BROADCAST LITIGIOUSNESS: SYNDI-COURT'S CONSTRUCTION OF LEGAL CONSCIOUSNESS

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We often hear that American society is litigious. Over the last decade, the media has bombarded us with accounts of tort litigation run amok,[1] litigious plaintiffs plaguing business,[2] and

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[1] *See* Nancy S. Marder, *Introduction to the Jury at a Crossroad: The American Experience*, 78

pro-plaintiff juries eager to award punitive damages[3] against business defendants.[4] Business warns that punitive damages force companies out of business,[5] into bankruptcy,[6] or into a paralysis

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CHI.-KENT L. REV. 909, 910-13 (2003) (pop culture portrays the jury as an institution run amok); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS 2 (2002) (stories of litigation "run amok are common"); Jennifer Robbennolt, *Determining Punitive Damages: Empirical Insights and Implications For Reform*, 50 BUFF. L. REV. 103, 159 (2002) (presenting the notion of out-of-control juries); Cass R. Sunstein et al., *Assessing Punitive Damages with Notes on Cognition and Valuation In Law*, 107 YALE L.J. 2071 (1998).

[2] *See* BURKE, *supra* note 1, at 2 (recounting claims that Americans are litigious and greedy); Marc Galanter, *The Conniving Claimant: Changing Images of Misuse of Legal Remedies*, 50 DEPAUL L. REV. 647, 664 (2000) (Americans believe that there is too much litigation); John Leo, *The World's Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24 (litigation explosion); Maurice Rosenberger, *Civil Justice and Civil Justice Reform*, 15 LAW & SOC'Y REV. 473 (1980-1981) (litigation explosion).

[3] Punitive damages are awarded in addition to the amount of damages necessary to compensate a plaintiff. For a discussion of punitive damages from Biblical times going forward, see Douglas G. Harkin, BMW of North America v. Gore: *A Trial Judge's Guide To Jury Instructions and Judicial Review of Punitive Damages Awards*, 60 MONT. L. REV. 367, 371 (1999); David G. Owen, *A Punitive Damages Overview: Functions, Problems, and Reform*, 39 VILL. L. REV. 363 (1994); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 AM. U. L. REV. 1269, 1285-1328 (1993).

Traditionally, punitive damages seek to (1) punish the wrongdoer for malicious and mean-spirited conduct and (2) deter him and others from repeating those actions in the future. Rustad & Koenig, *supra*, at 1305; Sunstein et al., *supra* note 1 (the traditional view is that punitive damages serve deterrent and retributive goals), at 1309 (the consistent historic function of punitive damages has been extended to punish and deter), 1318 (punishment and deterrence are the most frequently cited rationales for punitive damages); Harkin, *supra*, at 371 (twin goals of punishment and deterrence); W. Lee Pittman & Bert S. Nettles, *What Is The Role Or Function Of Punitive Damages*, 24 CUMB. L. REV. 453, 454 (1993/1994) (punitive damages recognized as means of punishing wrongdoer); Robbennolt, *supra* note 1, at 110 (purpose is to deter), 112 (specific and general deterrence).

[4] *See* Kimberlianne Podlas, *As Seen On TV: The Normative Influence Of Syndi-Court On Contemporary American Litigiousness*, 11 VILL. SPORTS & ENT. L.J. 1, 5-6 (2004) (recounting business's claims of rampant consumer litigation); Robbennolt, *supra* note 1, at 104 (large punitive damage awards garner substantial media attention); George L. Priest, *Introduction* to CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES, HOW JURIES DECIDE 6 (2002) (most Americans have heard something from the media about punitive damages), 1 (citing $144.8 billion Florida tobacco verdict, $4.8 billion California, $580 million Alabama, and $250 million South Carolina punitive awards); VALERIE P. HANS, BUSINESS ON TRIAL 13 (2000) [hereinafter HANS, BUSINESS] (reporting the public and business perception that juries operate using a deep pocket rationale); Valerie P. Hans, *The Illusions And Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 328-29 (1998) [hereinafter Hans, *Illusions*] (some people believe that jurors are anti-business); Valerie Hans & William Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 108 (1992) (presenting the deep pockets rationale).

Hans, however, has cast significant doubt on this belief, and has shown that civil juries in business cases are pre-disposed toward defendants. HANS, BUSINESS, *supra* note 4, at 131; Robert J. MacCoun, *Differential Treatment of Corporate Defendants By Juries: An Examination of the "Deep Pockets" Hypothesis*, 30 LAW & SOC'Y REV. 121, 140-43 (1996) (disputing claims of deep pocket and anti-business bias).

