

Columbia Law School
The Center for Law and Economic Studies
435 West 116th St.
New York, NY 10027-7201

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Why Do Cases Get Litigated**

Samuel Issacharoff

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The Content of Our Casebooks: Why Do Cases Get Litigated?

Samuel Issacharoff¹

Each year, first-year law students are introduced to the study of law through the case method. The minds of future lawyers are sharpened by considering the misfortune of the fellow with chest hair on his palm;² the people chasing each others' foxes through the forest;³ the dimwitted brothers seeking to farm the Oklahoma hardscrabble;⁴ or the individuals who, unable to make monthly installment payments on their home appliances, appeal to the U.S. Supreme Court for relief.⁵ While the claims of injustice are real, there is scant attention paid to the puzzling issue of why these individuals and organizations would give of their time and money to litigate cases to judgment and opinion, and thereby provide such a rich source of teaching material. What's more, these valiant contributors to the education of law students seek no compensation for their efforts, demand no copyright in the product created, and claim no protection against the snickers and guffaws that inevitably accompany the repeated recitation of their misfortune.

Even more peculiar is the fact that as soon as disputants enter the litigation process, they are clear losers. Whatever the stakes in a dispute between two parties, there is only one way in which they can preserve their joint welfare. Any division of the stake between them, whether it be one side taking all, or half-and-half, or anything in between, leaves the parties jointly in the same position as when they began their dispute: however they slice it, they will still have the entire pie to share. It is only by bringing lawyers into the mix and by subjecting themselves to the inevitable costs of litigation that the parties consign themselves to being worse off. Once lawyers and courts

¹Harold R. Medina Professor in Procedural Jurisprudence, Columbia Law School. This article was originally presented as the 2000 Mason Ladd Lecture at Florida State on March 13, 2000. My thanks to Mark Seidenfeld and my generous hosts at FSU Law School. Special thanks to my research assistants Greg Diamond, Dina Hamerman, and Todd Lundell.

² *Hawkins v. McGee*, 84 N.H. 114 (1929).

³ *Pierson v. Post*, 3 Cai 175 (1805).

⁴ *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109 (1962).

⁵ *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Mitchell v. W.T. Grant*, 416 U.S. 600 (1974).

and filing fees and witnesses and depositions and all the rest are brought into the picture, the pie starts getting smaller and smaller. Since this is perfectly obvious, and perfectly obvious to all rational disputants right from the get go, the penchant of our casebook warriors to litigate requires some explanation.

The explanation cannot be found in the short-sightedness of the disputants. Even if it were not perfectly clear at the very beginning that a trip through the litigation minefield is costly, that lesson is soon brought home to litigants. Regardless of the contractual terms with their attorneys, even if represented on a contingency, clients soon realize that they are signing away a significant amount of resources to their newly acquired legal representatives. Most parties quickly learn this lesson and a remarkably stable 95 percent of cases manage to get resolved well short of trial.⁶ But five percent or so do manage to make it to court, and some persist in going on to appeal. What accounts for these volunteer heroes of subsequent legal instruction?

The point of departure for considering this issue could be the prevailing understanding of two or so generations ago. At a time when the question why cases were fought to conclusion was not considered pressing, the common metaphor for explaining disputes that went to trial was that they were as rare and random as lightning strikes. But, just as our understanding of the physics of lightning changed over time — to where we understand that swinging a golf club in an exposed field during a thunderstorm can affect one's chances of making the evening news — so too our legal intuitions have advanced a bit. My goal in this essay is to both sketch a part of our emerging understanding of why cases actually litigate and of some of the limitations of that understanding. To do so, I first present a streamlined explanation of the first major improvement in our understanding, the law and economics model of why cases are litigated. I then present the limitations that this model faces in accounting for the actual choices of human beings.

I. The Law and Economics Model

⁶ See Robert B. McKay, Rule 16 and Alternate Dispute Resolution, 63 *Notre Dame L. Rev.* 818, 820 (1988) (noting that “an estimated 95 percent of all civil cases are settled before trial”); Marc Galanter, Words of Deals: Using Negotiation to Teach about Legal Process, 34 *J. Legal Ed.* 268, 269 (1984) (“Something like 90 percent of civil cases are settled.”).

Law and economics draws from the pioneering work of Nobel Laureate Gary Becker of the University of Chicago, and is important as the first coherent view of why cases reach and travel through the process of litigation. It provides insight into what is likeliest the central paradox of litigation: the fact that taken together, the parties to a lawsuit are losers from the moment they enter the process of adjudication. Becker's insight was that the neoclassical economic model of "marginal tradeoffs" could be applied with success (if not always the same degree of it) to less clearly economic decisions made in the domains of criminality, love, marriage — and law.⁷ An unexpectedly broad range of behaviors could be explained by the discounted utility that individuals could expect to achieve from among a set of alternatives. Why do some individuals engage in criminal activity while others do not? An answer might be found in the likely trade-offs between the risk of getting caught and the opportunities foregone if one or another person might have to spend time incarcerated.⁸ Why do people marry? Love may be part of the answer, but so are the search costs of seeking alternative partners and the opportunity cost of a foregone present relationship.⁹

I would hope that these caricatured renditions of complex human motivations will be found wanting. But nonetheless, they do capture a part of the motivation behind why those with less to lose or whose youth allows an unrealistically low estimation of the prospect of getting caught are those most likely to engage in unlawful conduct. Similarly, that human relationships are fraught with complex emotions does not render irrelevant to the success of a relationship the age of the individuals and the diminishing prospects of finding "Mr. or Ms. Right" waiting at the next bus stop.

The critical law and economics insight regarding litigated cases comes from asking a simple question about the incentives that would lead people to litigate a case. If instead of assuming the prospect of litigating through to trial and appeal to be random, and if instead we inquire as to the

⁷ See Gary S. Becker, *The Economic Approach to Human Behavior* (1976) (applying an economic model to "Law and Politics" (Part 3), "Marriage, Fertility, and the Family" (Part 6), and other "Social Interactions" (Part 7)).

⁸ See *id.* at 46 ("[T]here is a function relating the number of offenses by any person to his probability of conviction, to his punishment if convicted, and to other variables, such as the income available to him in legal and other illegal activities . . .").

