuit goes to trial.

There are reasons to doubt that rational-actor models provide a valid description of actual litigant behavior.² But even a boundedly rational psychological model will assume that expectations play a central role in choice.

The problem, even for the most rational of actors, is that the expected value of the trial verdict is not a given. It must be estimated by the actor. Yet there is no simple way to just “look it up”—no expert system, spreadsheet algorithm, or actuarial table. Indeed, until 1981, no one had systematically estimated the mean or median jury award.

¹ Robert J. MacCoun, Professor of Law, Boalt Hall School of Law and Goldman School of Public Policy, University of California at Berkeley. Prepared for the 11th Annual Clifford Symposium on Tort Law and Social Policy, Who Feels Their Pain? The Challenge of Non-Economic Damages in Civil Litigation, DePaul University College of Law, April 15, 2005. Earlier versions were presented at Duke University’s Fuqua School of Business and at the Annual Meeting of the Society for Experimental Social Psychology, Ft. Worth Texas, October 15, 2004. I thank Chip Heath (Stanford) for encouragement and advice, and Sean Farhang for very helpful comments on the first draft.

² See, e.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS (2000).

for any jurisdiction. Until the 1980s, there was no government equivalent of the FBI's Uniform Crime Reports or the prison statistics accumulated by the Bureau of Justice Statistics. At best, some communities had "Jury Verdict Reports"—brief synopses of recent, local trials compiled and marketed to attorneys practicing in some cities.

In the early 1980s, Mark Peterson and his colleagues at RAND's Institute for Civil Justice (ICJ) used information from published jury verdict reporters in Cook County, Illinois, to compile the first, systematic statistical database on civil jury trial characteristics and verdicts. Since that time, the ICJ has maintained a long-term time series on trends in Cook County and in California. Similar databases with shorter time spans but broader geographic coverage have been assembled and analyzed by the ICJ, by Stephen Daniels and Joanne Martin at the American Bar Foundation, and by Brian Ostrom and David Rottman of the National Center for State Courts. Today the federal government distributes civil jury data. Yet even today, there is no simple way to statistically forecast the expected value of any given case—the published data are inevitably dated, and they do not readily permit one to project the combined effects of case type, jurisdiction, and injury characteristics, much less a host of other potentially relevant factors not coded by the researchers.

In the absence of good actuarial estimates, what is a litigant or litigator to do? Drawing on insights from the psychological literature on judgment under uncertainty, Dan Bailis and I concluded that people probably cobbled together rough inductions from a mix of personal

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experience, local anecdotes, and media reporting. We also wondered whether distorted media coverage might play a role in the widespread view that jury awards were out of control. Despite the persistent complaints of tort reformers, it was already clear by the mid-1980s that median awards were modest and that fairly large awards were a rare event. We thus set out to systematically document what kind of impression one might form about the expected value of a jury verdict on the basis of popular and business media coverage.

As described below, our findings and those of subsequent studies document a remarkable pattern of distortion. If one were to use the media as a basis for estimating the expected value of a jury verdict, one would grossly overestimate the likelihood that the case would go to trial, the plaintiff’s probability of victory, and the magnitude of the award. Moreover, one would form the mistaken impression that tort litigation mostly involves medical malpractice and product liability rather than automobile negligence cases.

Our study soon found a place in the growing academic literature critiquing the empirical assertions of the tort reform movement. Seeing our findings repeatedly discussed and cited, I observed that many other authors either implicitly or explicitly endorsed two inferences: (1) The media distortion reflects the influence of powerful corporate interests favoring a tort reform agenda; and (2) the media distortion itself successfully advances that agenda. Only recently have I begun to question these highly plausible assumptions. In this essay, I will question both of them. I will suggest that (1) the media distortion may be parsimoniously explained by the intersection of an asymmetric, skewed outcome distribution combined with human brains that selectively attend to stimuli on the basis of extremity, valence, and narrative structure; and (2) the media distortion may be at least partly

10. ROBERT J. MACCOUN, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR (1987). The longest jury-verdict time series, from Cook County and San Francisco, suggests an increase in the mean award (which is more sensitive to large awards) over the past three decades, but this appears largely attributable to changes in case mix and medical losses. See Seabury et al., supra note 5.


counterproductive for tort reformers because it conveys descriptive, normative information that is at odds with its injunctive normative message—the distortion may even encourage litigation.

