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Planet of the APs: Reflections on the Scale of Law and Its Users

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Planet of the APs: Reflections on the Scale of Law and its Users†

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> [O]ne can no more predict the outcome of a case from the facts and the law than one can predict the outcome of a game of chess from the positions of the pieces and the rules of the game. In either case, one needs to know who is playing.
>
> Lynn M. LoPucki & Walter O. Weyrauch[1]

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† The James McCormick Mitchell Lecture, University at Buffalo Law School, April 18, 2005. The themes of this lecture have been percolating with me intermittently for a number of years. I am indebted to the Mitchell Lecture committee for providing an opportunity to bring it to long-postponed fruition and to Jim Wooten for his bountiful assistance in the run-up to the lecture. I am grateful to the participants in several workshops and seminars at various institutions. I would like to mention particularly the helpfulness of Stephen M. Bainbridge and the excellent research assistance of William B. Turner.

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1. *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1472 (2000).

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I. THE ASCENT OF THE APS

Our human world is populated by several kinds of creatures: the most familiar are we natural, biological, individual humans. But the world also contains artificial "corporate" actors. Blackstone sums up the distinction neatly:

> Natural persons are such as the God of nature formed us: artificial are such as are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.[2]

In the course of a typical day each of us consumes the products and employs the services of innumerable corporations, which supply us with foodstuffs, medications, television programs, and books as well as telephones, automobiles, insurance, banking services, and on and on. My normal progress through the day would be unsustainable without these creatures that routinely deliver unimaginable prodigies of organization and performance. These corporate creatures or artificial persons (APs) are one of humanity's great inventions. They have proved a tool for complex and coordinated action of a scale, consistency, and perseverance vastly beyond the range of biological individuals or informal groupings.

But these creatures are more than passive instruments serving our needs and desires. Their presence changes our world and it changes us. Like Dr. Frankenstein's creation,

2. WILLIAM BLACKSTONE, 1 COMMENTARIES *119.

they both reflect and escape from the purposes of their creators. I propose to examine the way that the growing presence of APs affects the character of our legal world, especially its institutions of civil justice.

Before moving to these questions it may be helpful to address in a preliminary way the question of the "reality" of APs. In what sense are APs entities that can act and can pursue interests or goals? A great deal of energy has been expended in theorizing about the nature of the corporation: The terminology differs, but the basic controversy is over whether a corporation is (1) a merely nominal entity; (2) a group or partnership of natural persons (NPs); (3) a natural entity or "person" in its own right. Over time the third has come to predominate in official and popular usage.[3]

The personhood of the corporation is denied by a theory popular among academics which regards the corporation as a nexus or web of explicit and implicit contracts.[4] "The description of the corporation as a nexus of contracts not only de-personalizes the corporation, it denies that there is any body there at all. . . . [I]t denies that there is anything distinctive out there to regulate. All there are are natural people engaged in their own individualized wealth-maximizing activities."[5] In the nexus view, reference to corporations as actors is a fiction or reification.[6] But the equal and opposite sin to reification is reductionism. Applying the same analysis, is not a contract merely a nexus of expectations, which in turn are nexuses of perceptions, and so forth? Why are contracts more fundamental building blocks of the "real" than

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3. *See* Morton J. Horwitz, Santa Clara *Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990); Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563 (1987).

4. *See* Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 99-100 (1989); Frank H. Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

5. David Millon, *Personifying the Corporate Body*, 2 GRAVEN IMAGES 116, 123 (1995).

6. For a richer view of corporations as political entities with law-making and law-applying capacities, see Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-Century American Legal Thought*, 30 LAW & SOC. INQUIRY 179 (2005).

corporations? Or than the law of California, for that matter, which is after all just a nexus of expectations about what courts and other officials will do? Are corporations to be singled out for deconstructive treatment that could be applied equally to all institutions? To show that something is made up of constituent elements is not much of a trick. The question is not, it seems to me, what corporations "really" are, but whether it makes sense to address entities at this level for the purposes of assigning entitlements and fashioning controls.

Like the common law tradition, ordinary English speech concurs in attributing a distinct moral status to corporations: analysis of linguistic usage shows that "extension of human properties to corporate bodies is woven into the very fabric of language."[7] While the use of physiological references in connection with institutions is taken as metaphoric or metonymic, "cognitive verbs and many activity words, when used with institutional nouns, have precisely the same meanings that they have with person nouns."[8]

> [N]ouns such as "corporation" occupy their own special class. Institutional nouns have unique properties. First, although physiological verbs, in their literal senses, are inappropriate with them, cognitive verbs reign supreme. So far as language is concerned, institutions do not have bodies—they indeed are incorporeal and intangible—but they certainly do have minds. They think and they feel and they say. Next, there are many activity verbs that are compatible with, and literally applicable to, institutional nouns, so that, linguistically, the institutions are viewed as competent to perform the designated acts. To be sure, language does not regard institutions as fully human, but it does impute important human characteristics to them—mentalities and the ability to pursue social activities. As a consequence, language treats the ensuing thoughts and actions as belonging to the institutions themselves—and not to the hidden members. This perspective from language turns out to be most congenial to the personal [i.e., entity] theory of corporate personality.[9]

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7. Schane, *supra* note 3, at 594-95.

8. *Id.* at 606.

9. *Id.* at 607.

That corporations are regarded as actors in their own right does not imply that moral standing equivalent to that of natural persons need be attributed to them. Nor are they necessarily regarded as the bearers of equal legal rights and responsibilities. For example, researchers describe jurors holding corporations to higher standards of responsibility in keeping with their greater perceived capacity to foresee and prevent harm.[10]

In other ways, too, APs may be more complete or competent persons. To a far greater extent than natural persons, APs may be capable of acting in the purposeful, rational, calculating fashion that the legal system prefers to ascribe to actors.[11] James Coleman describes APs as less susceptible to the lapses of willpower that are endemic to the activities of natural persons.[12] Chris Guthrie suggests that institutional litigants, "repeat players with active caseloads who are likely to view litigation primarily as a financial matter," are less likely than NPs to be emotionally disabled by "regret aversion" in pursuing litigation.[13] But APs suffer their own distinctive infirmities (what sociologists might label "goal displacement" and economists might view as "agency problems") that impede the optimal pursuit of their corporate interests or goals. These include the concealment or distortion of information as it flows up

10. *See* VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY (2000); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep-Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996).

11. *See* Hans Geser, *Organisationen als socziale Akteure* [Organizations as Social Actors], 19 ZEITSCHRIFT FÜR SOZIOLOGIE 401 (1990) (F.R.G.), *available at* http://socio.ch/arbeit/t_hgeser5.htm.

12. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 548 (1990) (defining willpower as "the power to prevent short-term interests from overwhelming long-tern interests"). He observes that the power asymmetry in interactions between NPs and APs is due in part to the fact that "one actor is a corporate actor, constructed differently from natural persons. The consequence is that a corporate actor is in a unique position to exploit weakness of will in natural persons, even to exploit the potential for such weakness by encouraging impulsive action." *Id.* at 549.

13. Chris Guthrie, *Better Settle Than Sorry: The Regret Aversion Theory of Litigation Behavior*, 1999 U. ILL. L. REV 43, 82.

the organizational hierarchy,[14] the perpetuation of unrealistic belief systems,[15] excessive optimism,[16] and a bias against relinquishing commitments, even in the face of contrary evidence[17]—traits that flourish in the small group setting of corporate decision-making.[18]

Of course, APs are staffed by NPs. APs have proven proficient in mobilizing the energies and engaging the loyalties of NPs, providing a sense of meaning and purpose, and even inspiring personal sacrifice. NPs often fuse their personal goals with those of APs, finding them vehicles for fulfillment of their central personal aspirations. Loyalty to APs may induce individuals to act contrary to the interests of NPs such as themselves—and sometimes indeed to their very selves.[19]

APs are not the only kinds of collectivities in which natural persons participate. APs are outnumbered, even now, by much more widespread and pervasive "primordial" institutions—families, religious fellowships, networks of transactors, neighbors, and friends. Until very recently these "spontaneous," "communal" institutions were the predominant forms of social organization. Some APs were present—governmental bodies, religious institutions, and a scatter of incorporated utilities, banks, and commercial enterprises—but most human activity was conducted

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14. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (And Cause Other Social Harms)*, 146 U. PA. L. REV. 122 (1997).

15. *Id.* at 133.

16. *Id.* at 139-40.

17. *Id.* at 142-43; *see also* John M. Darley, *How Organizations Socialize Individuals into Evildoing*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13 (David M. Messick & Ann E. Terbrunsel eds., 1994).

18. *See* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Darley, *supra* note 17, at 13-43 (1996).

19. For example, consider the story of Victor Crawford, a former Tobacco Institute lobbyist who died of lung cancer (after conversion to anti-tobacco activism). Jason Vest, *No More Smoke Screens: Cancer, Then Remorse, Strikes an Ex-Tobacco Lobbyist*, WASH. POST, Mar. 4, 1995, at C1. Or Frank Cornelius, an insurance lobbyist who led a successful effort to limit recoveries in Indiana before becoming the victim of catastrophic medical injuries. Andrew Blum, *Ex-Tort Reformer's Son Carries on the Fight*, NAT'L L.J., Apr. 17, 1995, at A10.

through these informal groupings.[20] Over the course of the last century there has been a dramatic transformation in the organization of social life from primordial institutions to "purposively constructed" organizations with specific goals and formal structures.[21] The family-owned corner grocery has been replaced by the supermarket, which is now being challenged by the national big-box retailer; the neighborhood doctor has become part of a Health Maintenance Organization (HMO); local musicians have been overshadowed by the fare provided by entertainment conglomerates. An increasing portion of our encounters, transactions, and relationships are with APs.[22]

The emergence of APs entails a change in our relationship to the law. If primordial or communal

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20. On the regulatory aspects of these, in contemporary society, see Marc Galanter, *Justice in Many Rooms: Courts, Private Ordering and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981); Stewart Macaulay, *Private Government*, *in* LAW AND THE SOCIAL SCIENCES 445 (Leon Lipson & Stanton Wheeler eds., 1986); Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 LAW & SOC'Y 719 (1973).

21. James S. Coleman, *The Rational Reconstruction of Society: 1992 Presidential Address*, AM. SOC. REV., Feb. 1993, at 1. I do not regard this as necessarily implying a loss of "community." Arthur Stinchcombe points out that rather than being mutually inimical, "the solidarity of communal groups is intimately dependent on their degree of formal organization." Arthur Stinchcombe, *Social Structure and Organizations*, *in* HANDBOOK OF ORGANIZATIONS (James E. March ed., 1965). Nor should the shift from enclosed self-contained inclusive communities to looser, overlapping, partial communities be deplored as a loss of human autonomy or amenity. *Cf.* SALLY ENGLE MERRY, GETTING JUSTICE OR GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 172-76 (1990).

22. The population of APs has been increasing more rapidly than the population of NPs. In 1950, there were 629,314 active corporations in the United States; in 2001, there were 5,136,000. If we eliminate the 2,986,000 S corporations, that leaves a total of some 2,150,000 active corporations—more than three times the total half a century earlier. Of these, some 26,000 had receipts of more than $50 million in 2001. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbls.725, 726 & 955 (2004-2005), http://www.census.gov/prod/www/statistical-abstract-2001_2005.html. (The NP population of the United States grew by 86% during the second half of the twentieth century.) A rough measure of the increasing prominence of APs in innovative economic activity is provided by figures on patents for invention. In 1980, corporations were the recipients of 46,000 (76%) of the 66,200 patents issued for inventions by the U.S. Patent Office. In 2003, corporations received 148,000 (88%) of the 169,000 invention patents. In other words, patents issued to individuals rose by more than one-third from 1980 to 2003, while patents issued to corporations more than tripled. U.S. CENSUS BUREAU, *supra*, at tbl.744.

institutions are "socially constructed," artificial persons such as corporations and governments are legally constructed. In addition to the front line activity of, for example, manufacturing and selling widgets, the corporate actor contains devices for governing and modifying this activity. Like H.L.A. Hart's legal systems, they contain a combination of primary rules and secondary rules (rules about the making, changing, and application of rules).[23] They contain rules about their internal operations and about relations with suppliers, customers, and employees. Not only are these corporate creatures themselves little legal systems, but they enjoy an affinity with the big, public legal system. They resemble that system in their reliance upon bureaucratic organization, written records, and formal rules.