⁹ See *id.* at 212 ("The gain from marriage has to be balanced against the costs, including legal fees and the cost of searching for a mate, to determine whether marriage is worthwhile.").

conditions under which rational parties might find themselves in an escalating conflict over rights and wrongs, then the world of litigated dispute resolution begins to look remarkably different.¹⁰ The key insight begins with a very simple model that assumes each party to enter the litigation process with an expected value attached to the claim of the plaintiff. At its most simple, the model appears as follows:

$$EV_p = P \times A \text{ minus } C_p$$

In this simple model, EV_p represents the expected value of the case to the plaintiff. As set forth in this account, the plaintiff's expectations are a function of her probability of success (P), the likely award to be obtained (A), and the costs associated with prosecuting the claim (C_p). This calculation can then also be expressed as the defendant's expected loss from a plaintiff's claim. Here the scaled down version of the model appear as follows:

$$EV_d = P \times A \text{ plus } C_d$$

The defendant's calculation is the mirror image of the plaintiff's, with one critical difference: the costs are added to the defendant's likely loss, whereas they are subtracted from the plaintiff's likely recovery.¹¹ Thus, these streamlined equations reflect the fact that the costs associated with litigation are a joint loss to the parties and subtract from their joint welfare.

By combining these two equations, it is possible to isolate what is termed a "settlement zone" in which two parties with convergent expectations of the likely award and the probability of the plaintiff prevailing are able to

¹⁰ See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 *J. Legal Stud.* 1 (1984) ("According to our model, the determinants of settlement and litigation are solely economic, including the expected costs to parties of favorable or adverse decisions, the information that parties possess about the likelihood of success at trial and the direct costs of litigation and settlement.").

¹¹ See Richard A. Posner, *Economic Analysis of Law* 523 (3d ed. 1986) ("[S]ettlement negotiations will fail, and litigation ensue, only if the minimum price that the plaintiff is willing to accept in compromise of his claim is greater than the maximum price the defendant is willing to pay in satisfaction of that claim."); see also, *Evans v. Jeff D.*, 475 U.S. 717 (1986) ("Most defendants are unlikely to settle unless the cost of the predicated judgment, discounted by its probability, plus the transactional costs of further litigation are greater than the cost of the settlement package.").

negotiate a mutually advantageous end to the litigation.¹² This may be represented as follows:

Settlement Zone created by C_p plus C_D , when parties agree on values of P and A

If parties can agree on the likelihood of P (the probability of the Plaintiff winning) and A (the amount that will be awarded if she wins), what they are really arguing about is how to divide up the costs of litigation, C_p and C_D . Consider then a concrete application:

Example: A dispute over \$200,000; plaintiff has 50% likelihood of prevailing; each side will pay \$25,000 to litigate through trial.

If each party would pay \$25,000 to litigate a \$200,000 claim that the Plaintiff has a 50% chance of winning, the gross expected value of the claim not considering the costs of litigation would be \$100,000. Once those costs are taken into account, though, Plaintiff stands to gain only \$75,000 if she wins, and Defendant stands to lose \$125,000 if he loses. Any settlement of more than \$75,000 and less than \$125,000, if made before those costs of litigation are sacrificed, makes each party better off.

In order for this model to work, however, there must be a convergence of the estimated value of the case, which is a function of the likelihood that the plaintiff will prevail, and the prospective damage award if she does indeed triumph.¹³ So if there is agreement on both the probability of the plaintiff prevailing and the likely size of the ensuing award, cases should settle almost immediately, before much of the pie is eaten away by the transactions costs associated with litigation. There may of course be disagreement about how to apportion the savings from the portion of the pie

¹² See Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. Legal Stud. 55, 56--57 (1982) ("If the plaintiff does decide to bring suit, it is assumed that he and the defendant will reach a settlement if and only if there exists some settlement amount that both he and the defendant would prefer to going to trial.").

¹³ See Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 Mich L. Rev. 107, 112 (1994) (noting that under an economic model, "as long as both sides make an identical estimate of the likely outcome of the trial, the case should settle.").

that would otherwise have been lost.¹⁴ And some portion of cases may fritter away resources as the parties posture to claim a greater willingness to go to trial.¹⁵ But life has a way of removing from the gene pool individuals whose sense of sport involves repeatedly playing chicken with oncoming cars. So too we would expect parties whose sense of righteousness or greed or simply amour-propre to be pushed to the margins if they indulge themselves in costly attempts to squeeze out the last dime from mutually advantageous settlements.

What then if the parties' estimates of probable success or likely award do not converge? This turns out to be the arena for intervention of the American rules of procedure. The basic law and economics insight is to claim that the source of divergence between the parties must rest on incompatible assessments of either the facts or the law governing a particular case.¹⁶ Since the parties (and society) are best served by promoting quick settlements that conserve the joint resources of the parties, the rules of procedure should attempt to intercede to remove the sources of division. This is one way of understanding the simple mandate of Federal Rule of Civil Procedure 1, that the object of the Rules is to foster the just, speedy, and inexpensive resolution of disputes.¹⁷

Disagreement on the governing law is addressed relatively directly. To begin with, as a society we invest heavily in the creation of the public good known as decisional law. We build courthouses, staff them with respected leaders of the communities called judges, stock them with bright clerks, and demand that their experiential wisdom be reduced to written form. The resulting case law forms the heart of the common law enterprise and is publicly available to counsel to inform their assessments of the strength of

¹⁴ See Posner, *supra* note 11, at 523 (noting that the "larger the settlement range, the more the parties will stand to gain from hard bargaining and the likelier (it may seem) the parties are to end up litigating because they cannot agree how to divide the available surplus.").

¹⁵ See Robert Cooter & Thomas Ulen, *Law & Economics* 487-92 (1988) (describing how strategic behavior can frustrate settlement).

¹⁶ See Patrick J. Borchers, *Jurisdictional Pragmatism: International Shoe's Half-Buried Legacy*, 28 *U.C. Davis L. Rev.* 561, 585 (1995) ("Unstable and unpredictable legal doctrine inhibits the convergence of the parties' estimates of the case value, thus inhibiting settlement.").