[5] *See* Stephen Daniels & Joanne Martin, "*The Impact That It Has Had is Between People's Ears*": *Tort Reform, Mass Culture, and Plaintiffs Lawyers*, 50 DEPAUL L. REV. 453, 461 (2000); Frank Cross, *Lawyers, the Economy, and Society*, 35 AM. BUS. L.J. 477, 504 (1998) (critics claim that tort litigation drives producers out of business); Carlos Conde, *Lawsuit Mania*, 11

where fear of litigation causes them to forgo new technologies and products.[7] Politicians tell us that the resulting damage awards range from the excessive to the nonsensical and threaten our economy.[8]

There is only one problem: American society has not become more litigious. Empirical evidence demonstrates that there has been no explosion of litigation,[9] but only one of media stories *about* a litigation explosion.[10] Unfortunately, social science

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HISPANIC, Dec. 1998, at 34 (the survival of small business is easily threatened by suit; suits force small businesses and entrepreneurs out of business).

6 *See* Conde, *supra* note 5, at 34 (litigation can bankrupt business); Bruce A. Finzen & Brooke B. Tassoni, *Editor's Letter: Regulation of Consumer Products: Myth, Reality, and the Media,* 11 KAN. J.L. & PUB. POL'Y 523, 524 (2002) (business claims litigation forces them into bankruptcy); Paul Sweeney, *Keeping Legal Costs Down,* FIN. EXECUTIVE, Dec. 2001, at 47 (after a $500 million judgment, Lowen Group "began inexorable slide toward bankruptcy.").

7 *See* Joseph Sanders, *Adversarial Legalism and Civil Litigation: Prospects for Change,* 28 LAW & SOC. INQUIRY 719 (2003) (the story reported that emergency rooms were closing and physicians were withdrawing care due to the cost of lawsuits); Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,* 40 ARIZ. L. REV. 717, 738 (1998); HANS, BUSINESS, *supra* note 4, at 14 (the unpredictability of civil juries is blamed for preventing the innovation of U.S. businesses); Andrea Moore Hawkins, Note, *Balancing Act: Public Policy and Punitive Damages Caps,* 49 S.C. L. REV. 293, 298 (1998) (critics argue that fear of punitive damages inhibits product innovation and keeps some off the market entirely); *see also* Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 556 (Cal. Sup. Ct. 1991) (manufacturers uncertain on how to limit risks will be discouraged from creating new products for fear that new products will result in legal liability); *cf.* Browning-Ferris Indus. of Vt. v. Kelco Disposal Co., 492 U.S. 257, 282 (1989) (O'Connor, J., dissenting) (excessive punitive damage awards chill the creation of new products).

8 *See* CATHERINE CRIER, THE CASE AGAINST LAWYERS 3 (2003) ("Punitive damages have rocketed into the stratosphere for the lucky plaintiff with the right jury."); Marder, *supra* note 1, at 910 (juries chastised by the press for damage awards); Robbennolt, *supra* note 1, at 105 (critics contend that juries are overgenerous), 159 (reforms focus on out-of-control juries); Priest, *supra* note 4, at 2 ("punitive damages phenomenon has generated substantial controversy.").

Furthermore, this encourages others to play the litigation lottery. Mark A. Hoffman, *Common Good Fights Against Litigious Culture,* BUS. INS., Apr. 29, 2002, at 40 (the "culture of litigiousness" is a fundamental problem in society); Hans & Lofquist, *supra* note 4, at 86 (juries contribute to litigation explosion through their damage awards). These costs are passed on to consumers in the form of the infamous "tort tax," the increased product prices that account for the costs of past or future tort judgments. *See* Conde, *supra* note 5, at 34 (referencing the tort tax).

9 *See* HANS, BUSINESS, *supra* note 4, at 9, 56-58; THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW (2001) (contesting the rhetoric of social litigiousness); Finzen & Tassoni, *supra* note 6, at 523 (business claims lack empirical evidence); Michael J. Saks, *Do We Really Know Anything About The Behavior Of The Tort Litigation System—And Why Not?* 140 U. PA. L. REV. 1147, 1147-1292 (1992) (claims of litigation explosion overblown); Marc S. Galanter, *Reading The Landscape Of Disputes: What We Know And Don't Know (And Think We Know) About Our Allegedly Contentious And Litigious Society,* 31 UCLA L. REV. 4 (1983) (discrediting claims of a litigation crisis).