The increasing presence of APs in our world makes law more salient. Relations with APs are regulated more by law than are relationships among NPs and primordial institutions, in which the admixture of "informal" norms and reciprocities is higher. Where APs are involved, regulation is more formal and more likely to rely upon, be modeled on, or invoke law. Where public law is not immediately present, it is mirrored in great webs of rules (for example in the coverage provisions of HMOs) or *faux* law (for example in airlines' frequent-flier programs).

As more of our encounters and relationships are with APs, an increasing portion of our troubles and disputes are with APs, rather than with other NPs. Conflicts arising from such relationships increasingly come to the legal system and are regulated by public law as well as by the law-like rules generated within APs. (Regulated here doesn't mean "determined"; law can be present, needing to be "taken into account," even where it is not "in charge.")

Thus an increasing portion of matters taken up by legal institutions are conflicts between individuals and organizations (i.e., between NPs and APs). Great parts of the civil justice system are populated by claims of APs against NPs, mostly routine matters of debt collection, foreclosure, replevin, and so forth.[24] And other sectors of the

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23. H.L.A. HART, THE CONCEPT OF LAW (1961).

24. PUBLIC CITIZEN, FREQUENT FILERS: CORPORATE HYPOCRISY IN ACCESSING THE COURTS (2004) (cases of types typically filed by businesses against

civil justice system are devoted mainly to individuals seeking to hold APs to account. A study of civil litigation in the state courts of general jurisdiction of the seventy-five most populous counties of the United States found that in 1992, APs were the plaintiffs in some 73% of contracts cases and only 6% of torts cases, while they defended 60% of contracts cases and more than half of torts cases.[25] In the federal courts, Gillian Hadfield estimates that in 1970 organizations were plaintiffs in some 43% of civil cases and defendants in some 67%. In that year 41% of cases involved individual plaintiffs suing organizational defendants. By 2000, organizational defendants had increased to 83% but organization plaintiffs had decreased to 30%, so that 60% of cases were now individual plaintiffs versus organizational defendants.[26] There is no comparable data for the state courts where the vast majority of cases are located, but we have some indication that the overall configuration of parties is similar. In 60% of civil jury trials in the seventy-five counties in 1992 individual plaintiffs were opposed to organizational defendants.[27]

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individuals greatly outnumber case types typically filed by individuals against businesses).

25. CAROL J. DEFRANCES ET AL., U.S. DEP'T OF JUST., CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CONTRACT CASES IN LARGE COUNTIES tbl.4 (1996); STEVEN K. SMITH, ET AL., U.S. DEP'T OF JUST., CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: TORT CASES IN LARGE COUNTIES tbl.6 (1995), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/tcilc.pdf. In the tort cases, non-individuals (who I am for the moment equating with APs) were 49.7% of defendants, but we can safely assume that insurers were interested parties in a large portion of the other half of cases in which the nominal defendants were overwhelmingly individuals. *Id.* at tbl.6.

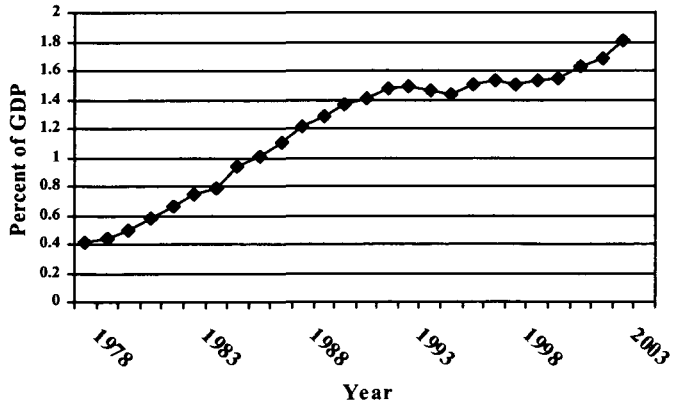
26. Gillian Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1298, 1304 (2005).

27. CAROL J. DEFRANCES ET AL., U.S. DEPT. OF JUSTICE, CIVIL JUSTICE SURVEY OF STATE COURTS, 1992: CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES 3 (1995). These magnitudes are confirmed by Gross and Syverud's study of trials-to-verdict in California in 1985-86 and 1990-91, where individuals made up about 94% of plaintiffs in both periods and only 30.6% (1985-86) and 32.6% (1990-91) of the defendants. Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 15, 18 (1996).

II. A SWOLLEN HEMISPHERE

Over the past half-century there has been a dramatic change in scale in many aspects of the legal world: the amount and complexity of legal regulation; the frequency of litigation; the amount of authoritative legal material; the number, coordination, and productivity of lawyers; the number of legal actors and the resources that they devote to legal activity; the amount of information about law and the velocity with which it circulates.[28] A crude but useful summary measure of the scope of legal activity is provided by looking at spending on law. The receipts of what the Census Bureau calls the legal services industry (basically, lawyers in private practice) grew from about four-tenths (0.4%) of one percent of the Gross Domestic Product (GDP) in 1978 to about one and eight-tenths percent (1.8%) in 2003.[29] This understates total spending on legal services for it does not include in-house legal services consumed by businesses or governments. In-house corporate lawyers and government lawyers (including judges) make up about one-fifth of all practicing lawyers. If we assume that they are as productive as lawyers in private practice, we can estimate that the "legal services" portion of GDP is now about two and a quarter percent—a portion over four times as large as it was a quarter-century earlier.

Figure 1. Expenditures on Legal Services as Percent of Gross Domestic Product, 1978–2003



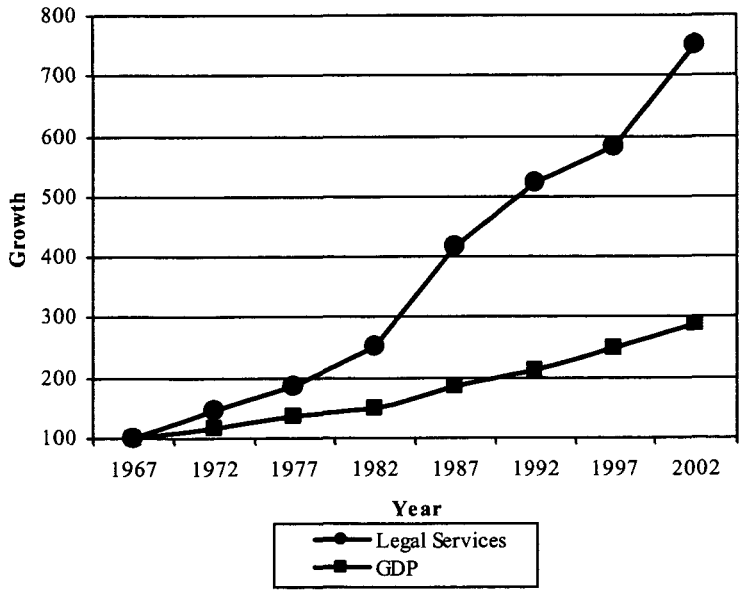
28. *See* Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1 (1992).

29. *See* sources cited *infra* Figure 1.

Sources: Legal Services data from U.S. Census Bureau, Current Business Reports: Service Annual Survey, 1983 to Present. The Census Bureau routinely revises published data in these reports from one year to the next. Where multiple figures were available, the most recent one was used. GDP data is in 2000 chained dollars, available from U.S. Department of Commerce, Bureau of Economic Analysis, http://www.bea.gov/bea/dn/home/gdp.htm (last visited March 9, 2006).

Given the substantial growth of the underlying economy, this growth in share represents a very substantial increase in the absolute size of the legal services industry. In constant 2000 dollars, the gross receipts of the U.S. law firms increased 649% from $22.15 billion in 1967 to $166.1 billion in 2002. Legal services expenditures grew much more rapidly than the economy as a whole. Figure 2 displays the growth of law (measured by legal services receipts) relative to the whole economy. Using 1967 as our baseline (n=100), legal services receipts reached 749 in 2002, while the GDP reached 289.

Figure 2. Growth of Gross Domestic Product Compared with Receipts of Legal Services Industry, 1967–2002, Five Year Intervals



Sources: Legal Services Industry from U.S. Census Bureau, Economic Census: Professional, Scientific, and Technical Services, 1972 to 2002; GDP data is in 2000 chained dollars, available from U.S. Department of Commerce, Bureau of Economic Analysis, http://www.bea.gov/bea/dn/home/gdp.htm (last visited March 9, 2006).

The provision of legal services to NPs and APs is performed by different lawyers, who are organized in different ways. Lawyers in the United States nominally form a single profession. But it is a profession that is intensely stratified. With due allowance for exceptions, the upper strata of the bar consist mostly of large firms whose members are recruited mainly from elite schools and who serve organizational clients; the lower strata practice as individuals or small firms, are drawn from less prestigious schools, and service individual clients. Law practice is a bifurcated structure, organized around different kinds of clients. Much of the variation within the profession, Heinz and Laumann conclude, is accounted for by

> one fundamental distinction—the distinction between lawyers who represent large organizations (corporations, labor unions, or government) and those who represent individuals. The two kinds of law practice are two hemispheres of the profession. Most lawyers reside exclusively in one hemisphere or the other and seldom, if ever, cross the equator.[30]

In the corporate hemisphere, a wider range of services is supplied over a longer duration; there is more specialization and coordination; research and investigation are more elaborate; tactics can be more innovative and less routine, etc.[31]

During recent decades there has been a dramatic increase in the presence of lawyers. From 1960 to 2000 the

30. JOHN H. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR 319 (1982).

31. On the contrasting styles of ordinary lawyering and mega-lawyering, see Marc Galanter, *Mega-Law and Mega-Lawyering in the Contemporary United States*," *in* THE SOCIOLOGY OF THE PROFESSIONS: LAWYERS, DOCTORS AND OTHERS 152 (Robert Dingwall & Philip Lewis eds., 1983).

number of lawyers in the United States more than tripled.[32] The law firms that service APs have multiplied, grown, and flourished while the sectors of the profession that serve individuals have been relatively stagnant in earnings and growth.[33] In 1960 the section of the profession consisting of large firms devoted to serving corporate clients consisted of just a few thousand lawyers but by 2000 over one hundred thousand lawyers worked in such firms.[34]

The increasing predominance of organizations as users of law is dramatically displayed by Heinz and Laumann's studies of the Chicago bar. They estimated that in 1975 "more than half (53 percent) of the total effort of Chicago's bar was devoted to the corporate client sector, and a smaller but still substantial proportion (40 percent) was expended on the personal client sector."[35] When the researchers returned to the field twenty years later, they found that there were roughly twice as many lawyers working in Chicago. But in 1995, about 64% of the total effort of all Chicago lawyers was devoted to the corporate client sector and only 29% to the personal/small business sector.[36] Since the number of lawyers in Chicago had doubled, this meant that the total effort devoted to the personal sector had increased by 45%. But the corporate sector grew by 126%. To the extent that lawyers serving the corporate sector were able to combine more staff and support services with their effort, these figures understate the gap in services delivered.

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32. The lawyer population increased 235% from 285,933 in 1960 to 1,066,328 in 2000. There was one lawyer for every 627 people in 1960 and one for every 264 people in 2000. CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 1 (2004).

33. *See* Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431 (1989).