¹⁷ Fed. R. Civ. P. 1 ("[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."). See Posner, *supra* note 11, at 525 ("How do rules of procedure affect the settlement rate? . . . A full exchange of information in the possession of the parties is likely to facilitate settlement by enabling each party to form a more accurate, and generally therefore, a more convergent, estimate of the likely outcome of the case . . .").

the claims put forward on behalf of their clients.¹⁸ In addition, we allow for a relatively quick reality check of the legal basis for a plaintiff's claim through the Rule 12(b)(6) motion to dismiss. In some circumstances we may even allow for interlocutory appeals, or mandamus, or certification of a case to a state appellate court, all for the purpose of providing an early look at the governing legal principles.

Factual disagreements are more difficult. Here the true rendition of the factual strength of a party's claim lies not in the public domain, but almost certainly in the private knowledge of the litigants themselves.¹⁹ So long as the parties have private information about their side of the case, the prospect of settlement may be significantly compromised.²⁰ Take a simple case in which the standard of liability turns in part on the state of mind of the defendant, such as with an intentional tort or a claim of discrimination. Here the defendant will likely have a much more informed sense of the prospects for proving liability than would the plaintiff. On the other side of the equation, the basic settlement model depends on convergent assessments of the probable award should the plaintiff prevail. But here it is the plaintiff who is likely to have the better quality information as to the exact nature of the injuries suffered.²¹ Because such private information is not likely to be discernible in the public sphere, there is a grave risk of inefficient impasses in the ability of parties to settle.

¹⁸ See Conference on Jurisdiction, Justice, and Choice of Law for the Twenty-First Century: Case Five: Complex Litigation and Prior Rulings Issues, 29 *New Eng. L. Rev.* 703, 716 (1995) ("The larger the body of historical data about outcomes in individual cases, the more likely it is that the parties' estimates of settlement value will converge on a reasonable figure."); John P. Gould, *The Economics of Legal Conflict*, 2 *J. Legal Stud.* 279, 296 (1973) ("The concept of legal precedent is in effect a means to provide stationarity over time to the probabilities and hence to increase the opportunities for out of court agreement.").

¹⁹ Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure to Settle*, 49 *Case W. Res. L. Rev.* 315, 323 (1999) ("Asymmetric information models, also based on divergent expectations by the parties, allow party estimate of outcome to differ not based on party optimism but based instead on information held by only one party (asymmetric information), so that one side has a truer estimate of the likely outcome at trial.").

²⁰ See Robert H. Gertner, *Asymmetric Information, Uncertainty, and Selection Bias in Litigation*, 1993 *U. Chi. Roundtable* 75, 81 (1993) (noting that divergent expectations "based on differences in information rather than opinion" account for trials).

²¹ See generally Geoffrey P. Miller, *Settlement of Litigation: A Critical Retrospective*, in *Reforming the Civil Justice System* (Larry Kramer ed., 1996) (noting that in tort cases plaintiff usually has better information as to the magnitude of his damages); Robert H. Gertner & Geoffrey P. Miller, 24 *J. Legal Stud.* 87, 90 (1995) ("Consider a typical tort claim. The plaintiff may have better information about the extent of damages because the effect of the injury may be difficult for another party to observe. A defendant may have better information about liability because he knows his level of care.").

Here too the rules of procedure seek to intercede. Rather than draw on a body of knowledge that is maintained in the public domain, as with published decisional law, the combined effects of notice pleading and liberal discovery serve to create a limited public domain of shared information between the parties. The scope of discovery is the single most distinctive feature of American procedure and its scope and cost not only draw attention, but typically shock foreign litigants who find themselves in American courts.²² But under the economic model of litigation, the costs of discovery serve two important functions. First, the fact that parties face significant costs in the litigation process expands the potential settlement zone and creates a greater possibility of mutually advantageous settlement, even if the parties do not have perfectly matched assessments of the likely prospects were the case to go to trial. More significantly, the costs of discovery are justified to the extent that they bring the parties assessments of the case into line at some point prior to trial. Under this approach, discovery not only allows for a trial to be “on the merits” if the parties are unable to settle, but the investment in mutually shared information makes settlement much more likely.²³ Once the parties have discovered all the information relevant to the claims and defenses in the case, to use the language of Rule 26, and once they have read from the same decisional law and tested the application of the law through motions to dismiss and motions for summary judgment, there is no reason to believe that the parties should not settle. And, indeed, our experience confirms that parties do settle in droves, including the famous settlement on the courthouse steps.

The next step in this analysis will be to question the assumptions made by the law and economics model as to how people actually behave

²² See John H. Shenefield, 52 *Fordham L. Rev.* 350, 355 (1983) (“Foreign discovery procedures are generally narrowly tailored to issues directly involved in the litigation. By contrast, more liberal American discovery procedures permit inquiry into a wide range of matters that may never receive the direct attention of a foreign court.”).

²³ Marshall E. Tracht, 52 *Vand. L. Rev.* 599, 632–33 (1999) (“Discovery proceedings encourage settlements in a number of ways. First, by facilitating the exchange of information, they reduce the informational asymmetries that may block negotiations. Second, the prospect of costly and time-consuming discovery may encourage the parties to settle.”); Robert B. Wilson, *Strategic and Informational Barriers to Negotiation*, in *Barriers to Conflict Resolution* 108, 114 (Kenneth J. Arrow et al. eds., 1995) (“[Discovery procedures] contribute to an equalized evidentiary basis for the trial, and before the trial they can narrow the informational gap and promote settlements; even the prospect of costly discovery can encourage early settlement.”).

under conditions of stress and uncertainty.²⁴ But for the moment there remains a critical question for the law and economics approach: why then do any cases go to trial once the lawyers have tested the law and discovered the facts? The economic model gives two answers. First, there is the possibility of parties just getting it wrong. Simply because we provide all the tools necessary to resolve the dispute does not mean that some litigants just won't get the hint. In a world full of claims that Elvis still lives, it would be sheer folly to suppose that any system that engages masses of people will be free from error. Second, and perhaps more significantly, there are always new areas of law, new claims, new conceptions of rights and duties. It may be that the pretrial system has given the parties all the tools necessary to mutually assess the facts and to evaluate the decisional law as it stands. But it may still be the case that parties diverge in their estimations of likely trial outcomes because the law is unsettled in the particular domain in which their dispute arose.