II. PATTERNS OF DISTORTION IN MEDIA COVERAGE OF TORT LITIGATION

The 1996 Bailis and MacCoun content analysis is based on a sample of 249 articles that mentioned tort litigation or lawsuits and were published between 1980 and 1990 in five popular news and business magazines: Time, Newsweek, Fortune, Forbes, and Business Week. We coded the date, type of tort, whether the case went to trial, whether the defendant was found liable, and the size of the award. We also coded any evaluative comments made by the authors. In order to assess the representativeness of the cases covered in popular media coverage, we computed the frequency of each tort type as well as the trial rate, plaintiff victory rate, and median and mean award sizes. We compared these to the best available archival sources on claiming, litigation, trial rates, plaintiff victories, and jury awards.

As seen in Table 1, compared with objective data on tort cases, the magazine articles considerably overrepresented the relative frequency of controversial forms of litigation (product liability and medical malpractice), the proportion of disputes resolved by trial (rather than settlement), and the plaintiff victory rate at trial.

<table>
<thead>
<tr>
<th>Actual accident rates</th>
<th>Auto</th>
<th>Products</th>
<th>Medical</th>
</tr>
</thead>
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<tr>
<td>Actual accident rates</td>
<td>18%</td>
<td>30%</td>
<td>1%</td>
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<tr>
<td>Actual tort filings</td>
<td>60%</td>
<td>4%</td>
<td>7%</td>
</tr>
<tr>
<td>Actual trial rates</td>
<td>42%</td>
<td>3%</td>
<td>10%</td>
</tr>
<tr>
<td>Magazine coverage</td>
<td>2%</td>
<td>49%</td>
<td>25%</td>
</tr>
</tbody>
</table>

13. Bailis & MacCoun, supra note 11, at tbl.2.
And as seen in Table 2, the pattern of distortion was even more striking for plaintiff win rates and for jury awards. Fully eighty-five percent of the magazine cases involved plaintiff victories compared to win rates ranging from twenty-seven to fifty-five percent in actual tort trials; the exaggeration is even greater when one considers that the magazine stories overrepresent product and medical malpractice cases, which actually have lower than average plaintiff win rates. The mean magazine award was a full order of magnitude higher than the most representative estimate for state courts—almost $6 million as compared to about $400,000. The median magazine-reported award was three orders of magnitude higher—$1.7 million vs. $51,000.

While our paper was in press, a similar comparison of reported awards was discussed independently by Oscar Chase. The same qualitative pattern of media distortion has been replicated by Steve

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14. Id. at tbl.3.
Garber and Anthony Bower\textsuperscript{16} for automotive product liability coverage, by Neal Feigenson and Dan Bailis\textsuperscript{17} for coverage of airbag safety and litigation, and by Laura Beth Nielsen and Aaron Beim\textsuperscript{18} for Title VII discrimination litigation. William Haltom and Michael McCann\textsuperscript{19} have recently published the most ambitious book-length study, with a much more extensive sample, a more detailed analysis of content, and a very compelling discussion of the political and institutional factors at play.

Since the pathbreaking studies of Kahneman and Tversky in the 1970s, it is now well established that when assessing probabilities, people give undue weight to those cases that come most readily to mind due to recency, saliency, or ease of recollection.\textsuperscript{20} It is also well known that media exposure can render certain issues or outcomes more "available" than others; and indeed, Bailis and I argued that this was a likely consequence of the distortions we uncovered. There are many examples in the literature. The classic early work was a content analysis of newspaper reporting on causes of death, conducted by Barbara Combs and Paul Slovic.\textsuperscript{21} Across various causes of death, they found that annual death rates were only weakly correlated with media attention—there was a strong emphasis on "catastrophic" events involving large numbers of deaths in a single incident. A similar pattern is seen in media coverage of crime, where violent

\textsuperscript{16} Steven Garber & Anthony G. Bower, \textit{Newspaper Coverage of Automotive Product-Liability Verdicts}, 33 \textit{LAW AND SOC'Y REV.} 93 (2000). Garber and Bower's study is especially significant because it used a different methodology that complements the one used by Bailis and MacCoun, Feigenson and Bailis, and Nielsen and Beim. Rather than sampling cases from the media and comparing them to court data, Garber and Bower sampled automotive product liability cases in the 1985–1996 period (259 defense verdicts, 67 plaintiff verdicts) and then searched media databases for coverage of the trials. They found several significant predictors of coverage, including high damages (especially in excess of $1 million), the interaction of high damages and local metropolitan area, cases with punitive damages, and cases with at least one fatality.


crimes are grossly overrepresented. Slovic and his colleagues found that when actual mortality rates are controlled, there is an almost perfect positive correlation between the frequency of news coverage and people's estimates of the riskiness of each activity. Thus, people mistakenly believe that death by fire is more common than by diabetes, and that death by homicide is more common than by stomach cancer, when in fact the diseases are considerably more prevalent than more graphically violent forms of death.