34. In 1957 there were just thirty-eight law firms in the United States with more than fifty lawyers. ERWIN O. SMIGEL, THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN? 43 (1969). In 2000 over 122,000 lawyers (some 36% of firm lawyers and 18% of all lawyers in private practice) worked in the 737 firms with fifty-one or more lawyers. CARSON, *supra* note 32, at 9, 15.

35. HEINZ & LAUMANN, *supra* note 30, at 42.

36. John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751, 765 tbl.3 (1998).

Is this pattern peculiar to Chicago? Or to the largest metropolitan areas? The generality of both the contours of distribution and the patterns of change are suggested by census data. As the size of the legal services "pie" was increasing, businesses were buying a greater share of that pie. In 1967, individuals bought 55% of the product of the legal services industry and businesses bought 39%. In 2002, individual purchases had fallen to 41.4% and business purchases has risen to 47.4% of a much-enlarged total.[37] Table 1 summarizes these changes. Figures 2 and 3 depict the change in the portion of purchases of legal services by different categories of buyers.

37. From 1967 to 1992, with each subsequent five-year period, the business portion has increased and the share consumed by individuals declined. The apparent sharp reversal in 1997 (visible in Figure 3) is due to reporting error (as explained in the note to Figure 3, *infra*).

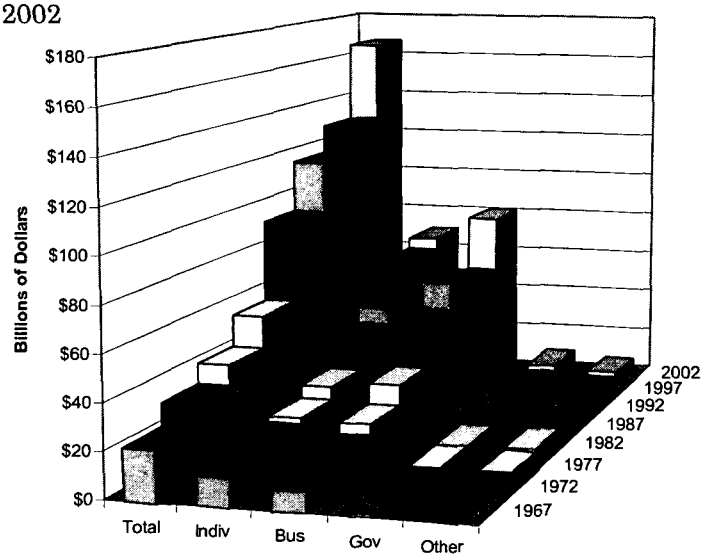
Table 1. Receipts of Legal Services Industry by Class of Client, 1967–2002 (Billions of Dollars)

	Total Suppliers	Total Receipts	Individuals	Business	Government	Other
1967						
2000 Dollars		$22.15	$12.20	$8.64	$1.31	*
Actual Dollars		$5.23	$2.88	$2.04	$0.31	*
% of Receipts		100%	55%	39%	6%	*
1972	77,282					
2000 Dollars		$32.47	$17.06	$13.73	$0.94	$0.74
Actual Dollars		$9.67	$5.08	$4.09	$0.28	$0.22
% of Receipts		100%	53%	42%	2.90%	2.30%
% Change from 1967		46.59%	39.85%	58.96%	-28.39%	
1977	94,882					
2000 Dollars		$41.03	$19.38	$18.23	$1.34	$0.98
Actual Dollars		$17.15	$8.10	$7.62	$0.56	$0.41
% of Receipts		100%	49%	46%	3.30%	2.50%
% Change from 1972		26.37%	13.61%	32.75%	42.51%	32.79%
1982	115,407					
2000 Dollars		$55.76	$24.81	$27.11	$1.79	$2.03
Actual Dollars		$34.32	$15.27	$16.69	$1.10	$1.25
% of Receipts		100%	45%	50%	3.30%	3.70%
% Change from 1977		35.88%	28.00%	48.72%	33.38%	107.01%
1987	138,222					
2000 Dollars		$92.42	$38.78	$47.07	$3.19	$3.39
Actual Dollars		$66.99	$28.11	$34.12	$2.31	$2.46
% of Receipts		100%	42%	51%	3.40%	3.70%
% Change from 1982		65.75%	56.32%	73.60%	78.33%	67.12%
1992	142,606					
2000 Dollars		$115.65	$46.70	$60.04	$4.46	$4.44
Actual Dollars		$99.14	$40.03	$51.47	$3.82	$3.81
% of Receipts		100%	40%	51%	3.80%	3.80%
% Change from 1987		25.14%	20.42%	27.56%	39.84%	30.97%
1997	165,757					
2000 Dollars		$129.00	$63.43	$54.47	$3.96	$1.73
Actual Dollars		$122.62	$60.29	$51.78	$3.76	$1.64
% of Receipts		100%	49.62%	42.20%	3.10%	1.30%
% Change from 1992		23.68%	50.61%	0.60%	-1.57%	-56.96%
2002	179,346					
2000 Dollars		$166.10	$68.73	$79.61	$6.28	$4.15
Actual Dollars		$171.83	$71.10	$82.36	$6.50	$4.29
% of Receipts		100.00%	41.40%	47.90%	3.80%	2.50%
% Change from 1997		40.13%	17.93%	59.06%	72.87%	161.59%

Sources: Legal Services Industry from U.S. Census Bureau, Economic Census: Professional, Scientific, and Technical Services, 1972 through 2002; Price deflator for 2000 dollar values from http://research.stlouisfed.org/fred2/data/GDPDEF.txt (last visited March 9, 2006). For 1967 only total receipts overall are available from the U.S. Census. Percentages for classes of clients are taken from Richard H. Sander & E. Douglas Williams, *Why are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431, 441 (1989). In their analyses, government and other are combined categories, thus the 6% figure includes both categories. Calculations of percentage change of these categories from 1967 to 1972 combines government and other.

Table 1 indicates that individuals' expenditures on legal services (in constant dollars) increased 463% from 1967 to 1992, while law firms' receipts from businesses increased by 821% during that period. Even this higher rate of growth understates the growth of business expenditures on legal services, for it includes only outside lawyers and does not include in-house legal expenditures, which greatly increased during this period.[38] Figures 3 and 4 display the relative growth in legal services receipts from the various kinds of clients.

Figure 3. Receipts of Legal Service Industry by Class of Client, 1967-2002



38. For exclusion of in-house legal services from Census of Service Industries, see the introduction to the U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1982 CENSUS OF SERVICE INDUSTRIES, iii-vi (1984).

Source: U.S. Census Bureau, Economic Census, 1972 through 2002.

Note: The component figures for 1997 are plainly anomalous: the clear trend of receipts from business growing faster than receipts from individuals over the entire period suddenly reverses in 1997 and reverts in 2002. This is the result of reporting error. According to Holly C. Higgins, Survey Statistician, U.S. Bureau of the Census, a number of firms that year entered all of their receipts on the line, "All other fees received," which appears on the form as a sub-category of Individuals. For the firms so reporting, receipts that came from Business, Government, or Other sources were counted as receipts from Individuals, which explains why the figure for Individuals grew much faster than the figure for Business in 1997. E-mail from Holly C. Higgins, Survey Statistician, U.S. Bureau of the Census, to William B. Turner, (Aug. 11, 2005) (on file with author).

We may think that the presence of dedicated "public interest lawyers" or "cause lawyers" and the "pro bono" exertions of corporate firms help to offset this imbalance. Pro bono volunteers "do a tremendous service representing individual poor clients in routine matters and lending their institutional resources to support the reform agendas of public interest groups."[39] But pro bono work is ultimately constrained by the interests of the provider firms, who are vigorous advocates for corporate clients. Public interest law firms may be free of such constraint, but it should be noted that the public interest law format has been successfully borrowed by groups aligned with corporate parties, so that there now is at least as much "public interest" lawyering on behalf of corporations and their allies as there is on behalf of their antagonists.[40]

As law, driven by corporate expenditures, becomes more technical, complex, and expensive, individuals are just the

39. Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1, 147 (2004). Estimating the scale of pro bono activity, Deborah Rhode concludes that "the best available research finds that American lawyers average less than half an hour of work per week and under half a dollar per day in support of pro bono legal services." Deborah L. Rhode, *Pro Bono in Principle and in Practice*, 26 HAMLINE J. PUB. L. & POL'Y 315, 328 (2005).

40. BRIAN TAMANAHA, THE STRUGGLE FOR LAW AS A MEANS TO AN END ch. 8 (forthcoming 2006).

wrong size to use legal services effectively.[41] It is a rare instance in which the kinds of options that are routine for large organizations are feasible and effective for individuals. "[T]he market for lawyers," Gillian Hadfield observes, "overwhelmingly allocates legal resources to clients with interests backed by corporate aggregations of wealth."[42] The aspects of the legal system most responsive to the needs and aspirations of individuals absorb less of its energy and attention as "the legal system prices itself out of the reach of all individuals except those with a claim on corporate wealth."[43] So the system is "heavily, and it seems increasingly, skewed towards managing the economy rather than safeguarding just relationships and democratic institutions."[44] As the courts focus more on economic issues, the message is that this is what adjudication should be about. Tort reform campaigns attack the propriety of "non-

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41. For example, the legal aid attorney who prevailed in the landmark unconscionability case of Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965), reported that the case required 210 hours of legal work. Robert H. Skilton & Orrin L. Helstad, *Protection of the Installment Buyer of Goods under the Uniform Commercial Code*, 65 MICH. L. REV. 1465, 1480 n.38 (1967). At a modest (for the 1960s) hourly fee of $25, protection of Mrs. William's $1800 worth of purchases would have cost her $5250 in lawyers' fees alone. An even more daunting example is provided by the experience of A. Ernest Fitzgerald, the Air Force cost analyst who disclosed the multibillion dollar cost overrun in the C-5A transport. In the course of winning his six-year fight for reinstatement (with back pay) in his $31,000 per year job, he accumulated lawyers fees of more than $400,000:

> [A] small army of Government lawyers was set to work against Mr. Fitzgerald—lawyers representing the Air Force, the Department of Defense, the Justice Department, the United States Attorney's Office and the Civil Service Commission.
>
> These lawyers delayed hearings, refusing to turn over documents, appealed every concession made, filed motions that required scores of time-consuming proceedings taking up time—and all the while Mr. Fitzgerald's attorneys were costing him $125 an hour.

Broad Effects Seen From Award of Legal Fees to Pentagon Aide, N.Y. TIMES, Jan. 2, 1976, at 8. A more recent example is provided by the inability of well-resourced individuals like the Clintons to finance their legal fees. *See* Stuart Taylor, *"Brother, Can You Spare Some Fees?"*, LEGAL TIMES, Mar. 18, 1996, at 23.

42. Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 998 (2000).

43. *Id.*

44. *Id.* at 1004.

economic" damages with the implication that "non-economic" items like pain, suffering, and disfigurement are unmeasurable, unsubstantial, and illusory.

III. THE WINNING WAYS OF APS

Not only do APs occupy more of the legal realm, they are more resourceful and more successful users of law than NPs. Unsurprisingly, in those arenas like lobbying[45] or administrative hearings[46] where actors can deploy the full range of their assets, recurrent organizational players fare better than individuals. Such advantages appear also in the judicial forum, in which parties are ostensibly on an equal footing. Some years ago, I attempted to identify some of the advantages enjoyed by recurrent (usually organizational) players ("repeat-players") over infrequent individual players ("one-shotters").[47] Briefly, my catalog included:

- ability to utilize advance intelligence, structure the next transaction, build a record and so forth.
- ability to develop expertise; ready access to specialists; economies of scale and low start-up costs for any case.

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45. *See* Lester M. Salamon & John J. Siegfried, *Economic Power and Political Influence: The Impact of Industry Structure on Public Policy*, 71 AM. POL. SCI. REV. 1026 (1977).

46. *See* Erasmus H. Kloman, *Public Participation in Technology Assessment*, 35 PUB. ADMIN. REV. 67 (1975).

47. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97 (1974). A number of scholars have identified further advantages of the corporate player in the legal arena, including the ability to impede less formidable opponents from using the legal process by bringing "SLAPP suits" ("Strategic Litigation Against Public Participation"). *See, e.g.*, GEORGE W. PRING & PENELOPE CANAN, SLAPPs: GETTING SUED FOR SPEAKING OUT (1996); FIONA J. L. DONSON, LEGAL INTIMIDATION: A SLAPP IN THE FACE OF DEMOCRACY (2000). Alternatively, repeat-players (who are almost always APs) may raise the barrier to challenges by manipulating the conflict of interest rules to prevent opponents from obtaining high-quality specialized representation. SUSAN P. SHAPIRO, TANGLED LOYALTIES: CONFLICT OF INTEREST IN LEGAL PRACTICE 182-84 (2002). Again, sheer scale may enable an AP to play for rules simultaneously and strategically in a number of different subject areas, carrying favorable rules "established in one substantive law area . . . to others." Lea VanderVelde, *Wal-Mart as a Phenomenon in the Legal World: Matters of Scale, Scale Matters*, *in* WAL-MART WORLD (Stanley Braun ed., forthcoming 2006).

- opportunity to develop facilitative informal relations with institutional incumbents.
- ability to establish and maintain credibility as a combatant. With no bargaining reputation to maintain, the one-time litigant has greater difficulty in convincing establishing commitments to his bargaining positions.[48]
- ability to play the odds. The larger the matter at issue looms for the one-shotter, the more likely he is to avoid risk (that is, minimize the probability of maximum loss). The greater size of these recurrent organizational litigants means that the stakes are both absolutely larger (and thus justify greater expenditures) and relatively smaller, so they can adopt strategies calculated to maximize gain over a long series of cases, even where this involves the risk of maximum loss in some cases. (This advantage is an application of a much more general capacity of corporate actors to utilize actuarial practices that "allow power to be exercised more effectively and at lower political cost.")[49]
- ability to play for rules as well as immediate gains. It is worthwhile for a recurrent litigant to expend resources in influencing the making of relevant rules by lobbying and so forth.[50] Recurrent litigants can

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48. H. LAWRENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT 156 (1970); THOMAS C. SHELLING, THE STRATEGY OF CONFLICT 22, 41 (1963).

49. Jonathan Simon, *The Ideological Effects of Actuarial Practices*, 21 LAW & SOC'Y REV. 771 (1988).

50. Lobbying may be subtle and may be directed to judges as well as legislators and administrators. On the organized provision of "educational" junkets for judges by corporate partisans, see DOUGLAS T. KENDALL & JASON C. RYLANDER, COMMUNITY RIGHTS COUNSEL, TAINTED JUSTICE: HOW PRIVATE JUDICIAL TRIPS UNDERMINE PUBLIC TRUST IN THE FEDERAL JUDICIARY (2004); ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993). Gary Edmond and David Mercer describe the role of corporate-sponsored think-tanks and polemicists in promoting the convergence of judicial attitudes about expert evidence and civil liability with "legal weapons [that] were crafted and refined in corporate foundries." Gary Edmond & David Mercer, Daubert *and the Exclusionary Ethos: The Convergence of* Corporate *and* Judicial *Attitudes towards the Admissibility of Expert Evidence in Tort Litigation*, 26 LAW & POL'Y 231, 251 (2004). The latest variation of "lobbying" the judiciary is "seeding" the research of independent scholars in the hope of

also play for rules in litigation itself whereas a one-time litigant is unlikely to do so.

In the years since these speculations were first published, many researchers have attempted to test the presence and magnitude of such advantages.[51] In the current American setting, the well-resourced repeat-player (RP) is in almost all cases an organization, so that researchers have variously operationalized RPs as organizations, businesses, etc. A body of evidence has accumulated showing that organizations do better than individuals in almost every kind of litigation, at almost every stage, and as both plaintiffs and defendants.

Two recent studies of federal court litigation suggest that organizational litigants win more frequently and lose less often than do individuals. Terence Dunworth and Joel Rogers compared the litigation of the largest corporations with that of all other parties in the federal courts for a twenty-year period. The largest corporations were more successful both as plaintiffs and as defendants: they won 79% of the federal cases in which they were plaintiffs, compared to 62% won by all other parties.[52] As defendants, the gap was even greater: the largest corporations won

producing literature that would be useful ammunition for advocacy. Thus the Exxon Corporation promoted and supported extensive research on punitive damages by prominent scholars. *See* Alan Zarembo, *Funding Studies to Suit Need: In the 1990s, Exxon Began Paying for Research into Juries and the Damages they Award. The Findings Have Served the Firm Well in Court*, L.A. TIMES, Dec. 3, 2003, at A-1; *see also* William R. Freudenburg, *Seeding Science, Courting Conclusions: Reexamining the Intersection of Science, Corporate Cash, and the Law*, 20 SOC. F. 3 (2005). The findings of this research have been deployed in advocacy aimed at curtailing punitive damages, such as those facing the corporate sponsor in the Exxon Valdez oil spill case. *See* Brief of Certain Leading Business Corporations as Amici Curiae Supporting Petitioner, State Farm Mutual Automobile Insurance Company v. Curtis B. Campbell & Inez Preece Campbell, 537 U.S. 1042 (2002) (No. 01-1289).

51. *See, e.g.*, Symposium, *Do the "Haves" Still Come Out Ahead?*, 33 LAW & SOC'Y REV. 793 (1999); IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003). Research along these lines is surveyed in Brian J. Glenn, *The Varied and Abundant Progeny*, *in* IN LITIGATION, *supra*, at 371.

52. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497, 557 (1996).

some 62% of the time while other parties won only 33% of their cases.[53]

In a comparison of performance confined to diversity cases, Dunworth and Rogers were able to separate business from non-business parties. As Table 2 shows, businesses outperformed non-business parties as both plaintiffs and defendants. The largest businesses actually won a smaller percentage of their plaintiff cases than did other businesses, but maintained their winning ways as defendants. Other businesses outperformed non-business parties by a wide margin as plaintiffs and a more modest one as defendants.

Table 2. Percentage of Cases Won by Various Kinds of Parties in Federal District Courts, 1971–1991

		As Plaintiffs	As Defendants
All Cases	Fortune 2000	79%	62%
	Other Parties	62%	33%
Diversity Cases	Fortune 2000	71%	61%
	Other Business Parties	80%	36%
	Non-Business Parties	64%	28%

Source: Dunworth & Rogers, *supra* note 52, at 557-58.

In another study of federal diversity cases, Theodore Eisenberg and Henry Farber eliminated personal injury cases (because corporations are so infrequently plaintiffs) and compared the performance of corporations and individuals as plaintiffs.[54] Again, corporations won some 83% and individuals some 60% of the cases in which they were plaintiffs. Eisenberg and Farber divide their cases according to the configuration of the parties and present the plaintiff-win rates for the various match-ups between individuals and organizations. These are shown in Table 3.

53. *Id.*

54. Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S99 (1997).

Table 3. Plaintiff Win Rates by Configuration of Parties, Federal District Courts, Non-Personal Injury Diversity Cases, 1986–1994

		Defendant		
Plaintiff	**Overall Plaintiff Win Rate (Win Rate at Trial) [Trial Rate]**	Individual	Corporation	TOTAL
	Individual	72.4% (63.3.%) [3.61%]	50.1% (56.0%) [4.49%]	60.8% (58.6%) [4.12%]
	Corporation	90.8% (66.2%) [2.52%]	74.8% (64.0%) [3.41%]	83.6% (64.8%) [3.04%]
	TOTAL	83.4% (64.5%) [3.07%]	63.2% (59.3%) [3.95%]	73.7% (61.2%) [3.58%]

Source: Eisenberg & Farber, *supra* note 54, at S103 tbl.2.

We see that not only do corporate plaintiffs win more, they win even more frequently as both plaintiffs and defendants when opposing individuals than when opposing other corporations. They won 90% of the cases in which they sued individuals and lost only 50% of the cases in which individuals sued them. The differentials are less for that small subset (3.58%) of cases that went to trial. (Interestingly, the individual plaintiff vs. corporate defendant match-up was the only configuration in which plaintiffs won more frequently at trial than at the pre-trial stages.)

These patterns are not peculiar to federal district courts. Studying three urban trial courts, Craig Wanner found that business and government plaintiffs win more often and more quickly than do individual plaintiffs.[55] Not only are they more successful overall, which might be attributed to differences in the kinds of cases they bring, but they are more successful in almost every one of the heavily litigated categories of cases. Organizations did

55. Craig Wanner, *The Public Ordering of Private Relations: Part II: Winning Civil Court Cases*, 9 LAW & SOC'Y REV. 293, 305 tbl.9 (1975).

strikingly better not only as plaintiffs, but also as defendants.[56] This general pattern is confirmed by Harold Owen's study of two Georgia trial courts: individual plaintiffs win less often and individual defendants lose more often than their organizational counterparts.[57]

Corporations not only get better results, but they do so at lower cost—i.e., with pre-tax dollars. As Jeffrey Stempel observes,

> commercial litigants have a natural economic advantage in litigation with natural persons. The litigation expenditures (indeed, all dispute resolution expenditures) of the commercial litigant are almost certain to be successfully characterized as business expenses deductible in the year in which they are incurred. Thus, the money spent on litigation . . . effectively reduces the litigant company's taxes by as much as one-third. By contrast, an individual claiming tortious injury, breach of consumer contract, discrimination, or fraud is normally unable to have his or her disputing costs partially subsidized by the government.[58]

It is widely believed that juries are resolutely hostile to corporations. Actually juries find more frequently in favor of corporations, but where they do find corporations liable, they award higher damages than against other parties for comparable injuries.[59] Experimental studies suggest that this is not so much a "deep pocket" effect as an effect of jurors' estimation of corporations as being equipped with greater capacity to foresee and prevent harm.[60]

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56. *Id.* at 302 tbl.7.

57. Harold J. Owen, Jr., The Role of Trial Courts in The Local Political System: A Comparison of Two Georgia Counties (1971) (unpublished Ph.D. dissertation, University of Georgia) (on file with author).

58. Jeffrey W. Stempel, *Contracting Access to the Courts: Myth of Reality? Boon or Bane?* 40 ARIZ. L. REV. 965, 998 (1998).

59. For example, "[b]usinesses were somewhat more successful with juries than were individuals, both as plaintiffs and defendants." AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS? 25 (1985). But awards against corporate defendants were considerably higher than against individuals. *Id.* at 27.

60. *See* Valerie P. Hans, *The Contested Role of the Civil Jury in Business Litigation*, 79 JUDICATURE 242 (1996); Robert J. MacCoun, *Differential Treatment of Corporate Defendants by Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121 (1996).

The advantages of organized and powerful players in the judicial arena are not peculiar to federal courts, or to trial courts, nor to the present era. Analyzing outcomes in state supreme courts over the period 1870-1970, Wheeler et al. found

> that parties with greater resources—relatively speaking, the "haves"—generally fared better than those with fewer resources. In match-ups between stronger and weaker parties, the stronger consistently and on a variety of different measures won an advantage averaging 5 percent.[61]

They also concluded that

> the more sharply party disparity can be delineated, the larger the net advantage of the stronger parties, and some of those advantages are really substantial. Thus the consistent advantage to the 'haves' in our results probably *understates* their true advantage.[62]

In a study of the success of appellants before U.S. Courts of Appeals (4th, 7th, and 11th circuits in 1986), Donald Songer and Reginald Sheehan found that "[t]he success rates of appellants consistently increase with each incremental increase in their strength relative to the strength of the respondent."[63] They discovered that "the relative advantages of the 'haves' were generally found to be several times as great in the courts of appeals as they were in [Wheeler et al.'s] state supreme courts."[64]

Kevin Clermont and Theodore Eisenberg looked at the propensity of federal appellate courts in thirteen categories of non-personal injury diversity trials and found that plaintiffs and defendants fare very differently in the

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61. Stanton Wheeler et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403, 443 (1987).