Thus, there are two potential explanations for cases going to trial. The first is mistake and the second is uncertainty in the state of the law.²⁵ As a result, parties who invest of themselves in providing fodder for the aspiring generations of law students do so either because they are foolish or because they have the misfortune to find themselves in an area where others have not sufficiently tread in the past. As to the former, well, there is not much we can do except be bemused as we read of their disputes. As to the latter, their decision to pursue the case and create the public good of decisional law turns out not to be a selfless act, but the product of seeking a just solution in an area where society could not provide enough certainty. But in either case, the methodology of the system of civil procedure stands vindicated as trying to protect individuals from their own folly or providing as much certainty as possible in the assertion of their legal rights.

One final point should be made about this conception of the litigation process. Under either explanation for why parties might actually go to trial, there is no reason to believe that the cases that actually do get litigated

²⁴ For a collection of the leading early studies of decisional processes under conditions of uncertainty see *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. Eds., 1982).

²⁵ See Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 *Wis. L. Rev.* 655, 662 (1985) ("The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.").

should favor one or the other side. If parties simply make mistakes, or if the law is uncertain, then the likely winner at trial could as easily be the plaintiff or the defendant. In other words, the selection of cases for trial should be random as between the parties. This observation was formulated by Professors George Priest and Benjamin Klein, in what is known as the Priest-Klein hypothesis. If indeed the sources of trial are either mistake or uncertainty in the law, then Priest-Klein would predict that there would be no systematic bias to cases that do go to trial, and that plaintiffs and defendants should each win about half of all litigated cases.²⁶ Early empirical attempts to assess this hypothesis were generally confirmatory, although some subsequent analyses introduce complexity depending on the repeat quality of the defendant, the presence of an insurer, and a host of other strategic variables.²⁷ But as a general matter, the basic insight that litigated cases tend to split between the parties has held up fairly well.²⁸

II. Do Litigants Behave as the Economic Model Would Predict?

A. *The World of Human Complexity*

If proven, the Priest-Klein hypothesis may confirm that the parties who get to trial are a random distribution from among the world of litigants. The hypothesis may confirm our sense that we have designed a pretty good system for letting all but the foolish and the trailblazers resolve their disputes prior to trial. And the hypothesis may even confirm an intuition that the right cases are basically the ones going to trial. But the economic model and its confirmatory hypothesis cannot assure us that the process of selecting out cases prior to trial is an efficient one. It may be that the selection of cases

²⁶ Priest & Klein, *supra* note 10, at 5.

²⁷ See Frank B. Cross, 86 *Cornell L. Rev.* 1, 11 (2000) (“The relatively high general tort rates are quite consistent with the predictions of Priest and Klein’s fifty percent hypothesis, although the low product liability plaintiff win rates are suspicious and evidence that strategic litigation may be transpiring.”); 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).

²⁸ Joel Waldfogel, *Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation*, 41 *J. Law & Econ.* 451, 452 (1998) (“Considerable evidence supports the main prediction of the DE model, Priest and Klein’s 50 percent rule, that as the fraction of cases going to trial approaches zero, the plaintiff win rate at trial approaches 50 percent.”)

for trial works pretty well, but only at a tremendous cost to all settling litigants – costs that end up being borne by the settling parties and by society as a deadweight loss.

In order to conclude that parties are being helped to settle in an efficient manner, we need to further be able to assume that they will integrate the shared knowledge of the facts and the law in such a way as to further their achievement of shared assessments of the case. In other words, we need to have a behavioral theory of how parties make decisions in conditions of uncertainty. For the law and economics model to fully hold, we must have confidence that mutually shared information will result in parties reassessing their positions in light of the new information. We must further assume that they will integrate the new information in parallel manner. In short, we need a behavioral theory of objective re-evaluation of information in a cold, dispassionate manner. For if this were not to be the case, if information were not integrated in such a way as to permit a dispassionate reassessment of the position of the parties, our confidence in the utility and the efficiency of the tremendous costs associated with pretrial process would be severely shaken.

Unfortunately, there is every reason to question this behavioral account of how litigants respond to information.²⁹ To begin with, the law and economics model failed to take robust account of the more nuanced account of strategic behavior that emerged from game theory.³⁰ Here the challenge lay in identifying the mechanisms through which information asymmetries between the parties could be exploited in ways that undermined the simple assumption of converging expectations. I will not attempt to address the broad range of strategic complications here. Rather I wish to direct my concern to the behavioral assumptions of the law and economics model more directly. Here I turn to an increasing body of social science evidence of decisionmaking under conditions of uncertainty, to draw on the title of the pathbreaking work by Amos Tversky and Daniel Kahneman and their behavioralist collaborators.³¹ The critical insight in this work is that

²⁹ For a good summary of this critique, see Daniel A. Farber, *Toward a New Legal Realism*, 68 U. Chi. L. Rev. 279 (2001).

³⁰ See generally Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1473 (discussing deficiencies in law and economics model and offering “an approach to economic analysis of law that is informed by a more accurate conception of choice, one that reflects a better understanding of human behavior and its wellsprings”).

³¹ *Judgment Under Uncertainty: Heuristics and Biases* (Daniel Kahneman et al. eds. 1982).

there are a number of robust decisional heuristics that impede the smooth reassessments of information called for in the economic model and which lay at the heart of the presumed efficiency of the modern procedural devices.³² I will examine a couple of these in order to suggest where the next generation of law and economics work is heading and the types of challenges that will inform the coming scholarly assessment of the processes of litigation.

To be clear, the concern here is not over the benefits of liberal pleading and court-supervised discovery over some more formalized common law pleading regimes from days gone by. The concern is over the assumption of how parties will respond to the new regime. To go back to the work of Gary Becker, the challenge is to the underlying assumption of how people integrate information. For Becker, the account is one of people acting as rational central processing units: “The economic approach does not assume that decision units are necessarily conscious of their own efforts to maximize or can verbalize or otherwise describe in an informative way reasons for the systematic patterns in their behavior. Thus it is consistent with the emphasis on the subconscious in modern psychology.”³³ These decision units (aka people) are assumed to have internalized a rational calculus deep in their subconscious. But rather than posit the truth of that, as did Becker and by extension the first generation of law and economics scholarship, this is an empirical claim that may be tested and challenged.