At this point, the fact of media distortion is well established. My interest in this essay is understanding why it occurs and what that might tell us. I consider five classes of explanations: two involving the motivations of the source (the media), two involving the motivations of the audience, and a final account that is more cognitive and perceptual than motivational.

III. COMPETING EXPLANATIONS: SOURCE MOTIVATION

There is a veritable cottage industry—actually more of a big business—in denouncing the political bias of the American mass media. A Google search of the phrase "media bias” turned up nearly two million web links. Of course, the problem is that the denouncers hold two diametrically opposed views: that the media are too liberal and that the media have a right-wing slant. It is difficult to casually adjudicate this dispute because of differences in the way one can operationalize concepts like media, bias, and ideology, and because authors tend to cherry pick examples to prove their point. Moreover, psychological research shows that partisans on both sides of a dispute tend to see the exact same media coverage as favoring their opponents' position—the "hostile media phenomenon." But, for our pur-

27. See Robert MacCoun, Biases in the Interpretation and Use of Research Results, 49 ANNUAL REV. PSYCHOL. 259 (1998).
poses, the main point is that any accusation of right-wing media bias needs to confront plausible counterarguments for left-wing media bias.

A. Is There a Right-Wing Bias in the Media?

In presenting these results over the years, I have found that many audiences—especially university students and faculty—take the findings on their face as evidence of a procorporate bias in the media. The argument is easily articulated, but hard to test. First, there has been a long and aggressive corporate campaign for tort reform, contending that juries are irrational and arbitrary and that jury awards must be curtailed or eliminated. Second, the news media are mostly owned by large corporations, and the increasing concentration of the media in the hands of a few large conglomerates has reduced journalistic independency and norms of objectivity. In conclusion, media coverage of tort cases gets distorted in ways that advance the corporate tort reform campaign.

The first two propositions are demonstrably correct, and the conclusion may have facial validity for many people—at least on the left. But the conclusion does not necessarily follow from the premises. The argument establishes motive, but not intent. And it fails to consider other explanations for the distortion.

For reasons I will give below, I do not believe a right-wing or procorporate bias is the most compelling explanation for the statistical misrepresentation in tort coverage. But there is no doubt that the statistical distortion is often accompanied by slanted coverage of the arguments for and against tort reform. Bailis and I found that in magazine stories, explicitly evaluative comments were fairly rare. But where they appeared; they were almost exclusively critical of the tort system: Thirteen percent of the articles mentioned potentially harmful consequences for the economy; ten percent suggested that Americans are too litigious, and ten percent argued that lawyers' fees are too high. We were only able to find two articles with a favorable statement about juries, and only one that suggested the tort system was working correctly.

30. Bailis & MacCoun, supra note 11.
31. Haltom and McCann revisited this question more comprehensively in their study. Somewhat surprisingly, in an analysis of the subset of articles focusing on specific cases (rather than tort reform more generally), they actually found slightly more statements favoring plaintiffs (forty-three percent of evaluative remarks) than favoring defendants (thirty-five percent). They
B. A Left-Wing Media Bias?

It is intriguing that sociolegal scholars have been quick to assume a conservative media bias in tort reporting without seriously considering the possibility that there is a left-wing slant favoring large awards. Who should be more likely to disproportionately highlight cases in which corporations were found negligent by citizen fact finders—a conservative or a liberal? And there is also evidence that a majority of practicing journalists are Democrats and tend to have centrist to left-of-center personal views. Are journalists playing "gotcha"—highlighting the most egregious forms of misconduct by powerful monied interests?

This argument has an appeal of its own, but also some problems. First, the argument works better for suits against corporations engaged in commercial activities than for individual physicians accused of malpractice. Granted, the American Medical Association (AMA) is a fairly conservative organization, but it is difficult to see why liberal journalists would have a political motive for going after individual physicians. Second, the argument leaves unexplained the popularity of media "tort tales," plaintiff victories that, as described, seem absurd on their face: the McDonalds coffee case; the psychic who blamed a CAT scan for destroying her telepathic skills; the injured robbers, burglars, and carjackers who sued their victims. I will argue below that such cases are explicable without recourse to political bias, but if a political bias is involved, it is surely more likely to be right- than left-wing.

suggest that this near equivalence may partly reflect a journalistic attempt to provide balance via offsetting quotes. Even in this subsample, Haltom and McCann reported a higher rate of evaluative remarks of either kind than we reported in 1996. This could result from any number of differences between the studies, including the choice of time periods, media covered, search terms, and coding procedures.