62. *Id.*

63. Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeals*, 36 AM. J. POL. SCI. 235, 246 (1992).

64. *Id.* at 255. Such consistent advantages for "haves" parties were not found in the U.S. Supreme Court when the effects of ideology were controlled. *See id.* at 235-58.

appeals process.[65] Where a plaintiff wins in the trial courts, defendant appellants secure reversals almost twice as frequently as do plaintiff appellants in cases where defendants win at trial (28.4% vs. 14.8%).[66] Corporate losers at the trial court level appeal more frequently than individual losers (28.5% vs. 20.2% as plaintiffs, 22.4% vs. 17.1% as defendants) and more of these appeals lead to reversals (21.5% for corporate plaintiffs vs. 12.5% for individual plaintiffs, 27.5% for corporate defendants vs. 24% for individual defendants).[67] Reversals of jury verdicts at the instance of defendants are almost twice as frequent as reversals at the instance of plaintiffs. Clermont and Eisenberg conclude that the most plausible explanation is appellate judges' mistaken attribution of pro-plaintiff bias on the part of juries.[68] We have seen that increasingly the plaintiffs in federal civil cases are NPs and the defendants are APs. So the "plaintiphobia" of the appellate courts, as Clermont and Eisenberg call it, becomes another layer of advantage for APs.

Do these disparities in success in the judicial forum necessarily reflect the differences in "party capability" or "the relational effects of asymmetric parties"?[69] The universe of disputes and litigation is frequently and usefully visualized as a pyramid made up of successive layers including perceived injuries, grievances, claims,

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65. Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947 (2002).

66. *Id.* at 131 tbl.1.

67. *Id.* at 138 nn.22-23.

68. *Id.* at 138.

69. Such effects are not confined to courts in the United States. Studies of the Supreme Court and the Provincial Courts of Appeal in Canada found clear confirmation of the party capability thesis. Peter McCormick, *Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949-1992*, 26 CAN. J. POL. SCI. 523 (1993); Peter McCormick, *Who Wins and Who Loses in the Provincial Courts of Appeal? A Statistical Analysis, 1920-1990*, CAN. J.L. & SOC'Y, Fall 1994, at 21. Outcomes in the English Court of Appeal reflect "the relational effects of asymmetric parties." Burton M. Atkins, *A Cross National Perspective on the Structuring of Trial Court Outputs: The Case of the English High Court*, *in* COMPARATIVE JUDICIAL SYSTEMS 143 (John R. Schmidhauser ed., 1987); *see also* Burton M. Atkins, *Party Capability Theory as an Explanation for Intervention Behavior in the English Court of Appeal*, 35 AM. J. POL. SCI. 881 (1991).

disputes, filings, trials, and appeals.[70] There is attrition—often very pronounced—as cases move up the pyramid; only a fraction of the possible cases run the whole course to trials and appeals. As matters proceed up the pyramid, there is selection.[71] The cases that survive to the next layer are not entirely representative of the cohort at a given level. For example, such survivors may involve larger injuries or involve parties that are more knowledgeable, more contentious, less risk-averse or better supplied with resources.

Some portion of the observed difference in gross rates of success is attributable to the make-up of the litigation portfolios of organizations and individuals. Organizations bring more cases of the kinds that are easiest to win (such

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70. A brief summation of the "pyramid" analysis may be found at Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contenious and Litigious Society*, 31 UCLA L. REV. 4, 12-32 (1983). *See also* Marc Galanter, *Adjudication, Litigation and Related Phenomena*, *in* LAW AND THE SOCIAL SCIENCES 151, 183-203 (Leon Lipson & Stanton Wheeler eds., 1986). *See generally* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-81) (providing a conceptual framework for studying the emergence and transformation of disputes); Neil Vidmar, *Justice Motives and Other Psychological Factors in the Development and Resolution of Disputes*, *in* THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR: ADAPTING TO TIMES OF SCARCITY AND CHANGE 395, 409-13 (Melvin J. Lerner & Sally C. Lerner eds., 1981). The first major empirical application of this method was undertaken by Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81) (reporting on a survey of households estimating the rates of grievances, claims, and disputes that could have been brought to a civil court of general jurisdiction). *See also* Herbert M. Kritzer, *Propensity to Sue in England and the United States of America: Blaming and Claiming in Tort Cases*, 18 J.L. & SOC'Y 400 (1991); Herbert M. Kritzer et al., *The Aftermath of Injury: Cultural Factors in Compensation Seeking in Canada and the United States*, 25 LAW & SOC'Y REV. 499, 501-02 (1991); Herbert M. Kritzer et al., *To Confront or Not to Confront: Measuring Claiming Rates in Discrimination Grievances*, 25 LAW & SOC'Y REV. 875, 879-82 (1991).

71. *See, e.g.*, George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); *see also* Donald Wittman, *Is the Selection of Cases for Trial Biased?*, 14 J. LEGAL STUD. 185 (1985) (proposing a model for the distribution of litigant estimates of outcomes that differs from Priest and Klein's model and leads to contrary conclusions about the litigation process); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991) (explaining why a good part of the Priest and Klein framework is at odds with the data and presenting data on failed pretrial negotiations).

as collections, foreclosures, etc.) and organizations bring not only different cases but "better" cases. As plaintiffs, they can avoid weak cases by forbearance to bring suit or by readily accepting a low settlement; as defendants, they can settle the more meritorious and attractive cases against them—perhaps before filing. So their portfolio tends to consist of cases in which the evidence is stronger and the claim more firmly located within accepted lines of recovery. Stronger evidence, more cut-and-dried claims, and unassailable defenses are the result of advance planning and good record-keeping, as well as of the intrinsic merit of the claim. A calculating settlement policy reflects their capacity as litigants as much as the virtues of their conduct in the underlying transaction. Their capacity is enhanced by lawyering that involves more preventive work, continuity of attention, specialized expertise, economies of scale, and shrewd investment in rule development in judicial, legislative, and administrative settings. This is not a new phenomenon. Describing federal diversity litigation in the late nineteenth century, Edward Purcell observes that

> [c]orporations had the time, resources, incentives and sophistication both to litigate selectively in order to maximize their chances of developing favorable common law rules and to lobby the legislatures persistently in an effort to have statutory law tailored most closely to their interests.[72]

Difference in the "merits" of cases, then, is in large measure not an alternative explanation of party success, but a specification of one of the ways in which party capability affects the profile of litigation.

Which is not to say that "merit" is illusory or that the courts are biased against individuals. Courts are like the referees in a basketball game between an NP team of six-foot tall players and an AP team of equally-talented seven-footers. The seven-foot AP team doesn't get its baskets dishonestly, and sometimes the six-footers win the game, but over the long haul the disparity in resources is reflected in the scores. In sports like basketball and football, we tolerate gross disparities of physical stature (relying on

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72. EDWARD A. PURCELL, JR., LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958, at 29 (1992).

schedulers to preserve the element of genuine contest?), while in other sports, such as boxing, this is considered unfair and the contest is conducted in weight classes (or in gender divisions, as in golf, tennis, swimming, and track). Adjudication resembles professional team sports in this respect: no allowance is made for the difference in height or reach. In basketball and football, the game is dominated by ever-taller and ever-heavier players; fewer short and light players can compete. In baseball, the richest teams collect the best players and win more frequently.[73] Similarly, in the legal arena, organizational players are crowding out individual ones and they are more frequently successful.

When I say corporations and other APs are on the whole more capable players of the law game, I am not attributing to them a preternatural competence and freedom from error. Corporations blunder just as do individuals and the blundering reflects the structure of corporations: their problems of coordination, the necessity of acting through agents with their own limited perspectives and separate ambitions. But their performance suggests that on the whole the corporate entity's incremental increase in capability as a legal actor outweighs these distractions. In short, our institutions of legal remedy are not exempt from the working of the general phenomenon of cumulative advantage.[74]

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73. "Of the 13 major league clubs with the highest payrolls during the 1998 season, only Baltimore finished below .500. Of the 17 others, only St. Louis and Toronto were above .500." Jeff Miller, *Too many franchises asking: Why bother?*, WIS. ST. J., Apr. 4, 1999, at 1D. From 1996 to 1999, teams in the fourth payroll quartile won a median of seventy-two games (in a 162 game season), a number which progressed steadily by quartiles to a median of 95 for teams in the first payroll quartile. Paul L. Caron & Rafael Gely, *What Law Schools Can Learn from Billy Beane and the Oakland Athletics*, 82 TEX. L. REV. 1483, 1489 (2004) (reviewing MICHAEL LEWIS, MONEYBALL: THE ART OF WINNING AN UNFAIR GAME (2003)).

74. The cumulative advantage phenomenon has been observed in many settings. Merton and Zuckerman identified what they called the "Matthew effect": "[T]he process by which those who have been given some advantages come to be given still more." WILLIAM J. GOODE, THE CELEBRATION OF HEROES: PRESTIGE AS A SOCIAL CONTROL SYSTEM 279 (1978). In the sociology of science, such cumulative advantage is understood to be present, but there is still uncertainty about the precise mechanism. *See* Paul D. Allison, J. Scott Long & Tad K. Krauze, *Cumulative Advantage and Inequality in Science*, 47 AM. SOC. REV. 615 (1982). A humbler example is Barry Schwartz's study of behavior in waiting rooms, which finds that the various sorts of accommodative deference

Party capacity to litigate not only affects the outcome of individual cases, but shapes the judicial agenda. Organized parties can undertake sustained campaigns of litigation. The classic example is the NAACP's campaign against school segregation.[75] A more recent example is the continuing corporate campaign to curtain punitive damage awards.[76] The scale of these "party effects" is displayed in Charles Epp's comparative study of the rights agenda of courts of last resort in the U.S., Canada, England, and India.[77] He found that an enlarged rights agenda was best explained not by "top-down" theories of judicial ideology but by a "bottom-up" theory focused on the organizational and financial resources of the groups advocating such cases. So organizations fare better in court not only in terms of results, but in terms of setting the courts' agenda.

IV. THE CORPORATIZATION OF THE LAW

At the same time that APs are becoming more dominant in the legal world they are themselves changing. Although it is difficult to generalize about such a large and diverse population, it appears that overall APs are moving away from their origins as instruments devoted to supplying specific goods or services to NPs and are increasingly guided by concerns with their own power, longevity, and reputation. According to an eminent organization-watcher, "virtually every development associated with industrialization and the establishment of

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(waiting time, escorting, proffering drinks) accorded to higher status clients tend to feed into and subserve one another, so that in the aggregate they unintentionally violate the norm of distributive justice they sought to conform to. "While each server grants a client his proper due, the resulting distribution (effected by two servers) allows some clients somewhat more than their due." BARRY SCHWARTZ, QUEUING AND WAITING: STUDIES IN THE SOCIAL ORGANIZATION OF ACCESS AND DELAY 152 (1975). Schwartz finds this same kind of "multiplication of social profits implicit in the strain toward status congruence" in the distribution of unproductive and costly waiting time in courts, where "some persons and groups are relatively exempt from waiting. . . . [In] the courtroom . . . the powerful are most likely to enjoy such advantage." *Id.* at 29.

75. MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987).

76. *See, e.g.*, STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM (1995).

77. CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

the corporate form of organization . . . [has] caused mission to be displaced as an organizational goal in favor of the systems goals, notably profit and especially growth . . . ."[78] The famous example of the March of Dimes re-inventing itself after the conquest of polio is a convenient symbol of this tendency within corporate organizations. Now corporations change their names to efface any connection with particular functions.