Looking back at Becker’s claims a quarter-century later, we have every reason to be skeptical that they can hold up. We know, for example, that there is a long litany of psychological evidence on the heuristics and biases in human reasoning.³⁴ We know with a fair degree of certainty that people individually and even aggregated through market transactions simply do not see the world through the lenses offered up by the expected value

³² See Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 Vand. L. Rev. 1729, 1732 (1998). For a comprehensive survey of these heuristics, see Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption From Law and Economics*, 88 Calif. L. Rev. 1051 (2000).

³³ Gary Becker, *The Economic Approach to Human Behavior* 7 (1976).

³⁴ See, e.g., Colin Camerer, *Individual Decision Making*, in *The Handbook of Experimental Economics* 587 (John H. Kagel et al. eds. 1995); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669 (1979); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *Judgment Under Uncertainty*, supra note 9, at 3-23 [hereinafter Tversky & Kahneman, *Uncertainty*].

economic calculus.³⁵ We can look at some of the more well-established models to see how far we have moved since Becker would have attributed his insights to the core of the human psyche.

For example, we know that contrary to what economists would tell us, people value losses more than gains and that they will invest more heavily in seeking to avoid a loss than realize a gain, even of equal value.³⁶ Perhaps as a consequence, people value their what they have over what they may aspire to have, what is known as the endowment effect.³⁷ This is a robust effect, even if the goods are of equal value. We also see the real world applications of these effects. Thus, people will refuse to sell a possession for a fixed amount of money even if they would not buy another for the same amount of money.³⁸ And, people tend to hold losing stocks too long and sell winners too quickly, and are reluctant to sell their houses in a declining market, seeking to avoid taking a loss.³⁹ Similarly, we know that individuals play the lottery, clearly irrational behavior in itself, and that they are loathe to sell a one dollar lottery ticket already in their possession, even if offered a premium over the fact value of the ticket – it could have been a winner! And even on the old Monty Hall game show, Let's Make a Deal, participants are typically reluctant to switch the door they initially picked (so as to avoid the dread feeling of regret should their initial choice have been correct), despite the fact that the structure of the game made accepting the offer to switch a significantly better strategy.

We also know that people integrate information oddly by responding

³⁵ See Jolls et al., *supra* note 8, at 1477.

³⁶ This is the critical insight of the prospect theory work of Kahneman and Tversky. See Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 *Econometrica* 263 (1979).

³⁷ See, e.g., Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 *J. Pol. Econ.* 1325 (1990); George Loewenstein & Samuel Issacharoff, *Source Dependence in the Valuation of Objects*, 7 *J. Behav. Decision Making* 157 (1994).

³⁸ See Jolls et al., *supra* note 8, at 1482 (offering as example that individuals would not buy a Super Bowl ticket they held for \$1000, but they would also refuse to sell at that price).

³⁹ Issacharoff, *supra* note 10, at 1736. See generally Richard H. Thaler, *Quasi-Rational Economics* 11-13, 148-49 (1991) (providing examples of individuals' inability to disregard sunk costs in making market related decisions).

to high salience cues rather than more circumscribed statistical inferences.⁴⁰ As a result, flood insurance sells quickly after a high profile, distant flood, as does earthquake insurance after a distant tremor. We know that people pour good money after bad, hoping to salvage investments gone sour, despite repeated admonitions from economists to disregard sunk costs in making investment decisions.⁴¹

While we may continue to debate the magnitude of these peculiar effects and the consequences of this type of decisionmaking,⁴² there is little doubt about their existence. The important question is not to label these as being rational or otherwise. We live in a world so awash in information and data as to leave us incapacitated were we not to have some form of shorthand methods to conduct our lives. Attention to our holdings, aversion to losses, attention to significant events that force themselves on our attention, these are all mechanisms that allow us to survive in an increasingly complex world. Just as the eye evolved to focus on the salient effects of motion and change, so too we developed heuristics for capturing information that helps us deal with the problems of uncertainty. These heuristics are indispensable for ordering our lives. But as the effects described above indicate, they can distort our behaviors in ways that lawyers should be aware of.

B. Examples in the Domain of Law.

1. Following the cues.

Some examples should help understand the implications of behavioral insights for the legal system. The easiest to begin with is the problem of “framing” – the effect that presenting the same information as a matter of gains or losses has on the valuation. A fine example is presented in a study by Professors McCaffery, Kahneman and Spitzer, which they

⁴⁰ This is often referred to as the “availability heuristic.” See Jolls et al., *supra* note 8, at 1519; Tversky & Kahneman, *Uncertainty*, *supra* note 12, at 3, 11.

⁴¹ See Thaler, *supra* note 17, at 11-13, 148-49.

⁴² Robert Scott, for one, has argued that many of the models and studies described in this Article are flawed. See Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 Va. L. Rev. 1603 (2000).

presented as a problem of “Framing the Jury.”⁴³ In this experiment, the authors asked individual subjects in an experimental setting to assume the role of jurors in a personal injury trial in which, following a determination of liability, an award had to be rendered for harms that consisted of extreme stiffness in the upper back and neck, coupled with intermittent severe migraine headaches. The subjects were all given the identical information and an identical scale of possible awards to choose from. The only difference between the two sets of subjects in the experiment was in the presentation of the question to be answered. One group was asked how much should be awarded to make whole the victim of the accident. The second group was asked how much they would have to be paid to accept the harm suffered by the victim.

As should be evident, the answer to the two questions should be the same. If an individual were truly made whole, then that individual should be indifferent as to the occurrence or non-occurrence of the accident. She will have been fully compensated for whatever harms she may have suffered, and should therefore be in the same position whether or not the accident had occurred. The only difference in asking the question in one or another way is to pose the inquiry as backward-looking ex post relief, or as forward-looking ex ante valuation of the harm. In either case, the value should be the same.