32. In a 2004 poll, the Pew Research Center for the People and the Press found that thirty-four percent of the national press consider themselves liberal, fifty-four percent moderate, and seven percent conservative, vs. twenty, forty-one, and thirty-three percent, respectively, among the general public. Pew Research Center, Bottom-Line Pressures Now Hurting Coverage, Say Journalists (May 23, 2004). In a 1996 poll of reporters at sixty-one newspapers, sixty-one percent described their political leaning as "liberal," twenty-four percent "independent other," and only fifteen percent "conservative." See Paul S. Volkes, The Newspaper Journalists of the '90s (1997), available at http://www.asne.org/index.cfm?id=2980 (click on "The Journalists").

IV. Competing Explanations: Audience Motivation

A. Just Providing What Readers Want?

Political accounts of right- and left-wing bias imply that the motivations of the sources drive media coverage. But of course, media outlets are for-profit enterprises operating in a market, so it is not unreasonable to counter that the media may simply give us what we want. The economic analysis of media markets is complex. In a truly competitive market for a single commodity, consumers might reign sovereign. But media markets are highly segmented with respect to products, outlets, and audience demographics. Moreover, the right-wing bias theory contends that the media form oligopolies (and in some markets, near monopolies), reducing their responsiveness to consumer desires. So the "giving us what we want" account is too simplistic, and even if it were true, it leaves the extent and pattern of media distortion of tort cases unexplained, shifting the puzzle from the question of source motivation to the question of audience motivation.

B. Audience Fear of Liability Losses?

It is tempting to view the concern over very large awards as "irrational." Bailis and I implied as much in our 1996 paper, and others have voiced that view as well. For example, in the early 1990s, Thomas Koenig and Michael Rustad systematically documented just how extremely rare punitive damage awards really are, especially blockbuster punitives. For tort reform critics, this was seen as clear evidence that reform advocates were being either foolish or duplicitous.

It is well established that people overweight salient or vivid cases when estimating risks. This "availability heuristic" may well have evolved because it is (or once was) generally adaptive. But it does seem safe to say that it is at least irrational to rely on reports of blockbuster awards if one is trying to estimate the central tendency of the


36. See HEURISTICS & BIASES, supra note 20; Tversky & Kahneman, supra note 20.

37. GERD GIGERENZER, ADAPTIVE THINKING: RATIONALITY IN THE REAL WORLD (2000); see also BOUNDED RATIONALITY: THE ADAPTIVE TOOLBOX (Gerd Gigerenzer & Reinhard Selten eds., 2001).
distribution—the "expected value" needed in the law-and-economic accounts of litigation rationality. This is particularly true if there are more representative data sources available.

There are other reasons, however, why one might focus on the unrepresentative tails of a distribution, reasons that are defensible under some accounts of rationality. In the decision theory tradition, attitudes toward risk are exogenous parameters of a rational model and cannot themselves be judged as either rational or irrational so long as the parameters are used coherently to derive a choice from inputs. From the coherence perspective, there is nothing inherently irrational about extreme risk aversion.

Thus, a disproportionate focus on extreme outcomes may simply reflect extreme risk aversion. In lay terms, the perceiver is not trying to estimate the typical (median), average (mean), or most likely (mode) award; the perceiver is trying to anticipate worst-case (or for plaintiffs, best-case) scenarios. Lola Lopes and James March have promoted psychological models of choice in which people strive to balance a concern with expected values and a concern with extreme outcomes. Indeed, surveys of corporate managers reveal that they frequently focus on worst-case scenarios in making choices; they are reluctant to take actions that could potentially jeopardize their firm's (or their own) survival—even if the expected value of the gamble looks profitable.

The equivalent concept in game theory is the minimax principle: Choose the option that has the least-bad worst-case outcome. John Rawls famously used this principle to defend his theory of the justice


39. A similar argument can be made for the "arationality" of extreme myopia, at least with respect to the exponential discounting posited by economists. The form of time discounting that psychologists believe actually describes choice—hyperbolic discounting—is harder to defend because it leads to intertemporal preference reversals. See George Ainslie, Breakdown of Will (2001).


42. March & Shapira, supra note 41.

43. See Duncan Luce & Howard Raffia: Games and Decisions (1957). Many authors use the term "maximin" rather than "minimax"; the terms are interchangeable and differ only in whether one is describing the column player or the row player in a game matrix.
principles people would adopt in the "original position," operating behind a veil of ignorance.\(^4\) Shrader-Frechette used a similar perspective to defend risk regulation policies that strike many economists, from an expected value perspective, as grossly inefficient if not socially irrational.\(^5\) And most recently, environmentalists have championed—and sometimes written into law—a "precautionary principle" in which global responses cannot wait for solid proof of looming ecological crises.\(^6\)

So perhaps the media are indeed giving people exactly the information they want—the tail of the distribution rather than its central tendency. One could test this empirically using an information search paradigm: Let consumers click a button to indicate which information they most want—the mean award, the median award, or the upper quartile (described in lay terms)—and make the choice costly with respect to time or some other currency so they do not simply choose everything. One could vary their goals by assigning them specific roles such as consumer, corporate risk manager, or injured person. A complementary experiment would provide consumers with one of these distributional features, assigned randomly, to see how it affected their judgments about a hypothetical course of action (going forward with a product, filing a lawsuit, settling before trial).