And the relations among the various sorts of APs are changing as well. In the past thirty years the business corporation has achieved an ascendancy over government entities and non-profit associations. Business corporations have for a long time enjoyed a privileged position in American government, enjoying subsidies, solicitude, and deference.[79] Since the 1970s, this has been accentuated by a precipitous decline in confidence in governmental institutions[80] and a great augmentation of the political activity of business entities and their satellite foundations and think-tanks.[81] There has been a major increase in business lobbying, in the political activity of CEOs, in electoral activity, and in the formation of organizations and coalitions to carry these out.[82] The thrust of much of this has been to reduce or soften governmental regulation of corporate activity. Governmental functions—prisons, police, even military operations—have been farmed out to the private sector. At the same time business corporations have penetrated and patronized other institutions—schools, universities, arts, healthcare, sports. Their presence has been naturalized—they are not seen as inhabitants of the specialized realm of production, but as institutions of civic

78. HENRY MINTZBERG, POWER IN AND AROUND ORGANIZATIONS 286 (1983).

79. *See* CHARLES E. LINDBLOM, POLITICS AND MARKETS: THE WORLD'S POLITICAL ECONOMIC SYSTEMS (1977).

80. *See* MARTIN SEYMOUR LIPSET & WILLIAM SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR, AND GOVERNMENT IN THE PUBLIC MIND (1987).

81. On the rise of think tanks, see THOMAS BYRNE EDSALL, THE NEW POLITICS OF INEQUALITY 117-20 (1984). *See also* DAVID M. RICCI, THE TRANSFORMATION OF AMERICAN POLITICS: THE NEW WASHINGTON AND THE RISE OF THINK TANKS (1993).

82. *See* DAVID VOGEL, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA (1989); *see also* EDSALL, *supra* note 81, at 107-41; KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH (2003).

life. They have discarded their old names based on their work (e.g., AT&T, Standard Oil) to become Verizon or Exxon, sonorous invocations of institutional dynamism. Formerly, public spaces might be named after heroic figures or public benefactors; now it has come to seem natural for stadiums and parks to be named after corporations. As civic actors, corporations occupy some of the space left by the contraction of civic participation by individuals through voluntary associations, at the same time as those associations become more corporate and less participatory.[83]

Corporate parties are not merely part of the clientele of unchanging adjudicative institutions. In important ways, the increasing presence of APs transforms the institutions of adjudication. Meir Dan-Cohen argues that as courts encounter more organizational parties, their decision-making shifts from an arbitral model focusing on retrospective examination of "a self-contained private [dispute] . . . involving exclusively the rights and interests of the contending parties" to a regulation model that seeks prospectively to "shape the form of future transactions and interactions" among a whole category of parties.[84] The shift that Dan-Cohen describes has impressed other observers as well.[85] "Since organizations augment the social ramifications of judicial decisions, they incline the judge toward the regulatory mode."[86] As the ratio of general-to-specific effects increases, courts shift from an arbitral to a regulatory style.[87] The presence of organizations makes

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83. *See* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000).

84. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 128 (1986).

85. *See* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); *see also* Horwitz, *supra* note 3.

86. DAN-COHEN, *supra* note 84, at 128. If we distinguish the outcomes of judicial action as either special effects (i.e., on the parties involved) or general effects (i.e., on wider audiences, including potential parties), we can translate the shift from arbitral to regulatory style as an increase in the ratio of general to special effects. Marc Galanter, *The Radiating Effects of Courts, in* EMPIRICAL THEORIES ABOUT COURTS 117 (K. Boyum & L. Mather eds., 1983).

87. On the distinction between special effects (i.e., impacts on the parties before the court) and general effects (i.e., impacts on others), see Galanter, *supra* note 86, at 117, 124-27.

courts more future-oriented, more managerial, more utilitarian, and generally more "legislative." But this in turn raises the stakes in any given litigation and confers additional advantage on those parties that can plan and invest accordingly.[88]

The regulatory shift is evidenced in a set of interlinked changes that are pervasive in American courts. There are fewer trials—not just fewer as a percentage of all terminations—but fewer absolutely. For example, although the number of civil filings in the federal district courts has increased by a factor of five since 1962, the number of civil trials has decreased by thirty-two percent.[89] Comparable declines are found in state courts and in criminal as well as civil trials. The decline in trials is accompanied by the rise of managerial judging, with intensive pre-trial supervision of cases, more terminations by pre-trial adjudication (e.g., summary judgment, motions to dismiss), judicial promotion of settlements, and the embrace of Alternative Dispute Resolution.[90] Legislators and judges, beguiled by tales of a litigation explosion and overuse of the courts, incline to restricting access to the courts. But these restrictions are

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88. For a classic discussion, see Stewart Macaulay's description of litigation between the automobile manufacturers and their dealers. Macaulay, *supra* note 20, at 99-101.

89. In 1962, some 5802 cases in the Federal District Courts terminated "during or after trial" making up 11.5% of dispositions. In 2004, the corresponding figure was 3951 (just 1.7% of all dispositions). *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2004, tbl. C-4 (2004), http://www.uscourts.gov/caseload2004/tables/C04Mar04.pdf. The Administrative Office (AO) counts as a trial "a contested proceeding before a jury or court at which evidence is introduced." Federal Judicial Center, 2003-2004 District Court Case-Weighing Study app. F (2004), http://www.fjc.gov/public/pdf.nsf/lookup/CaseWtsF.pdf/$file/CaseWtsF.pdf (Form JS-10). The definition of trial varies in the state courts. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 533-34 tbl.A-2 (2004). In sorting out terminations, the AO's record-keeping category is cases terminated "during or after trial," so the number of trials counted includes cases that settle during trial and some evidentiary proceedings that do not lead to judgments. So, the count here is not a count of completed trials but of cases that reach the trial stage. These figures provide an inexact but useful indicator of both the magnitude and year-to-year-trends in trial activity. For a full discussion of the counting of trials problems, see Galanter, *supra*, at 475-76.

90. *See* Galanter, *supra* note 89; Judith Resnik, *Migrating, Morphing* and *Vanishing: The Empirical and Normative Pussles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783 (2004).

not broadside; they target the claims of NPs, not those of organizations.[91] A recent and poignant example is the September 11th Victim Compensation Fund which removed the claims of natural persons from the legal system. Individuals were given (generous) scheduled compensation but were deprived of any forum for their potentially embarrassing non-monetary claims, while the APs—airlines, airport authorities, security firms, insurance companies, and governmental units—were protected from any legal accountability to NPs. But the act made "no effort to divert property damage, business disruption, or insurance subrogation claims out of the legal system."[92]

NPs may depart the courts along various paths—by judicial outsourcing to auxiliaries or ADR forums, by conscription into captive tribunals by mandatory arbitration clauses,[93] by contractual confinement to "internal" tribunals within APs.[94] Bryant Garth describes the evolution of a "segmented and hierarchical" system in which "high stakes business disputes" enjoy "a full array of alternatives" including courts and elite ADR providers,

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91. Current examples include restrictions on class actions (Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005); John F. Harris, *Victory For Bush On Suits; New Law to Limit Class-Action Cases*, WASH. POST, Feb. 18, 2005, at A1) and proposed limits on medical malpractice claims. Steve Lohr, *Bush's Next Target: Malpractice Lawyers*, N.Y. TIMES, Feb. 27, 2005, § 3, at 1 (describing Bush administration legislation that would cap non-economic damages in malpractice suits at $250,000 and limit attorneys' fees). Early this year, the Department of Health and Human Services proposed to restrict trials of Medicare claims: hearings will be shifted from 140 Social Security offices around the country to just four sites; most hearings will be held by teleconference or telephone and those beneficiaries who insist on a face-to-face hearing will waive their right to receive a decision within ninety days. Robert Pear, *Medicare Change Will Limit Access to Claim Hearing*, N.Y. TIMES, Apr. 24, 2005, at 1.

92. Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy," in* THE FUTURE OF TERRORISM RISK INSURANCE (forthcoming 2005), *available at* http://ssrn.com/abstract=690401.

93. On the increasing prevalence of adhesive mandatory pre-dispute arbitration clauses, see Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33.

94. Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941 (1999).

while ordinary litigants are pushed into "settlement-oriented ADR processes dominated by quick-and-dirty arbitration and by mediation conducted by private individuals accountable neither through review processes nor appeal."[95]

Individuals with their passions and their occasional appetite for vindication,[96] for establishing truth, and for challenging authority, are eased out of the courts, which become more focused on economic claims. Policies designed to pressure parties to settle (like F.R.C.P. Rule 68) "delegitimatize all noneconomic motives associated with litigation."[97] In such an environment, repeat-players can use settlement strategy to vitiate the production of precedent favorable to claimants, who are reasonably equivalent to NPs. As full-blown contest over non-economic principles is squeezed out, law is "de-moralized"—as signified by the invariable qualifier in all settlements that the defendant does not admit any wrongdoing. This feature of our legal system is neatly displayed in a New Yorker cartoon by Lee Lorenz, who anticipated by fifteen years the Global Tobacco Settlement which said in effect, we'll give you $300 billion but there is no admission of any wrongdoing.

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95. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 930, 932 (2002).

96. Individual litigants vary in the extent to which they seek justice or moral vindication instead of, or in addition to, a satisfactory solution to their immediate discomforts. A survey of Detroit residents found that the proportion of respondents reporting serious problems who sought justice or vindication was tiny in all areas other than discrimination. Leon Mayhew, *Institutions of Representation*, 9 LAW & SOC'Y REV. 401, 413 (1975). A study of the Illinois Attorney General's Consumer Fraud Bureau found that the desire for "public-oriented" remedies as opposed to private relief varied directly with income level. Only 4% of those with incomes of less that $12,000 requested a public remedy, in contrast to 28% of those with incomes over $17,000. Eric Steele, *Fraud, Dispute and the Consumer: Responding to Consumer Complaints*, 123 U. PA. L. REV. 1107, 1140 (1975).

97. Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 29 (2000).

"I accept the four thousand years in Limbo with the understanding that it in no way constitutes an admission of wrongdoing."

V. CULTURAL INDULGENCE

In addition to these structural advantages, APs enjoy "cultural" advantages in the legal forum. For more than a century American courts have been receptive to the notion that corporate actors are persons or entities with rights of their own rather than merely creatures of the state or instruments of NPs.[98] Corporations are "persons" for purposes of enjoying the protection of the Fourteenth Amendment's Due Process and Equal Protection Clauses.[99]

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98. *See* Mayer, *supra* note 3; Schane, *supra* note 3; DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977).

99. *See, e.g.*, Santa Clara County v. S. Pac. R.R., 118 U.S. 394 (1886); Minneapolis & St. Louis Ry. Co. v. Beckwith, 129 U.S. 26 (1889); Smyth v. Ames, 169 U.S. 466 (1898). These late nineteenth-century decisions displaced earlier jurisprudence denied that corporations were "persons" or "citizens" and viewed them as groups or partnerships. *See also* Mayer, *supra* note 3; Schane, *supra* note 3; HOROWITZ, *supra* note 98.

Commercial corporations enjoy the same freedom of the press as do individuals under the First Amendment.[100]

In a string of decisions since the mid-1970s, the Supreme Court has conferred on corporations significant Bill of Rights protections involving double jeopardy,[101] search and seizure,[102] and, most importantly, free speech protection for corporate political spending and advertising.[103] One commentator characterized these opinions as symbolic of "the transformation of our constitutional system from one of individual freedoms to one of organizational prerogatives."[104]

Within the legal profession, the greatest prestige is enjoyed by those who represent large corporations.[105] Mirroring the prestige structure of the bar, many judges think that big-dollar commercial cases are what properly deserve the attention of courts and the routine matters of individuals are "junk cases" that should be addressed elsewhere. As noted earlier, appellate judges are inclined to think that they must protect corporate defendants against misguided claimants and prejudiced juries.[106]

But the warm feelings of judges for the corporate world are not reciprocated. Although corporations have in recent years increasingly used litigation as a strategic tool in managing business relationships, they have not embraced the courts. John Lande, who interviewed senior executives of publicly-held firms about their views, found that

> [m]ost said they were dissatisfied with the results in their experience with litigation and even more were dissatisfied with the process. Most believe that the courts are not sensitive to the needs of business. Many had doubts about the process of finding the facts, especially when juries make the decisions, and questioned the fairness of court outcomes. They were virtually unanimous that there has been a litigation explosion, and the vast

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100. *See* Grosjean v. American Press Co., 297 U.S. 233, 244 (1936).