Studies demonstrate that litigation is either declining or remaining stable and that most Americans entitled to bring legal claims do not do so. HANS, BUSINESS, *supra* note 4, at 56, 58; Michael Rustad, *In Defense Of Punitive Damages In Products Liability: Testing Tort Anecdotes With Empirical Data,* 78 IOWA L. REV. 1, 2, nn. 1-5 (1992); Saks, *supra* note 9, at 1183 (a small proportion of plaintiffs are in the tort system), 1185 (victims do not complain).

10 *See* Podlas, *supra* note 4, at 12-18 (describing media's story selection and reporting

evidence disputing the litigation myth does not seem to resonate with the public.[11] As a result, these beliefs continue to pervade all sectors of society, influencing civil jury reform and infecting business decision-making.[12]

This discord between the reality and the perception of litigation underscores our lack of understanding about legal consciousness.[13] Although the influences on the propensity to pursue or avoid lawsuits is an obvious subject for behavioral inquiry,[14] research commonly neglects this transformative process.[15] Consequently, we know little about the average person's understanding of the law and the circumstances of its use, let alone the factors that influence the construction of legal consciousness.

Indeed, much of what drives perceptions about litigation is not per se legal or even factual. Rather, it is constructed by the media's images that saturate our culture.[16] As these pop culture representations of law disseminate beliefs about the uses and

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supporting ideas of a litigation explosion); Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425, 428 (media's stories construct a culture of legal hypochondria); Sanders, *supra* note 7, at 721 (describing the popularity of newspaper stories of tort suits).

11 It is not, as Marc Galanter had hoped, an antidote to incorrect legal anecdote. Galanter has employed social science as an antidote to the perverted anecdotes of a litigious society. *See* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996).

12 *See* HANS, BUSINESS, *supra* note 4, at 76 (assumptions about the litigation crisis being at hands of juries pervades all sectors of society). As a result, juries have become the primary target of contemporary tort reform efforts. HANS, BUSINESS, *supra* note 4, at 15 (tort reforms focus on civil juries); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 744 (2002) (concerns about juries dominate punitive damages reform debates), 746 (punitive damages reform is main battleground in tort reform struggle). Typically, these "reforms" limit the traditional powers of the jury either by restricting its ability to consider punitive damages or by capping the amount of damages that it may award. *See* Hans, *Illusions*, *supra* note 4, at 327 (many state jury reforms seek to limit the power of juries to award punitive damages); Robbennolt, *supra* note 1, at 159 (reforms focused on restraining out-of-control juries), 167 (reform efforts respond to the conception of the out-of-control jury); Harkin, *supra* note 3, at 370 (punitive damage reforms attempt to limit punitive damages); Pittman & Nettles, *supra* note 3, at 456 (Alabama's tort reform efforts involve restraining or capping punitive damages); Marc Galanter, *Shadow Play: The Fabled Menace of Punitive Damages*, 1998 WIS. L. REV. 1, 4 (1998) (discussing statutory caps or ceilings on awards removing discretion from the jury).

13 Legal consciousness is the way in which people make sense of and give meaning to the law and legal system. Elizabeth A. Hoffman, *Legal Consciousness and Dispute Resolution: Different Disputing Behavior at Two Similar Taxicab Companies*, 28 LAW & SOC. INQUIRY 691, 692-93 (2003) (defining legal consciousness).

14 *See* Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1083 (2003) (knowledge about influences on human behavior and propensities towards judgment can be relevant to legal theory and practice).

15 *Cf.* Julie MacFarlane, *Why Do People Settle?* 46 MCGILL L.J. 663, 668 (2001) (civil justice reform scholarship focuses on the adjudicative system and its agents rather than claimants).

16 *See* Sarat, *supra* note 10, at 452 n.2 ("Today we have law on the books, law in action, and law in the image").

abuses of litigation,[17] they inform people about litigation and its normative bounds, i.e., whether litigation is "bad" or "good" and when it is appropriate. This then influences the propensity of people to turn to the law for the resolution of their disputes.

In contemporary society, syndi-court is our primary icon of law.[18] It is more pervasive than any other type of legal information. Accordingly, inquiry into legal consciousness demands an examination of syndi-court. Quite simply, it is critical to understand what lessons syndi-court teaches, what normative influence it might exact, and how it contributes to contemporary legal culture.