Without knowing what such studies would reveal, it is unclear whether this "minimax" account describes the citizenry as a whole. Why should ordinary citizens fear large awards against product manufacturers, or against physicians? Citizens may fear the "trickle down" effect on prices, product availability, and insurance premiums, but if those factors are affected by tort awards, they are surely affected by the whole distribution, not just the tail. At any rate, media consumers and corporate actors are not discrete sets; the readers of the Wall Street Journal, Forbes, Fortune, and Business Week are likely to be citizens who work for corporations. So at least some consumers may want to know what the worst case awards look like. Indirect support for this view comes from Garber and Bower's finding that cases that were both local and involved high damages were particularly likely to receive media coverage, though this finding is also consistent with the

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44. See John Rawls, A Theory of Justice (1971).
alternative account offered below.\textsuperscript{47} Still, if readers were using the media to monitor their own liability risk, one would expect greater coverage of suits against \textit{individual} defendants.

\section*{C. Citizen Vigilance Over Powerful Corporate Actors?}

Another possibility is roughly the audience equivalent of the "left-biased source" account. The idea is that citizens look to the media to keep them informed of potentially dangerous misbehavior by powerful corporations. This argument has a lot going for it. Consumer watchdog stories are now a staple of the print, radio, and TV media. The argument would also explain the disproportionate focus on medical malpractice and product liability cases—domains where people may feel they have less control than "slip-and-fall" and automobile domains.\textsuperscript{48} Moreover, at least when serving on a jury, citizens do appear to hold corporations to higher standards of conduct than they apply to individuals.\textsuperscript{49}

Yet there are also some problems with this account. It is difficult to reconcile the argument that citizens are ever on the alert for corporate negligence, when in fact seriously injured accident victims rarely even consider filing a claim against a corporation.\textsuperscript{50} Indeed, the injured mostly blame themselves, and they are more likely to blame someone else in auto accidents—the other driver—than in product- or medicine-related accidents.\textsuperscript{51} And if we are eagerly monitoring corporate misconduct, why are so many specific tort accounts about patently irrational (according to the telling) jury verdicts—the so-called "tort tales"?\textsuperscript{52}

\section*{D. A Nonmotivational Account: Formal Stimulus Properties and the Brain}

Though I once endorsed a more political view of media distortion, upon closer examination I have come to conclude that politics may play little role in the news media's dissemination of distorted tort sta-

\textsuperscript{47} Garber & Bower, supra note 16.
\textsuperscript{48} Robert MacCoun, Blaming Others to a Fault?, 6 \textit{CHANCE} 31 (1993).
\textsuperscript{51} MacCoun, supra note 48.
\textsuperscript{52} \textit{HALTOM \\& MCCANN, supra note 19; see} Daniels, supra note 33; \textit{see also} Galanter, supra note 33.
tistics. This distortion may well be welcomed enthusiastically by tort reformers, but it is not necessarily produced with that as the aim.

Here is my argument in a nutshell:

1. journalists sample cases for their interest value, not their statistical representativeness;
2. our brains have evolved to give disproportionate weight to extreme stimuli;
3. jury awards are distributed asymmetrically, bounded at zero on the left but unbounded in the right tail;
4. as a result, very large awards will attract interest, but very small awards will not;
5. because product liability, medical malpractice, and class action cases produce more extremity, they will be overrepresented in the set of attention-grabbing cases;
6. and because only plaintiff victories produce extreme awards, plaintiff victories will be overrepresented in the set of attention-grabbing cases, relative to defense verdicts.

I will also argue that other newsworthy (and even politicized) outcome distributions do not share this asymmetry.

I. The Asymmetric Distribution

I start with a statistical observation long familiar to jury researchers: the distribution of jury awards is highly asymmetric. It is bounded on the low end at zero—awards cannot be negative—but effectively unbounded at the upper end. As a result, awards data have a strong positive skew; most awards pile up at the low end of the distribution, there is a long "right tail" of occasional very large awards, the median is smaller than the mean, and indeed most awards are lower than the mean award. See Figures 1a and 1b for a stylistic example.