101. *See* U.S. v. Martin Linen Supply Co., 430 U.S. 564 (1976).

102. *See* Marshall v. Barlow's Inc., 436 U.S. 307 (1977).

103. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1976).

104. Mayer, *supra* note 3, at 578.

105. *See infra* text accompanying notes 121-23.

106. *See supra* text accompanying note 65.

majority believed that most suits by individuals against businesses are frivolous.[107]

Although they enjoy an array of rights, corporations are largely immune from criminal punishment.[108] They can't be imprisoned, and it is difficult to use fines effectively to deter corporate wrongdoing, for most corporate crimes are difficult to recognize and easy to conceal. The high stakes mean that adequate deterrence would require that fines be astronomical to achieve deterrence.[109] And fines have the disadvantage in that the effects are likely to fall on innocent parties—low level workers, customers, stockholders.[110] So, except in the glare of scandal, corporate organizations tend to be regulated in a sort of "restorative" mode that has gone out of fashion in dealing with individual offenders. On the other hand, corporate actors are frequent and successful users of the criminal justice system to punish offenses against themselves.[111]

Rather than chastening, many of the follies and blunders of corporations are deemed worthy of solace in the form of tax deductions.[112] Corporations enjoy a relative impunity to moral condemnation for single-minded pursuit of advantage that would be condemned as unworthy if done

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107. John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 51 (1998). The thrust of Lande's findings is confirmed in other survey evidence. For example, a 1992 survey of business executives by Business Week found that 62% felt that "the U.S. civil justice system significantly hampers the ability of U.S. companies to compete with Japanese and European companies." Mark N. Vaumus, *The Verdict From the Corner Office*, BUS. WK., Apr. 13, 1992, at 66.

108. *See* Coffee, *supra* note 18.

109. Corporations can be punished by punitive damage awards, but such awards are hedged with protections that are not available to bar harsh criminal sentences for recidivist NPs. States may "freely consider extraterritorial misconduct when sentencing criminal recidivists, [but] such freedom is absent in the imposition of punitive damage awards." Wayne A. Logan, *Civil and Criminal Recidivists: Extraterritoriality in Tort and Crime*, 73 U. CIN. L. REV. 1609, 1626 (2005).

110. *See* Coffee, *supra* note 18, at 390.

111. *See* John Hagan, *The Corporate Advantage: A Study of the Involvement of Corporate and Individual Victims in a Criminal Justice System*, 60 SOC. FORCES 993-94 (1982).

112. *See* Reed Abelson, *Tax Reformers, Take Your Mark*, N.Y. TIMES, Feb. 11, 1996, § 3, at 12.

by NPs. (For example, changes in residence or status to secure tax advantages, or relocating assets to avoid liability.) While individuals who invoke the legal system arouse suspicion and reproach,[113] corporate actors are rarely condemned for aggressively using litigation in pursuit of their interests.[114] (Compare the outrage at the McDonalds coffee spill case with the sanguine response to the Texaco-Pennzoil award.)[115]

Being seen as a "tool" of corporations was once stigmatizing to lawyers. Back in 1910, Woodrow Wilson noted that "the country . . . distrusts every 'corporation lawyer' [and] supposes him in league with persons whom it has learned to dread, to whom it ascribes a degree of selfishness which in effect makes them public enemies . . . [The lawyer] stands stoutly on the defensive."[116] Theron G. Strong, a lawyer contemporary of Wilson, who kept a wonderful journal through the years when modern corporate practice emerged, disdainfully described the subservience of lawyers to their corporate masters. Lawyers on annual retainers to corporations, Strong thought,

> become little more than a paid employee[s] bound hand and foot to the service of [the corporation] . . . [the lawyer] is almost completely deprived of free moral agency and is open to at least the inference that he is virtually owned and controlled by the client he serves.[117]

Throughout much of the twentieth century, the large firm that serves corporate clients was portrayed as the exemplary site of legal professionalism, where lawyers

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113. *See* David Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551, 553-54 (1984); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177 (1989); HANS, *supra* note 10, at 22-49.

114. *See* Ross E. Cheit, *Corporate Ambulance Chasers: The Charmed Life of Business Litigation*, *in* STUDIES IN LAW, POLITICS, AND SOCIETY 119-20 (Austin Sarat & Susan S. Silbey eds., 1991).

115. *See* Edward O. Laumann & John P. Heinz, *Specialization and Prestige in the Legal Profession:Tthe Structure of Deference*, 1977 AM. B. FOUND. RES. J. 155.

116. Woodrow Wilson, *The Lawyer and the Community*, 192 N. AM. REV. 604, 620 (1910).

117. THERON G. STRONG, LANDMARKS OF A LAWYER'S LIFETIME 353-54 (1914).

exercise their autonomy to restrain the unreasonable or anti-social demands of clients. But research suggests that large corporate firm lawyers may have less autonomy *vis-à-vis* their clients than lawyers in smaller practices. Robert Nelson concluded that

> the notion that lawyers struggle with clients over fundamental questions about the common good is simply wrong . . . in general large firm lawyers strive to maximize the substantive interest of their clients within the boundaries of legal ethics.[118]

Many believe that the large firm sector was once populated by lawyer statesmen who induced corporate clients to refrain from acting against the public interest.[119] Stuart Speiser tested these claims by examining the biographies and collected papers of reputed lawyer statesmen and the published histories of leading law firms found that they contained no evidence of any instance or policy of such counseling. Such "client purification," he concluded, was "a pure myth" and "merely wishful thinking . . . there never was such an operating tradition."[120] Lawyering by leading firms in deals giving rise to the corporate scandals of recent years has not allayed concern about lawyer independence of powerful clients.

Lawyers are more comfortable with corporations than is the public at-large. As more of their work and income comes from corporate sources, the disparity has widened. In 1975, Heinz and Laumann found, Chicago lawyers were "considerably more supportive of big business than . . . the general population." By 1995 the difference was accentuated. "Three-quarters of [a sample of the national population] adopted the position that large companies had too much power—the same percentage as in 1975." But only

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118. ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 258-59 (1988). A review of recent literature reports a decline in the autonomy of large firm lawyers. John M. Conley and Scott Baker, *Fall from Grace or Business as Usual? A Retrospective Look at Lawyers on Wall Street and Main Street*, 30 LAW & SOC. INQUIRY 783, 814-15 (2005).

119. *See, e.g.*, ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993).

120. Stuart M. Speiser, *Trial Balloon: Sarbanes-Oxley and the Myth of the Lawyer-Statesman*, 32(1) LITIGATION 5, 67, 69 (2005).

31% of Chicago lawyers held this view in 1995, down from 52% in 1975.

Table 4. Portion who believe large companies have too much power

	National population	**Chicago lawyers**
1975	78%	52%
1995	75%	31%

Source: JOHN HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 199-200 (2005).

Those who are best served by lawyers and the legal system hold them in low esteem. Their lawyers, however, are rewarded not only by higher incomes, but by standing within the legal profession. Heinz and Laumann reported that the prestige ranking of legal fields mirrors the structural division of the profession, "with fields serving big business clients at the top and those serving individual clients (especially clients from lower socioeconomic groups) at the bottom."[121] "The higher a specialty stands in its reputation for being motivated by altruistic (as opposed to profitable) considerations, the lower it is likely to be in the prestige order."[122] This was in 1975. Twenty years later they observed that the prestige order had "undergone a crystallization." From 1975 to 1995 the disparity between the highly prestigious corporate fields and the less prestigious individual-service fields increased. Prestige was located in "fields serving large and powerful organizations." Contrariwise, "the more a field is oriented toward public service, rather than profit, the lower its prestige."[123] The accentuation of hierarchy in professional prestige reflects more general changes in the representation of status hierarchies, in the spread of "winner-take-all" reward

121. HEINZ & LAUMANN, *supra* note 30, at 127.

122. Laumann & Heinz, *supra* note 115, at 202.

123. All of the above from JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 81-89 (2005).

structures,[124] and the displacement of indistinct strata by avowedly precise ordinal rankings (like *U.S. News & World Report's* law school rankings and the *American Lawyer's* ranking of law firms)—a development in virtually every field of endeavor.

VI. PUBLIC AMBIVALENCE ABOUT THE DISTRIBUTIVE TILT OF THE LAW

Wider publics have a different take on the legal pre-eminence of corporate actors. That those with superior fiscal and organizational resources enjoy advantages in litigation has been appreciated by most observers (not just on the left) for a long time.[125] Although survey researchers seem to avoid asking questions about organizational potency per se, the responses to their questions about treatment of rich and poor reveal a sanguine public

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124. *See* ROBERT H. FRANK & PHILIP J. COOK, THE WINNER TAKE ALL SOCIETY (1995).

125. From then-ex-President William Howard Taft's 1908 talk to the Virginia Bar Association:

> [E]verything which tends to prolong or delay litigation . . . is a great advantage for that litigant who has the longer purse. The man whose all is involved in the decision of the lawsuit is much prejudiced in a fight through the courts, if his opponent is able, by reason of his means, to prolong the litigation and keep him for years out of what really belongs to him. The wealthy defendant can almost always secure a compromise or yielding of lawful rights because of the necessities of the poor plaintiff.

William Howard Taft, *The Delays of the Law*, 18 YALE L.J. 28, 33 (1908). Taft stresses that it is not judicial bias but institutional structure that confers advantages on the rich:

> The complaints that the courts are made for the rich and not for the poor have no foundation in fact in the attitude of the courts upon the merits of any controversy which may come before them, for the judges of this country are as free from prejudice in this respect as it is possible to be. But the inevitable effect of the delays incident to the machinery now required in the settlement of controversies in judicial tribunals is to oppress and put at a disadvantage the poor litigant and give great advantage to his wealthy opponent.

Id. at 35. In contemporary work Taft's notion of "rich" parties has been elaborated by what some have called "party capability theory," which analyzes the systemic advantages enjoyed by parties that have greater resources, are recurrent players, and are organizations. *See, e.g.*, McCormick, *Party Capability Theory*, *supra* note 69; Atkins, *Party Capability Theory*, *supra* note 69.

estimation that the legal system is biased in favor of the "haves." Thirty years ago, 59% of a national sample agreed that "the legal system favors the rich and powerful over everyone else."[126] Twenty years ago, when asked whether "[t]he justice system in the United States mainly favors the rich" or "treats all Americans as equally as possible," 57% of respondents chose the "favored the rich" response and only 39% the "equally" response.[127] In a 1995 survey conducted by *U.S. News & World Report*, fully three-quarters of the respondents thought that the American legal system affords less access to justice to "average Americans" than to rich people—and four out of five of these thought "much less."[128] In August 1998, only 33% of respondents to a national survey thought "[c]ourts try to treat poor people and wealthy people alike." But 90% agreed that "[w]ealthy people or companies often wear down their opponents by dragging out the legal proceedings."[129] Half-a-year later in another national survey, 80% of respondents thought that the "wealthy" receive better treatment from the courts than do other people and two-thirds agreed that "[w]hen a person sues a corporation, the courts generally favor the

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126. BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC 234 (1977). The survey interviews were conducted in March, 1974. *Id.* at 10.