This article presents an empirical and normative account of syndi-court's contribution to the construction of the legal consciousness. To that end, Part I focuses on consumer-business litigation. It considers business' use of litigation risk management models—models that attempt to define the rational behavior of consumer litigants—in addressing perceived risk. Yet, as summarized in Part I, these models are deficient in several respects: most notably, they do not integrate empirically-based understandings of consumer legal consciousness or cultural icons that influence consumer decisions to dispute.

Part II thus turns to the construction of legal culture and our socialization into that culture. After arguing that television is a powerful source of such acculturation, cultivation is posited as the mechanism by which television socializes audiences. Next, this article identifies syndi-court as American society's primary, or at least most pervasive, source of legal information. In doing so, the article describes syndi-court's attributes and potential influences.

Turning to empirical analysis, Part III investigates and quantifies the impact of syndi-court on audiences. This section reports a set of studies investigating syndi-court's impact on legal consciousness, in particular, its contribution to norms of and propensities toward disputing. This investigation proceeds in two phases. The first phase consists of a content analysis that systematically analyzes the disputes broadcast and remedies sought on syndi-court. The second phase consists of two groups of surveys that were administered to a total of 241 prospective jurors and to

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17 *See* Sarat, *supra* note 10, at 428.

18 *See* Kimberlianne Podlas, *Please Adjust Your Signal: How Television's Syndicated Courtrooms Bias Our Juror Citizenry*, 39 AM. BUS. L.J. 1, 6-8 (2001) [hereinafter, Podlas, *Please Adjust*] (discussing the primacy of syndi-court as a legal representation). The proliferation of law on television has both altered and expanded the sphere of legal life. Sarat, *supra* note 10, at 429.

326 jury-eligible adults. ANOVA and tests for statistical significance were performed, and results were analyzed both independently, and, ultimately, via meta-analysis.

The results, presented in Part IV, suggest that syndi-court cultivates audiences to its litigious reality, a reality where virtually any slight deserves judicial redress. Specifically, viewers who frequently watched syndi-court expressed propensities toward litigation, low-stakes litigation, and *pro se* litigation in significantly greater proportions than did their non-viewing counterparts. This might lead to an increase in low-end consumer-business litigation, as well as an overall increase in litigation.

With this enhanced understanding of legal consciousness and litigious propensities, this article next proposes ways in which business can integrate this enhanced understanding of legal culture into consumer-business litigation risk management guidelines. Primary among these recommendations are paying greater attention to low-end claims, and offering consumers apologies and immediate small sum payouts (using a settlement matrix). Ultimately, this article concludes that, by integrating this aspect of legal culture, risk management plans can more efficiently rationalize risk.

I. PERCEPTIONS OF THE LITIGIOUS CONSUMER

A. *Business's Attempt At Understanding Consumer Litigation*

To manage its fear of lawsuits, businesses have turned to litigation risk management.[19] Indeed, litigation-related costs have become "a major expense" in a business's annual budget, require millions of dollars, the companion costs of settlements and verdicts, and advertising and other public relations expenditures to maintain the corporate reputation.[20] Consequently, it has become a comprehensively managed undertaking.[21] Litigation management guidelines that implement litigation philosophies have even become common in retention contracts between insurers and defense attorneys.[22] By one estimate, litigation

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19 *See* Katherine E. Giddings & J. Stephen Zielezienski, *Insurance Defense in the Twenty-First Century: The Florida Bar's Proposed Statement of Insured Clients' Rights—A Unique Approach to the Tripartite Relationship*, 28 FLA. ST. U. L. REV. 855, 867 (2001).

20 *See* Giddings & Zielezienski, *supra* note 19, at 868.

21 *Id.* at 868 (litigation is no longer a matter of only occasional concern, but "a major expense item in annual budgets, necessitating comprehensive management controls"); Matthew T. Miklave, *Why "Jury" Is A Four Letter Word*, 77 WORKFORCE, March 1998, at 56, 56-58.