Perhaps the values should be the same, but our intuition tells us that they are not. In many states, this intuition takes the form of a prohibition on lawyers asking jurors what they would accept to have the harm occur to them, a manifestation of the commonly observed disparity between willingness to accept and willingness to pay that is such a persistent bane to more formally inclined economists. True to form, this is precisely what the study by McCaffery and his collaborators found.

INJURY:

Three Years of Extreme Stiffness in Back and Neck and Migraines

⁴³ Edward J. McCaffery, Daniel J. Kahneman, and Matthew L. Spitzer, *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 Virginia L. Rev. 1341 (1995).

DAMAGES

Make-Whole: \$290,000

Accept to Have Occur: \$527,500

When asked to make the victim whole, the subject jurors awarded an average of \$290,000.⁴⁴ But when asked what they would have accepted ahead of time to suffer the victim's fate, the award jumped to \$527,500.⁴⁵ The disparity from the mere framing of the question was almost 2-to-1.

Presentation of these experimental results is often met with skepticism. There must be something wrong with the pool from which subjects are drawn to allow such marked effects from how a question is framed. Such skepticism may be healthy, but I would hesitate to be so quickly dismissive of the results. By way of confirmation, I took the liberty of distributing some sample questions among several hundred undoubtedly intelligent, rational and sophisticated participants who should be expected to see through such cant. I speak of course of first year law students at Florida State, the very same group for whom this lecture is written.

In order to enlist the assistance of this admirable group, I distributed a question that asked students here to guess the population of Turkey. I did this by giving each student a questionnaire that gave an estimate of the population of Turkey, asked whether the student thought the estimate was true or false, asked the student to give a percentage estimate of how certain she was of her answer, and finally asked the student to give her own best estimate of what the actual population of Turkey might be. The only difference in the questions asked came with the initial population estimate: one-half of the students received a questionnaire that estimated the population at 34 million; the other half received a questionnaire with an estimate of 106 million.

The interesting question is whether the final estimate of the two groups should be any different. Any rational calculus should tell us that the

⁴⁴ Id. at 1372-73.

⁴⁵ Id.

two groups should converge in their final estimates. Since the distribution of the questionnaires was random within the classes, any actual knowledge of Turkey would likely be distributed randomly between the two groups. Similarly, any errors would also be likely to be randomly distributed. The only difference would come with the unverified and unsubstantiated number at the top of the questionnaire, something shrewd and skeptical law students would quickly disregard as having no bearing on their informed judgments. Or so it would seem. As with the prospective jurors in the McCaffery study, the FSU students took their cues from the way the information was presented. The average estimate of the actual population of Turkey by those whose baseline was 34 million turned out to be 32.9 million. By contrast, the group whose baseline was 106 million turned in average estimates of 77.4 million. Again a disparity of a little over 2-to-1 based solely on the way a question was asked.

2. *Being led astray.*

Other studies reveal just how powerful the framing effects are in overcoming logical structures in integrating information. For example, a study by Amos Tversky, Mark Kelman and Yuval Rottenstreich,⁴⁶ asked experimental subjects to figure out the appropriate remedy for an individual whose sense of peace and solitude had been disrupted by the sudden arrival of a loud weekend nightclub as a neighbor. One set of subjects were presented with two choices: a payment that included weekend lodging to get away from the noise, or an injunction to stop the high decibel activity. Of course you will recognize this example as the familiar Coasean exchange from which emerges an assumption that, in the absence of transactions costs, parties will bargain to a mutually advantageous allocation of resources.⁴⁷ The twist in this experiment was to provide a second set of subjects with three rather than two options. Instead of allowing only a weekend lodging or an order diminishing the sound level, the second set of subjects were

⁴⁶ Mark Kelman, Yuval Rottenstreich & Amos Tversky, *Context-Dependence in Legal Decision Making*, 25 J. Legal Stud. 287 (1996).

⁴⁷ The original work is R. H. Coase, *The Problem of Social Cost*, 3 J. L. & Econ. 1 (1960).

presented with a third option of a clearly inferior set of weekend choices for the afflicted neighbor, including free admission to the very sort of nightclub he sought to escape.

Among the group presented with two options, the participants split roughly in half.⁴⁸ A total of 53 percent chose the compelled decrease in sound and 47 percent accepted the alternative weekend lodging arrangements. If this roughly even division of choice were driven by the comparability of the two options, then the addition of a third inferior option should have no bearing on the results for the group of subjects presented with three options. Among the second set of subjects, everyone recognized that the inferior weekend arrangements were clearly inferior. No subject chose the inferior weekend arrangement as the preferred outcome. So, in effect, the second set was choosing among the same two options as the first, save for the introduction of an undesirable bad choice. The results were markedly different. Among the second set of subjects, 74 percent chose the initial weekend lodging option, while only 26 percent choose the diminution of sound from the offending nightclub.⁴⁹ Clearly, the presentation of two lodging option framed the subjects' approach to the question, even if in fact they were still choosing from among the same two options as the first set.

Again, it is possible to detect the murmurs of skepticism arising from the audience. From where do these subjects come? Are they idiots? Dim-witted? Drunk? Well, these are fair questions and require that we compare

⁴⁸

	%Choosing Weekend Lodging	% Choosing Inferior Weekend Lodging	%Choosing Sound Decrease	<i>N</i>
Two-Option Group	47	...	53	32
Three-Option Group	74	0	26	31

⁴⁹ Kelman et al., *supra* note 24, at 299.

these subjects to a group whose intellectual pedigree is beyond reproach. Of course, I refer again to the first-year class of FSU law students. I decided to test the ability of this group to make the most logical of assessments of probability to see if the presentation of factual information would cloud their judgment as it clearly did in the study by Kelman and his collaborators.