127. ABC News/*Washington Post* Survey 1985 (USACWP.196.R24) (on file with author).

128. Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50. The same poll shows the public placing responsibility for this imbalance squarely on lawyers. Respondents were asked:

> *Here are some things that people say about lawyers. Which one of the following comes closest to your views?*
>
> *Lawyers have in important role to play in holding wrongdoers accountable and helping the injured*
>
> *Lawyers use the legal system to protect the powerful and get rich.*

Press Release, U.S. News & World Report, Americans Have Mixed Feelings About the Legal Reforms Contained in the House Republicans' Contract with America (Jan. 21, 1995) (on file with author). Fifty-six percent affirmed the "protect the powerful and get rich" response; only 35% the "helping" response. *Id.*

129. AMERICAN BAR ASSOCIATION, PERCEPTIONS OF THE U.S. JUSTICE SYSTEM 65, 114 tbl.4 (1999), *available at* http://www.abanet.org/media/perception/perceptions.pdf. This 90% response, quite uniform across demographic groups, is the closest to unanimity of any response to any item in a lengthy survey, outranking complaints about delay, expense, and leniency toward criminals.

corporation over the person."[130] I think it is fair to conclude that wide sections of the American public share an enduring sense that legal institutions, whether intentionally or inadvertently, operate to amplify the advantages of "haves" in general, including corporations.[131]

Yet this awareness is only part of the legal culture of the American public. Large sections of the public subscribe to a complex of beliefs about law, lawyers, and lawsuits that I have elsewhere called the "jaundiced view." By this I refer to the familiar beliefs that the U.S. is overflowing with frivolous litigation, brought by self-styled victims and inspired by greedy lawyers, and encouraged by irresponsible juries and activist judges. In this "litigation lottery," claimants walk away with immense and undeserved sums. Useful business and civil activities are inhibited. The system is out of control and causes immense damage, undermining the country's economic strength and unraveling the fabric of trust that underlies civic life. Space permits only a single example, whose authorship (by a lawyer who subsequently was elevated to Solicitor General of the United States) testifies to the respectability as well as the audacity of such fulminations.

> Our mechanism for the peaceable resolution of civil disputes has transmogrified into an insatiable organism that is devouring a segment of our society and culture from the inside-out. Like the giant underground fungus discovered several years ago in Michigan, which manifests itself above the ground only in the form of an occasional mushroom, our civil justice system parasite is barely perceptible to the average person on a day-to-day basis, except for the occasional but increasingly frequent news reports of a freakish lawsuit or outlandish jury verdict. But the destructive

130. National Center for State Courts, How the Public Views the State Courts: A 1999 National Survey, Presented at the National Conference on Public Trust and Confidence in the Justice System (May 14, 1999), www.ncsconline.org/wc/publications/res_amtptc_publicviewcrtspub.pdf.

131. A 1995 survey of Iowans (n=803) slices things a bit finer than the national surveys cited above. Respondents were asked which groups are treated better or worse than others in the courts. 82.8% thought wealthy people were treated better and 80.1% thought "big business" was treated better. The only other groups that were thought to be so favored were politicians (77.5%) and celebrities (83.7%). About 2% of respondents thought each of these groups was treated worse than others. Iowa Supreme Court Survey Questions and Responses in DAVID ROTTMAN, NATIONAL CENTER FOR STATE COURTS, STATE COURT SURVEYS ON PUBLIC TRUST AND CONFIDENCE 59 (1998).

> process is nevertheless continuously at work, growing and relentlessly consuming vital resources and disabling our productive capacity.[132]

The jaundiced view flourishes most luxuriantly among corporate and governmental elites, but many elements of it have been embraced by wider publics. It is supported by a web of stories about abusive lawsuits, frivolous claims, and outrageous awards.[133] One of the salient features of this discourse is that it depicts upstanding, beneficent corporations and governments being exploited by rapacious individuals and their lawyers. The master narrative is that opportunistic plaintiffs who harm themselves by acting irresponsibly and then attempt to fasten responsibility on beneficent organizations and secure undeserved compensation are "the source and carriers of [a] devastating social disease."[134] These stories and the discourse in which they are embedded are disseminated by a massive campaign to impugn the legal system"[135] and delegitimize claimants and their lawyers who use the system against APs. This propaganda campaign is promoted by corporations and their political allies, supported by right-wing foundations and think tanks, and has enjoyed great success in resisting debunking. William Haltom and Michael McCann propose that the jaundiced view is so resilient because it is constantly confirmed and reinforced

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132. Theodore B. Olson, *The Parasitic Destruction of America's Civil Justice System*, 47 SMU L. REV. 359 (1994). Further examples may be found in Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998). *See also* WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS (2004).

133. *See* Galanter, *supra* note 132, at 720, 726-33; *see also* HALTOM & MCCANN, *supra* note 132, at 155-56. All or virtually all of these stories have long been exposed as fabrications or, at best, misrepresentations. *See* Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony, and the Great American Liability Insurance Famine of 1986*, *in* STUDIES IN LAW, POLITICS AND SOCIETY 104, 104-08 (1991); Stephen Daniels, *The Question of Jury Competence and the Politics of Civil Justice Reform: Symbols, Rhetoric and Agenda-Building*, 52 LAW & CONTEMP. PROBS. 269 (1989); Steven Brill & James Lyons, *The Not-So-Simple Crisis*, AM. LAW., May 1986, at 1; Gail Diane Cox, *Tort Tales Lash Back*, NAT'L L.J., Aug. 3, 1992, at 1; Fred Strasser, *Tort Tales: Old Stories Never Die*, NAT'L L.J., Feb. 16, 1987, at 39.

134. HALTOM & MCCANN, *supra* note 132, at 59.

135. *Id.* at 223. *See generally* DANIELS & MARTIN, *supra* note 76, at 43-51.

by the conventions of news reportage in the mass media. Corporate propaganda and media reportage combine to project the "reigning common sense" about the legal system.[136] The APs' success on the legal front in the culture wars has succeeded in neutralizing the public's great fund of cynical knowledge about the tilt of the legal system and its appreciation of the legal dominance of APs.

VII. CONCLUSION

In describing the ascendancy of the APs in the legal arena, I don't mean to portray the judicial system as one in which individuals never prevail or obtain vindication. What I have tried to describe is a structural and cultural setting that seems to be growing over time. Thanks to growth-inducing supplements, the seven-footers are becoming eight-footers. For almost half a century, starting in the days of the New Deal, the enactment of new rights, the development of more favorable judicial doctrine, the emergence of a more proficient plaintiffs bar, and increasing awareness of the possibility of legal redress enabled individuals to be more successful in using the courts to secure remedies against corporate actors than they were earlier.[137] We moved away from the pre-World War Two world of infrequent and inadequate compensation described by Friedman, Russell, and Bergstrom, and displayed in the response to the Triangle Fire or the Hawk's Nest Disaster,[138] to a world in which liability is regularly if unevenly imposed on APs at the instance of NP claimants. NPs were able to exert control over APs through enactment of new rights, imposition of liability by courts, and

136. HALTOM & MCCANN, *supra* note 132, at 177, 297.

137. On the broadening of remedy in the preceding period, see Marc Galanter, *The Turn Against Law: the Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002). *See also* LAWRENCE M. FRIEDMAN, TOTAL JUSTICE 53-67 (1985).

138. RANDOLPH E. BERGSTROM, COURTING DANGER: INJURY AND LAW IN NEW YORK CITY, 1870-1910 (1992); Lawrence M. Friedman, *Civil Wrongs: Personal Injury Law in the Late 19th Century*, 1987 AM. B. FOUND. RES. J. 351; Lawrence M. Friedman & Thomas D. Russell, *More Civil Wrongs: Personal Injury Litigation, 1901-1910*, 34 AM. J. LEGAL HIST. 295 (1990). For an overview of the treatment of disasters before and after World War II, see Marc Galanter, *Bhopals, Past and Present: The Changing Legal Response to Mass Disaster*, 10 WINDSOR Y.B. ACCESS TO JUSTICE 151 (1990).

responsive administrative regulation, reinforced by mounting cultural expectations of remedy and protection. But about thirty years ago the legal world underwent a climate change, The cultural supports for enhanced accountability were weakened by distrust of government and the exaltation of the market. Regulation is enfeebled and liability in particular is threatened by a massive recoil against enhanced accountability ("tort reform" to curtail remedies by caps, to restrict access by regulating contingency fees and class actions) and a sustained public campaign to disparage and weaken the civil justice system while demonizing lawyers, especially those who represent individuals in their battles with APs—"tort lawyers," "contingency fee lawyers," "class action lawyers." But the onus tends to rub off on all lawyers, who are regarded as undermining prosperity and unraveling the fabric of social life.[139] In a historic reversal from the time that lawyers were viewed as pillars of the establishment, such anti-lawyer attitudes are particularly prevalent among "top people"—those with more education, higher incomes, and more prestigious occupations.[140]

The legal forum, increasingly dominated by APs, becomes more amenable to economic policing and less hospitable to dramas of moral vindication. The role of moral outrage and human solidarity and empathy are undercut by campaigns to limit remedies for NPs. The stakes in these struggles are escalating, because the potential for remedy and protection is expanding, driven by advances in science, technology, and social management. As more things are capable of being done by human institutions, the line between unavoidable misfortune and imposed injustice shifts. Bioethicists Allen Buchanan, Dan W. Brock, Norman Daniels, and Dan Wickler observe that

> [t]he boundary between the natural and the social, and between the realm of fortune and that of justice, is not static. What we have

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139. On the public animus against lawyers, see MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (2005); Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633 (1994); Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

140. On the distribution of public estimation of lawyers, see PETER D. HART RESEARCH ASSOCIATES, A SURVEY OF ATTITUDES NATIONWIDE TOWARD LAWYERS AND THE LEGAL SYSTEM (1993).

> taken to be moral progress has often consisted in pushing back the frontiers of the natural, in bringing within the sphere of social control, and thereby within the domain of justice, what was previously regarded as the natural, and as merely a matter of good or ill fortune.[141]

Once, having an incurable disease was an inalterable misfortune; now a perception of insufficient vigor in pursuing a cure or refusal to authorize an experimental treatment can give rise to a claim of injustice. As the scope of possible interventions broadens, more and more the presence of avoidable bad things or the absence of achievable good things are evaluated in terms of that intervention. Thus famine or social subordination or a flawed appearance is not inalterable fate, but a matter of appropriate interventions. What was seen as fate may now be seen as inappropriate policy. Advances in medical care and biotechnology have creased a whole new realm of justice issues concerning death, transplants, reproductive technologies, stem cells, DNA, and so forth. Like medicine and technology, law and policy enlarge both the supply of answers and the supply of unanswered questions.

For the most part the advances in human capability and control that drive the justice frontier are located in or managed by APs, either corporations or governmental bodies. By creating new capacities for intervention, they produce new potential for regulation and remedy. But they can use their agility as legal players to resist having their responsibilities measured by heightened expectations that reflect new technical possibilities. The capacity of legal institutions to project and enforce norms that weigh and balance the new possibilities of control will depend primarily on the course of democratic politics. Widespread public gullibility about representations of the civil justice system induces pessimism. But the new possibilities for intervention and control will impinge on and be appreciated by the more educated and affluent, the very sectors of the population most distracted by current misreadings of the system.

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141. ALLEN BUCHANAN, DAN W. BROCK, NORMAN DANIELS, & DAN WICKLER, FROM CHANCE TO CHOICE: GENETICS AND JUSTICE 83 (2000); *see also* JUDITH N. SHKLAR, THE FACES OF INJUSTICE 5, 51-82 (1990).

James Coleman reminds us that "[t]he modern corporate actor will not be the last social invention to be made. . . . It will eventually be displaced."[142] Much the same might be said of the present forms of courts and the legal profession. At the moment it appears that APs are well on their way to capturing the legal profession and overwhelming or circumventing the courts. Whether the APs can be tamed by the courts depends on the emergence of a democratic politics that is informed by the public's basic insight into dominance of APs and the distributive tilt of the legal system. It will also depend on the inventiveness of lawyers in coming up with new formats and devices for making public policy and effectively controlling APs.

142. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 552 (1990).