22 *Id.* at 871.

management eats up 3% to 10% of a company's yearly revenue.[23]

Central to litigation management is litigation risk assessment. Litigation risk assessment mimics traditional cost-benefit analysis or rational economic theory.[24] In other words, like rational theory, litigation risk assessment presumes that people act in rational, outcome-maximizing ways.[25] Of course, despite the number of disciplines employing rational choice as their central account of human decision-making,[26] what constitutes rational behavior is seldom defined.[27]

In the litigation risk assessment process, business identifies, assigns weight to, and weighs factors that it presumes to be important to the parties.[28] These factors include both direct costs, such as the price of adverse legal judgments,[29] litigation costs and attorneys' fees, and indirect costs, such as the impact of negative publicity or a lawsuit on consumer spending, market opportunities,[30] and business investment.[31] This "weight-added strategy" should also contemplate trial-oriented factors such as the potential amount of damages in the event of a judgment, the likelihood that the judge will side with the other party, the length of litigation, and the costs expended on litigation as opposed to the costs necessary to achieve the "best outcome."[32] The sum of

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23 *See* Sweeney, *supra* note 6, at 47 (PricewaterhouseCoopers report of U.S.-based companies). This figure includes insurance premium payments. *Id.*

24 MacFarlane, *supra* note 15, at 705 (rational risk assessment is a straightforward cost-benefit analysis); Russell B. Korobkin & Thomas S. Ullen, *Law And Behavioral Science: Removing The Rationality Assumption From Law And Economics*, 88 CAL. L. REV. 1051, 1055, 1060 (2000).

25 *See* Earl Johnson, Jr., *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567 (1980-1981).

26 *See* Korobkin & Ullen, *supra* note 24, at 1055-56, 1060 ("[T]here are probably nearly as many different conceptions of rational choice theory as there are scholars who implicitly employ it in their work").

27 *See id.*

28 *See* MacFarlane, *supra* note 15, at 704-05 (cost-benefit analysis in litigation weighs factors that are known and perceived as fact); Russel Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1220 (2003) ("weight-added strategy").

One prominent view of litigious behavior likens it to an economic model, wherein potential litigants base their decisions to settle, litigate, or lump it based on a desire to maximize the value of litigation. *See* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163, 170-71 (2000).

29 *See* Johnson, *supra* note 25, at 567.

30 *See* MacFarlane, *supra* note 15, at 705. Some tangible commercial consequences include the "loss of future contracts, and workplace morale problems. . . ." *Id.*; Richard Birke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements*, 4 HARV. NEGOT. L. REV. 1, 4 (1999) (valuations include how much the case is worth and the likelihood of prevailing).

31 *See* MacFarlane, *supra* note 15, at 706; PR NEWS, *America's Love Affair With Litigation Means News For Law for PR*, June 26, 2000, at 1 (litigation can damage stock prices).

32 *See* MacFarlane, *supra* note 15, at 706; Korobkin, *supra* note 28, at 1220.

this purportedly objective measurement attempts to reflect the best interests of the parties and with this calculation business can decide whether to settle, litigate, resort to insurance, or ignore a claim.[33]

B. *The Irrationality of Litigation Risk Assessment*

Unfortunately, the process of litigation risk assessment is deficient in several respects.[34] For risk assessment to work, it must include all relevant factors and weigh them correctly, but this generally is not done.[35] Although attorneys may be experts in litigation, they are not experts in the behavioral testing and the prediction crucial to this type of assessment.[36] For instance, one study showed that lawyers are particularly poor at estimating the proportion and amount of plaintiffs' verdicts, greatly overestimating both numbers.[37] Business management is even worse at making such predictions. Commonly, managers are either so distanced from the conflict, or have so little stake in it, that they cannot meaningfully assess the conflict.[38] Others have such a bleak view of consumer-business litigation[39] that they simply overestimate risk.[40] Moreover, research has shown that assessments differ depending on whether such evaluations are calculated by potential plaintiffs or potential defendants.[41]

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[33] *See* MacFarlane, *supra* note 15, at 704-05 (assessment reflects the best interests of the disputants); Korobkin, *supra* note 28, at 1220-21 (numerical score designates the best choice).

[34] *See* Christine Jolls et al., *A Behavioral Approach to Law and Economics, in* BEHAVIORAL LAW & ECONOMICS 16-19 (Cass Sunstein ed., 2000) [hereinafter SUNSTEIN, LAW & ECONOMICS] (observing failures of economic analysis in contemplating an individual's choice to dispute).

[35] *See* Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 597 (1988).

[36] *Id.* at 597; *see* Korobkin & Ullen, *supra* note 24, at 1067-68 (noting that rational theory suffers from difficulty in making predictions).