These features of the award distribution play a key role in the recent work by Daniel Kahneman, David Schkade, and Cass Sunstein on punitive-damage decisions by juries. Kahneman and colleagues argued that citizens have great difficulty making judgments on a dollar scale because the scale lacks clear anchors—citizens may agree that a defendant behaved outrageously, but how much money does it take to

53. See Haltom & McCann, supra note 19.
54. This is mostly as an analytical nuisance, because awards data must be log-transformed before they can be analyzed using traditional methods of statistical inference.
express that outrage or deter a multinational corporation? As a result, dollar judgments are likely to be much more variable across citizens than the range of their views on a seven-point attitude scale might predict. And because, in the tort context, the dollar scale is bounded at zero, variability can only be expressed in one direction—the larger end.

**Figures 1A and 1B**

The histogram on the left shows the total jury awards from San Francisco County and Cook County for the years 1960–1999 (provided to the author by Robert Reville and Seth Sebury of RAND’s Institute for Social Justice). The histogram on the right shows a similar (but far less extreme) pattern for mock juror verdicts from a single case.

Interestingly, the late paleontologist Stephan Jay Gould made a very similar argument in his book *Full House*. Gould disputed the widely held view that evolution has favored the development of ever-more complex organisms, with humans at the apex. Gould argued that the apparently increasing complexity of organisms was artifactual. Since complexity is necessarily bounded at a low level near zero—a niche long occupied by bacteria—a purely random process (a “ran-

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57. MacCoun, supra note 48 (providing compensatory award recommendations in an unpublished histogram from Experiment 2). Note the typical asymmetric pattern, bounded at zero on the left, but unbounded on the right with a long tail.

dom walk” in statistical terms) would inevitably produce an ever-increasing right tail of complexity (see Figure 2).

**Figure 2**

Stephen Jay Gould’s use of a lognormal distribution to argue that a “random walk” process could create an illusion that evolution favors increasing complexity.⁵⁹

Once we recognize the form of the tort award distribution, it becomes apparent that it can only produce extreme awards in the right tail—the large awards. Indeed, the only exception that comes to mind is the one that proves the rule—a jury’s tart choice to award only one dollar to the United States Football League (USFL) in its antitrust suit (for a half billion dollars) against the National Football League.⁶⁰

2. Extremity Bias

The problem—from an inductive standpoint—is that the right tail, by its very extremity, is bound to attract our attention. Psychologists long ago established that the brain forms a “cortical model” of the stimuli in the environment. We habituate to the typical range of stimuli, but we “wake up” and pay attention when an extreme stimulus deviates from this range—the so-called “orienting reflex.”⁶¹ And

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⁵⁹. Id. at 18, 171.

⁶⁰. The USFL never cashed the check, which was trebled to $3.76 plus interest in accordance with antitrust law. Darren Rovell, *Former Executive Holding Onto Monumental Check*, http://www.thisistheusfl.com/ESPN_20th_ChecksandBalances.htm (last visited Nov. 26, 2005).

once beyond the act of perception, our brains continue to give extreme stimuli disproportionate weight in emotion,\textsuperscript{62} evaluative judgment,\textsuperscript{63} and impression formation.\textsuperscript{64}

An additional factor—more social than neurological—is suggested by linguistic and cognitive theories of conversational pragmatics. In a widely cited 1975 paper, Paul Grice proposed that a list of "conversational maxims" are implicitly assumed by competent speakers during a conversation.\textsuperscript{65} His first maxim of quantity was that one should "make your contribution as informative as is required."\textsuperscript{66} Arguably, a description of a typical low-stakes lawsuit is not very informative for anyone. Of course, another of his maxims: "Do not say that for which you lack adequate evidence," is grossly violated by tort coverage in the media.\textsuperscript{67}

3. Implications for Media Coverage

If this line of reasoning is correct, then it may not be necessary (or even accurate) to invoke politics as an explanation for media distortion of jury awards. According to this account, the media should be preoccupied with extreme events—a claim that is hardly counterintuitive. But what is perhaps more novel about this account is that those extremes should be bilateral in some domains (drawn from both tails), but unilateral in others (drawn from one tail)—depending on the distribution in question. Table 3 offers examples of each type. I do not attempt to cite evidence for these cases because I think they are fairly self-evident to any consumer of the media.


\textsuperscript{63} See Russell H. Fazio et al., On the Automatic Activation of Attitudes, 50 J. PERSONALITY & SOC. PSYCHOL. 229 (1986).


\textsuperscript{65} H. P. Grice, Logic and Conversation, in 3 Syntax and Semantics 41 (P. Cole ed., 1975); \textit{but see} Dan Sperber & Deirdre Wilson, Relevance: Communication and Cognition (1986).

\textsuperscript{66} Grice, supra note 65, at 45.