I begin by presenting a very simple logical construct: the probability of two events both occurring can never be greater than the probability of either one of them occurring independently. This is simply the proposition that the conjunctive can never be more probable than the disjunctive: [A and B] can never be more likely than [A] or [B]. If two events have to happen, they can never be more likely to occur together than either one standing alone. So, if you had to bet on what are the chances of say the Texas Rangers or the Pittsburgh Pirates getting to the World Series, your odds would be better if you had to guess only that one of them would make it as opposed to guessing that they would both have to make it. No matter which you pick, you cannot improve your odds by picking both. Simple enough, and a concept that should be clear to all.⁵⁰

But now suppose we put this proposition to the test in a richer factual context. To do this, I turn to the famous pair of examples developed by Amos Tversky and Daniel Kahneman: Linda, the 31 year old, bright outspoken former philosophy student and student activist; and Bill, the 34 year old, intelligent but unimaginative and lifeless former math major who showed little proclivity for social studies and the humanities.⁵¹ For each of them, there is a series of eight options in which the subjects, here the FSU

⁵⁰ If the question is assess the relative probabilities of the following:

- 1) A (alone)
- 2) B (alone)
- 3) A plus B

The answer cannot be that (3) is more probable. The conjunctive can never be more likely than the disjunctive

⁵¹ Amos Tversky & Daniel Kahneman, *Judgments of an by Representativeness, in Judgment Under Uncertainty*, supra note 9, at 84-93 [hereinafter Tversky & Kahneman, Representativeness]. For additional examples of what is termed the "representativeness heuristic," see Korobkin & Ulen, supra note 10, at 1144 n.130.

students, are asked to rank order what most likely characterizes the activities of Linda⁵² and Bill⁵³ today. Among the choices are three that are of interest to us. For Linda these are the choice that she is active in the feminist

⁵²Linda is 31 years old, single, outspoken, and very bright. She majored in philosophy. As a student, she was deeply concerned with issues of discrimination and social justice, and also participated in anti-nuclear discriminations.

Please rank the following statements by their probability, using 1 for the most probable and 8 for the least probable.

_____ Linda is a teacher in elementary school.

_____ Linda works in a bookstore and takes Yoga classes.

_____ Linda is active in the feminist movement.

_____ Linda is a psychiatric social worker.

_____ Linda is a member of the League of Women Voters.

_____ Linda is a bank teller.

_____ Linda is an insurance salesperson.

_____ Linda is a bank teller and is active in the feminist movement.

⁵³Bill is 34 years old. He is intelligent, but unimaginative, compulsive, and generally lifeless. In school, he was strong in mathematics but weak in social studies and humanities.

Please rank the following statements by their probability, using 1 for the *most* probable and 8 for the least probable.

_____ Bill is a physician who plays poker for a hobby.

_____ Bill is an architect.

_____ Bill is an accountant.

_____ Bill plays jazz for a hobby.

_____ Bill surfs for a hobby.

_____ Bill is a reporter.

_____ Bill is an accountant who plays jazz for a hobby.

_____ Bill climbs mountains for a hobby.

movement, that she is a bank teller, or that she is a bank teller *and* is active in the feminist movement. For Bill, the choices of interest are that he is an accountant, that he plays jazz for a hobby, or that he is an accountant who plays jazz for a hobby.

It should be clear that these choices are nothing more than a factually rich rendition of the logical propositions set forth earlier. It may be that Linda is a bank teller, and it may be that she is active in the feminist movement, but it cannot be that her being a bank teller *and* active in the feminist movement is the likelier choice than either of the two standing alone. Similarly, it may be that Bill is an accountant, and it may be (however unlikely) that he plays jazz for a hobby, but it cannot be more probable that he is an accountant *and* plays jazz for a hobby than either one of those choices standing alone.

Yet, the students of FSU, joining their brethren in numerous experimental settings,⁵⁴ would beg to differ. Applying a simple ordinal ranking to the choices, Linda is selected as being currently active in the feminist movement on average 2.22 among the 8 choices. The choice of her being a bank teller ranks at 6.37 out of the 8 choices. But Linda as a bank teller who is active in the feminist movement comes in at 5.1 – significantly more likely in the view of hundreds of FSU students than that she would be a bank teller with no additional requirement.⁵⁵

⁵⁴ Tversky & Kahneman, Representativeness, *supra* note 27, at 93.

⁵⁵

LINDA	1	2	3	4	5	6	7	8
A) Teacher	7	7	11	23	36	26	16	11
B) Bookstore/Yoga	19	15	24	35	16	5	9	12
C) Feminist	56	40	22	5	7	3	2	2
D) Psychiatric	19	24	28	24	24	11	3	3
E) League	26	40	28	18	13	4	3	3
F) Bank Teller	4	2	6	3	8	26	61	25
G) Insurance	3	4	3	5	4	16	26	76

Bill is treated no differently. The students here find it overwhelmingly likely that Bill is an accountant, with that choice receiving a scaled score of 1.68 – how cruel these students can be toward fraternal professions. By contrast, the prospect of Bill playing jazz for a hobby is deemed unlikely, receiving a score of 5.51. But the prospect of Bill being an accountant who plays jazz for a hobby receives a score of 4.0, as if the taint of being an accountant could overcome the apparent absence of sufficient creativity to play jazz.⁵⁶

3. *Believing in yourself.*

The examples I have just reviewed show just how central are our established frameworks for integrating information – what behavioral economists term our decisional heuristics. Even though there is no reason to trust an unsubstantiated statement on the population of Turkey, and even though we should all acknowledge as a formal matter that two events occurring together can never be more probable than one occurring alone,

H) Bank Teller/Feminist	3	4	14	25	25	44	16	5
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BILL	1	2	3	4	5	6	7	8
A) Physician	16	37	36	27	9	7	3	11
B) Architect	7	36	31	20	16	22	8	6
C) Accountant	104	17	8	4	2	5	1	2
D) Jazz	0	7	12	16	33	34	24	20
E) Surfer	5	4	5	5	13	26	42	43
F) Reporter	3	14	14	27	30	19	16	19
G) Accountant	5	18	28	31	24	11	18	3
H) Mountain Climber	2	6	10	11	19	19	34	38

nonetheless we can easily fall prey to the way we look for cues to guide our behavior. These experimental observations do challenge the assumption of the formal economic model that information can be integrated in a cold, rational fashion. Whatever the full psychological pathways by which these decisions are made, there are evident departures from the predicted mechanisms for making decisions in light of new information.