[37] Songer, *supra* note 35, at 597; *see also* John Lande, *Failing Faith in Litigation? A Survey of Business Lawyers' and Executives' Opinions*, 3 HARV. NEGOT. L. REV. 1, 15-16 (1998) (illustrating that outside counsel, when compared to inside counsel and executives, have more favorable views of litigation); Sanders, *supra* note 7, at 727 (recounting a "number of studies" showing that lawyers have a difficult time assessing the value of a case). These mistaken beliefs were also unusually resistant to change. Even after lawyer respondents were made aware of accurate statistics regarding litigation, they continued to overestimate its frequency. Songer, *supra* note 35, at 600.

[38] *See* MacFarlane, *supra* note 15, at 707; *but see id.* at 707 (documenting that in the competitive culture of corporate governance, purely objective risk appraisal is rare).

[39] *See* Galanter, *supra* note 7, at 742. These beliefs, though common, are generally not based on first-hand experience. *Id.* at 742-43.

[40] *See id.* at 743 (reporting a study by Charles Epp). Recent studies show that a corporation's total liability risk equaled 25.5 cents for every $100 dollars in revenue, whereas in 1987 it was 25.9 cents per $100 in revenue. *Id.* at 737-38 (*citing* J. Robert Hunter, *Product Liability Insurance Experience 1984-1993* (Mar. 1995)).

[41] Frank A. Sloan & Chee Ruey Hsieh, *Injury, Liability, and the Decision to File a Medical*

In addition to the deficiencies of those entrusted with calculation, the applicability of rational theory in assessing the risk of consumer litigation is questionable at best.[42] "Rational" calculations assume that consumer litigants make risk-neutral, outcome-maximizing decisions.[43] The resulting litigation models central to litigation risk assessment then extrapolate the potential litigants' claims based on a prediction of the value of the claim (or expected compensation), weighed against the expected cost to bring that claim.[44] Yet, research in decision-making,[45] not to mention common experience, suggests that this presumption is irrational.[46] A mass of experimental evidence shows that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory.[47] It appears that this supposedly rational choice is not all that rational, after all.

This is hardly surprising; the decision to file suit or complain in some way is hardly a dispassionate process.[48] Rather, legal disputing is influenced by factors independent of the facts of the case[49] and economic rationality.[50] Potential litigants may be guided by non-pecuniary motives[51] such as emotions about,[52] past experiences with,[53] and perceptions of law.[54] Litigants may harbor

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Malpractice Claim, 29 LAW & SOC'Y REV. 413, 414-15 (1995) (discussing the upward and downward bias of injury cost estimates).

42 *See generally* Korobkin & Ullen, *supra* note 24, at 1055-56, 1066-67 ("[R]ational choice theory is inadequate in predicting future behavior and the implausibility of [litigants'] predictions.").

43 *See* Guthrie, *supra* note 28, at 165; MacFarlane, *supra* note 15, at 668.

44 *See* Sloan & Hsieh, *supra* note 41, at 415 (describing the early conceptualization of the economic framework).

45 *See* Guthrie, *supra* note 28, at 175-76; SUNSTEIN, LAW & ECONOMICS, *supra* note 34, at 1 (indicating the effect of social science research on decision-making); Johnson, *supra* note 25, at 568.

46 *See* Korobkin & Ullen, *supra* note 24, at 1055-56, 1075.

47 *See id.* at 1055-56.

48 *See* Sloan & Hsieh, *supra* note 41, at 415.

49 *See* MacFarlane, *supra* note 15, at 669 (explaining that a disputant's settlement appraisals are influenced by factors other than advice from an attorney); Diane Vaughan, *Rational Choice, Situated Action, and the Social Control of Organizations*, 32 LAW & SOC'Y REV. 23, 26 (1998) (illustrating that rational theory does not consider preference formation).

50 Even where consumer perceptions of the ease, cost, and benefits of litigation are objectively incorrect, excluding these from calculation impedes rational assessment. *Cf.* MacFarlane, *supra* note 15, at 709.

51 *See* Sloan & Hsieh, *supra* note 41, at 421 (showing the non-pecuniary motives for claims in tort lawsuits).

52 MacFarlane, *supra* note 15, at 668.

53 *Id.* at 705 (claiming that the definition of risk is narrow and suffers from a "tendency to exclude the experience of the disputants themselves").