\textsuperscript{67} Id. at 46.
Table 3
Newsworthy Outliers Drawn From Asymmetrical and Symmetrical Distributions

<table>
<thead>
<tr>
<th>Asymmetrical Distributions (one tail is newsworthy)</th>
<th>Symmetrical Distributions (both tails are newsworthy)</th>
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<td>Jury awards</td>
<td>Swings in corporate earnings and stock prices</td>
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<td>Lottery winners</td>
<td>Casino winners and losers</td>
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<tr>
<td>Campaign expenditures</td>
<td>Budget and trade deficits and surpluses</td>
</tr>
<tr>
<td>Human longevity (oldest)</td>
<td>Human height (shortest, tallest)</td>
</tr>
<tr>
<td>Most strikeouts by a baseball pitcher</td>
<td>Most wins or losses per season, for a baseball pitcher</td>
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<td>Record snowfalls</td>
<td>Record temperatures</td>
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</tbody>
</table>

This stimulus-based account has several attractive features. It accounts for the magnitude effect (the fact that reported awards are disproportionately high), the case-type effect (the overrepresentation of product and medical cases, which produce higher damages than auto cases), the plaintiff effect (defense verdicts cannot really be "extreme"), and the trial effect (settlements are less likely to happen if they are too extreme, and do not always get revealed to the press anyway). It is memetic, in keeping with a growing recognition that the formal features of a message can encourage its propagation, irrespective of any intent by the communicator or recipient.68 And notably, the stimulus-based account works without any political conspiracies—or at least, in addition to any conspiracies.69 To say this is not to argue that the media distortion is politically neutral in its consequences. It is


surely pernicious, distorting decisionmaking by injury victims, lawyers, manufacturers, and government. Whether the net effect actually benefits tort reformers is a question addressed in the final section.

E. But What About Tort Tales?

The pattern of distortion this article is attempting to explain is the statistical misrepresentation of torts. But at various points I have invoked the media’s fascination with “tort tales” as a constraint on these explanations. It is not logically necessary for an explanation for the statistical distortion to also explain the focus on tort tales, but it would help. And on its face, the telling of tort tales seems to reveal a pro-tort-reform bias. But it is easy to offer a brief sketch of why we might be attracted to tort tales, irrespective of any political motives.

Narrative structures play a central role in human cognition, and sociolegal scholars have argued that lay people think about legal cases by constructing stories rather than employing abstract doctrinal or Bayesian analysis. Tort tales are not just comprehensible, they are engaging and even entertaining. Incongruent or unexpected events are particularly likely to attract our attention and to provoke rumination.

In a very short narrative, they set up an expectation—surely the jurors will see right through this outrageous legal claim—and then violate it. The fact that the outcome seems unexpectedly unfair rather than unexpectedly fair is icing on the cake, because bad outcomes attract more attention than good outcomes. Evolutionary psycholo-


gists even maintain that there is an evolved "cheater detection module" in the brain; if so, tort tales involving successful but undeserving plaintiffs seem particularly well suited to trigger it.\(^{74}\)

V. DOES MEDIA DISTORTION REALLY BENEFIT THE TORT REFORMERS?

Recall the argument that rational actors—potential and actual defendants, potential and actual plaintiffs, and their lawyers—ought to base their tort-relevant decisions on the expected value of a lawsuit at trial. But notice that the media is grossly overestimating that expected value, with respect to the probability of trial, the probability of a plaintiff victory, and the size of the resulting award. So if citizens do in fact base their expectations in part on what they learn about tort outcomes from the media, then it follows, all this being equal, that the media distortion is (a) increasing the rate at which citizens file lawsuits; (b) discouraging plaintiffs and their attorneys from settling out of court; (c) informing jurors that it is "normal" to award large amounts; and (d) discouraging producers and innovators from engaging in otherwise beneficial actions. So why should tort reformers embrace a process that actually encourages litigation, large awards, and overdeterrence?

One possibility, which I will acknowledge but not pursue, is that tort reformers do not assume citizens are rational economic actors. But it seems doubtful that anyone really believes citizens are completely impervious to the expected consequences of their actions. I will also note that it is puzzling why tort reformers highlight cases involving deep-pocket defendants, if in fact the goal is to win support among ordinary citizens.

But I suspect that tort reformers believe that the "greedy plaintiffs and irrational juries" message works because of its moral content—because it offends popular standards of equity, justice, and morality. The problem with this as a rhetorical approach is that two messages are being delivered simultaneously. To explain this point, it is helpful to make use of Robert Cialdini's important distinction between injunctive norms (what others think I should do in this situation) and descriptive norms (what others are doing in this situation).\(^{75}\)

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75. See Robert B. Cialdini et al., A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places, 58 J. PERSONALITY & SOC. PSYCHOL. 1015 (1990); Carl A. Kallgren et al., A Focus Theory of Normative Conduct: When Norms Do and Do
Cialdini’s focus theory of normative influence predicted that the momentary salience of each normative source (descriptive and injunctive) will determine their joint influence on behavior. He and his colleagues have tested the theory in numerous field experiments involving littering of public spaces, where they have manipulated the salience and content of injunctive and descriptive norms in the environment and observed the effects on those passing through the environment.