Nonetheless, these observed behaviors are not enough to alone disrupt our confidence in the basic model of dispute resolution under American civil procedure. Whatever missteps may ensue appear to be random. There may be some efficiency losses when litigants fail to integrate information properly, but there is no systemic bias. The mistakes appear as likely as not to cancel each other out.

The same cannot be said for another set of studies that tests whether the mistaken integration of information is truly random. I refer here to a series of studies undertaken by Linda Babcock, Colin Camerer, George Loewenstein, and me, which sought to assess a phenomenon we termed “self-serving biases.”⁵⁷ In these studies subjects were presented with a rich set of factual materials taken from an actual case involving a motor vehicle accident. The materials included deposition excerpts, maps of the accident sites, medical records, and witness statements. The key was that they were provided identical information and were informed of this and further told that there was no other private information available. The subjects were then placed in negotiations settings by pairs. One of the subjects was assigned the role of plaintiff, the other was the defendant. The defendant was given a sum of money and the parties were instructed that they could settle as to the amount, or else the matter would be assigned to a judge and that they would be taxed the costs of the litigation. Every inducement was toward settlement.

These studies are somewhat extensive and cannot be fully represented in the course of a single lecture. But the key point can be readily

⁵⁷ Linda Babcock, George Loewenstein & Samuel Issacharoff, *Debiasing Litigation Impasse*, 22 J. L. Soc. Inquiry 913 (1997) [hereinafter Babcock et al., *Debiasing Litigation*]; Linda Babcock, George Loewenstein, Samuel Issacharoff & Colin Camerer, *Biased Judgments of Fairness in Bargaining*, 85 Am. Econ. Rev. 1337 (1995) [hereinafter Babcock et al., *Biased Judgments*]; George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. Legal Stud. 135 (1993) [hereinafter Loewenstein et al., *Self-Serving Assessments*].

summarized. If errors were random, there should be no particular bias to how the parties integrated information. Following the methodology of the Preist-Klein hypothesis, errors should wash out and the overall efficiency of the process maintained. Unfortunately, the results do not bear this out. Rather than finding a random distribution of error, we find a persistent tendency to integrate new information in a self-serving fashion.⁵⁸ Rather than bring parties together, mutually shared common information can provide a fertile environment for disagreement and inefficient impasses.⁵⁹

Let me focus on just a subset of the findings that should illustrate the point, as set forth in the following table:

1	Fair Settlement	Plaintiff 37,028	Defendant 19,318
2	Difference in Estimates of Fair Settlement	Settled 11,941	Did not Settle 33,915
3	Difference in Fair Settlement Value Estimates of Plaintiff and Defendant	Knew Roles 19,756	Did Not Know Roles -6,275
4	Settlement Rate	Knew Roles .72	Did Not Know Roles .94

The first line shows the challenge to the hypothesized efficient convergence on mutually shared information. In this scenario, subjects were given the exact same information and asked to assess what a fair value of the plaintiff's claim would be. There was no difference between the subject populations save that in each experimental setting the subjects were told that one was the plaintiff who was seeking some of the money given at the outset to the defendant and the other was the defendant who was in possession of

⁵⁸ See Issacharoff, *supra* note 10, at 1738; Korobkin & Ulen, *supra* note 10, at 1093.

⁵⁹ See Babcock, et al., *Biased Judgments*, *supra* note 31; Loewenstein et al., *Self-Serving Assessments*, *supra* note 31.

the money. If parties could converge on the value of the claim, there should be no difference between the groups. Even if individuals made errors in judgment, so long as there was no systematic bias, the effect should wash out in the comparative aggregate valuations. As line 1 shows, however, the differences were hardly random. Plaintiffs valued the claim almost twice as greatly as did defendants. Out of a maximum value of \$100,000, the plaintiffs thought the claim was worth roughly \$37,000 to the defendants' \$19,000.

That the parties differed in the valuation of identical sets of information is significant, but more significant is the impact that the differences in valuation have on the settlement prospects of the parties. As line 2 shows, the difference in valuation is directly correlated to the ability to settle. Among the subject pairs who settled, the difference between plaintiff and defendant valuations was \$12,000, while the non-settling pairs differed in their valuations by almost \$34,000. Line 3 establishes that the relation between the role of the parties and the valuations is not merely a matter of correlation, but of causation. In a subsequent experiment, subjects were divided between those pairs who gave their estimates of fair value after being assigned a role as plaintiff and defendant, and those who were not assigned a role until after they had formed an opinion of the value of the case. Not surprisingly, there is no systematic bias to the differences in value estimates in the group that did not have their roles assigned. Line 4 further establishes that the group that did not have roles assigned was able to settle more successfully than the groups whose estimations were infected by what we term self-serving bias in the integration of information. Despite strong incentives to settle, including punishing ongoing litigation by penalizing the subjects for each period of delay in negotiations, more than a quarter of the subject litigants were unable to settle despite basing their estimations on exactly convergent sets of information.

Conclusion

The first generation of law and economics insights helped to systematize the understanding of law and to examine critically the regulatory ambitions of the law. The next generation of this scholarship poses a direct

challenge to the law. The challenge is to understand the behavioral dynamics that drive the real people we encounter in our profession. If our predictions make use of the narrow incentive structure admitted by law and economics, they will often fail. This impoverished model fails to capture a robust picture of human decision-making.

Our next challenge is to determine what use we can make of our understanding of these phenomena. How do they apply within the legal system in general? Are the effects robust? Are they substantively important? Do they suggest policy prescriptions?

Clearly we cannot remove from real world litigants knowledge of whether they are plaintiffs or defendants; it is unlikely that parties actually injured will readily be deprived of that knowledge. But there are debiasing techniques that may prove useful⁶⁰ in some circumstances, while there may be greater warrant for earlier judicial intervention in controlling the acceleration of discovery costs in others. Nonetheless the challenge persists. The task is to adapt the system of dispute resolution to the world in which real humans exist, imperfections and all. It is the task to which the law must turn to define its success, as future disputants will engage our evolved but still evolving litigation system. Presumably, it is a system that may even catch the attention of the 65 million inhabitants of Turkey.

⁶⁰ See Babcock et al., *Debiasing Litigation*, supra note 31.