54 *Id.* (noting that factors other than the likely outcome are important for litigants, and "deserve fuller consideration than they commonly receive"). Evidence has also shown that religious background can influence a person's decision to claim. *See* Sloan & Hsieh, *supra* note 41, at 427. In a study of tort claims arising from adverse birth outcome, Sloan and

biases that impede their ability to make rational judgments,[55] and their enthusiasm for claiming may be influenced by the importance that funds from a verdict have to them.[56] Moreover, rational theory does not adequately allow for reevaluations when parties discover additional information about liability or damages during the disputing process.[57] This does not mean that the behavior of putative plaintiffs is unpredictable or random,[58] but rather, that traditional models are too constricted to quantify it accurately.[59] Thus, while traditional litigation risk assessment emphasizes consequences, it excludes from its calculations the way in which preconditions shape preferences.[60]

1. Difficulties in Decision-Making

It is not that individuals consciously attempt to act contrary to these rational choice models, but that they are cognitively constrained to do so. The limits of human cognitive ability make constant utility-maximizing behavior impossible. It is simply too complex.[61] Consumers seldom know the legal rules underpinning their disputes, so they cannot accurately assess the strength of their claim or its likely cost, let alone the amount of any verdict.[62]

As a result, people substitute heuristics to simplify their decision-making.[63] A heuristic is a mental shortcut or rule of thumb that people use when making judgments.[64] Without such

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Hsieh found that Catholics and Jews were more likely to claim than Protestants. *Id.* at 427-28.

55 Ross & Shestowsky, *supra*, note 14, at 1081.

56 *Cf.* Sloan & Hsieh, *supra* note 41, at 430-31 (indicating that victims with funds from other sources are less likely to file).

57 *Id.* at 415.

58 Korobkin, *supra* note 28, at 1223 (explaining that buyers used decision-making strategies more complex than random choice, but not as precise as utility-maximizing algorithms).

59 *See* LAW & ECONOMICS, *supra* note 34, at 1.

60 *See* Vaughan, *supra* note 49, at 26.

61 *See* Jeffrey Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1192 (2003) (positing a relationship between cognitive errors in decision-making and excess litigation); Korobkin & Ullen, *supra* note 24, at 1078.

62 *See* Korobkin & Ullen, *supra* note 24, at 1084; Korobkin, *supra* note 28, at 1223 (claiming that maximizing behavior is difficult for buyers to achieve). Actors can maximize the expected utility of a given decision only if their judgments are based on accurate perceptions of the likelihood that specific choices will lead to various possible outcomes. Korobkin & Ullen, *supra* note 24, at 1066.

63 *See* Korobkin, *supra* note 28, at 1223. Although such complexity beyond human cognitive capacity begs for a simplified decision strategy, it is not necessarily a pre-condition for it. Korobkin & Ullen, *supra* note 24, at 1077.

64 *See* Korobkin, *supra* note 28, at 1223; Korobkin & Ullen, *supra* note 24, at 1085; J. RICHARD EISER, SOCIAL JUDGMENT 103-04 (1991) (referencing the contribution of Tversky and Kahneman); NEAL FEIGENSON, LEGAL BLAME, HOW JURORS THINK AND TALK ABOUT ACCIDENTS 11 (2000).

mental shortcuts, making even relatively simple decisions would be incapacitating.[65] Indeed, Sunstein posits that it is quite rational for a person lacking statistical knowledge of various choices to rely on a heuristic for legal decision-making.[66] Yet, heuristics can bias decision-making, causing resulting decisions to deviate from rational models.[67]

Researchers recognize that our beliefs, knowledge of the world, and impressions[68] bound[69] or constrain rational decision-making. This is referred to as "bounded rationality."[70] Bounded rationality recognizes that actors take shortcuts in decision-making and that these shortcuts often result in choices that do not satisfy the utility-maximizing prediction.[71] In legal matters, people who lack information about the rules may resort to comparing their problems to other cases of which they are aware.[72]

The "availability heuristic" is an example of one way in which actors err in making predictions.[73] People assign a higher frequency to events that they can recall easily.[74] In other words, the easier a person can think of an example, the more frequent she believes that event occurs. Thus, the ease with which an image can be brought to mind[75] strengthens a heuristic device.[76] As applied to legal decision-making, a potential litigant relying on heuristics may have a distorted vision of litigation based on the most popular, and prominent, stories portrayed in pop culture.

The media is a primary source of heuristic knowledge. It presents stories in television shows, movies, and news reports that

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65 *See* Korobkin & Ullen, *supra* note 24, at 1076; FEIGENSON, *supra* note 64, at 45.

66 *See* Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1301 (2003).

67 *See* EISER, *supra* note 64, at 104.