Cialdini made the provocative suggestion that many public service advertisements may have actually backfired because they presented descriptive normative information that conflicted with the stated injunctive messages. Take, for instance, the classic antilittering ad featuring actor Iron Eyes Cody, in full Native American ritual garb, tearfully eying a heavily littered beach, further desecrated by trash thrown from a passing car. Cialdini argued that the poignant injunctive message—littering is a tragic betrayal of our planet—may well have been subtly undermined by the clear descriptive message: “[T]his is how people usually behave at this beach.”76 The result? More littering.

Dan Kahan offered a related argument regarding tax compliance:

When government engages in dramatic gestures to make individuals aware that the penalties for tax evasion are being increased, it also causes individuals to infer that more taxpayers than they thought are choosing to evade. This inference, in turn, triggers a reciprocal motive to evade, which dominates the greater material incentive to comply associated with the higher than expected penalty.77

Similar concerns have been raised in the prevention literature. For example, Dishion, McCord, and Poulin argued that interventions for juvenile delinquency often inadvertently reinforce problem behavior by bringing delinquent youth together in settings with few if any non-delinquent peers.78 Finding that college students actually overestimate the prevalence of binge drinking on their campus, Prentice and


76. Cialdini et al., supra note 75.
Miller argued that an important prevention strategy is to present the behavior as statistically deviant, rather than as a growing menace.79

Theory and research on the anchoring-and-adjustment heuristic80 and on the range-frequency model also suggest that the availability or salience of large dollar awards could inflate lay judgments.81 There are many empirical demonstrations that the availability or salience of large scale values can increase the magnitude of judgments about lesser stimuli.82 In fact, some of the most striking examples involve tort litigation, where plaintiff recommendations and caps on damages each serve to inflate judgments in laboratory experiments.83

But has the tort reform campaign not been a big success? It is hard to know how to operationalize such a claim or what baseline to use for comparison. There have been many small victories, and both Bush administrations have featured it prominently from the bully pulpit. But it is striking just how few of the major goals have been achieved— we have not abandoned the contingency fee or the civil jury (unlike England), and most jurisdictions have not adopted a loser pays rule (again, unlike England) or caps on damages.84 Those states that have

84. My colleague Stephen D. Sugarman argues that “[a]fter 30 years of fighting, although most States have engaged in some statutory reform, the overall pattern across the nation is something of a crazy quilt, with different States adopting very different parts of the defence package.” Stephen D. Sugarman, United States Tort Reform Wars, 25 U. NEW S.WALES L.J. 849, 852 (2002).
capped either or both damages and contingency fees may have reduced litigation rates, and surveys indicate that many jury pool members share tort reformers' jaundiced views of plaintiffs, attorneys, and runaway juries. But it is not clear to what extent these views were shaped by tort reform ads or media coverage.

An experiment by Elizabeth Loftus did find that mock jurors who were exposed to tort reform ads recommended significantly (but not dramatically) smaller awards than those in an unexposed condition. But because actual reform ads were used, the injunctive message (large awards are bad) and the descriptive message (large awards are increasingly common) were confounded. In a later study, Greene, Goodman, and Loftus found a significant positive correlation between jury-pool members beliefs about the frequency of large jury awards and their subsequent award recommendations in a mock trial: "[J]urors who believed that million dollar awards were common tended to award more, not less." To the extent that messages become dissociated from their sources, and from each other, over time, it is conceivable that the descriptive norm content of a tort reform ad has a delayed and diffuse effect that is independent of its moral disapprobation. Moreover, even if jurors are persuaded by the injunctive message, prospective plaintiffs and their attorneys seem more likely to attend to the enticement of the descriptive message.

VI. CONCLUSION

Thus, distortion in tort reporting may have several simultaneous effects, and these effects are in tension. The injunctive message that "the system is irrational and unfair" may be advancing tort reform in
citizen voting and state and federal legislative behavior. The descriptive message that one should expect large and frequent awards may be encouraging the filing of lawsuits, inflated settlement offers, and overdeterrence. Because we do not yet know the magnitude of either type of influence, we should not take for granted that the net effect of distorted reporting benefits those who favor tort reform. If there is even a grain of truth in conventional models of litigation behavior, it is far from clear why tort reformers should unequivocally welcome, or why the plaintiffs' bar should decry, media coverage that exaggerates the public view that lawsuits (especially those involving products or doctors) have a good chance of going to trial and providing plaintiffs with a victory and a very large award.