68 *See* Donald C. Langevoort, *Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review*, 51 VAND. L. REV. 1499, 1502 (1998) (noting that transaction cost economics presumes the rationality of economic actors is "bounded").

69 *Id.* at 1502; Korobkin & Ullen, *supra* note 24, at 1069.

70 Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 958 (1995) [hereinafter Sunstein, *Problems*]; Korobkin, *supra* note 28, at 1207 (describing the impact of bounded rationality on buyers' contracts).

71 *See* Sunstein, *Problems*, *supra* note 70, at 958; Korobkin & Ullen, *supra* note 24, at 1070, 1075-76.

72 *See* Sunstein, *Problems*, *supra* note 70, at 958.

73 *See* Korobkin & Ullen, *supra* note 24, at 1085-86; Langevoort, *supra* note 68, at 1500.

74 *See* L.J. Shrum, & Valerie Darmanin Bischak, *Mainstreaming, Resonance, and Impersonal Impact*, 27 HUMAN COMMUNICATION RESEARCH 187 (2001); EISER, *supra* note 64, at 105-6; Amos Tversky and Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453 (1981); T.R. Tyler & Franklin L. Cook, *The Mass Media and Judgments of Risk*, 47 J. PERSONALITY & SOCIAL PSYCH. 693 (1984); Daniel Kahneman, *New Challenges to the Rationality Assumption*, 150 J. INSTITUTIONAL & THEORETICAL ECON. 18 (1994).

75 *See* Rachlinski, *supra* note 61, at 1170; FEIGENSON, *supra* note 64, at 46-47.

76 *See* Sunstein, supra note 66, at 1302 (discussing experimental data on availability heuristic).

become exemplars of litigation. The more common or memorable these stories are, the stronger heuristics they become. For example, the world of anecdote is dominated by stories about tort litigation and punitive damages gone mad; stories crafted by business itself.[77] Although some businesses could recognize and use this propaganda for their benefit, it appears that many have fallen prey to their own rhetoric.[78] As a result, business tends to overestimate the frequency of high-end litigation,[79] the number of verdicts against business defendants, and the dollar amounts of verdicts.[80]

According to the bin theory of memory, memory is like a file cabinet.[81] We place information that is new, more memorable, or more frequently encountered into the front of the file cabinet, and, when we search for information, we begin by looking in the front.[82] Consequently, this information is the most likely to be remembered,[83] and therefore, become a heuristic device.

2. Impact on Litigation Management

Irrationality flaws the rational undertaking of litigation risk assessment in a number of ways. In addition to suffering from limits of rational theory, it neglects pop culture and empirically-based assessments of the propensities, heuristic devices, and perceptions about litigation, including mistaken ones, of consumer plaintiffs.[84] Instead, risk assessment commonly substitutes empirical assessments with anecdotes about consumer

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77 Business conjured the litigation crisis for its own ends. BURKE, *supra* note 1, at 3; Daniels & Martin, *supra* note 5, at 466-72 (recounting business's anti-punitive damages and anti-litigation advertisements). Valerie Hans posits that the "litigation explosion" rhetoric has been promulgated by business seeking to influence public consciousness. HANS, BUSINESS, *supra* note 4, at 50. Finzen and Tassoni concur that business conducted its own public relations campaign to convince the media, the public, and Congress that a litigation explosion was undermining corporate America. Finzen & Tassoni, *supra* note 6, at 524-25.

78 *See* Finzen & Tassoni, *supra* note 6 (showing that business relies on its own marketing to the exclusion of reality).

79 *See* Eisenberg et al., *supra* note 12, at 745-46 (discussing overestimates of the frequency of damage awards).

80 *Id.* at 745 (discussing incorrect perceptions about the cost and likelihood of punitive damages); *id.* at 763 (businesses tend to focus on juries' propensity to award punitive damages).

81 *See* Hyung-Jin Woo & Joseph R. Dominick, *Acculturation, Cultivation, and Daytime TV Talk Shows*, 80 JOURNALISM & MASS COMM. Q. 109, 112 (2003) (describing the "file cabinet" model); L.J. Shrum & Thomas C. O'Guinn, *Processes and Effects in the Construction of Social Reality: Construct Accessibility as an Explanatory Variable*, 20 COMM. RES. 436 (1993).

82 *See* Shrum & O'Guinn, *supra* note 81.

83 *See* Woo & Dominick, *supra* note 81, at 112 (describing the "file cabinet" model).

84 *See* Eisenberg et al., *supra* note 12, at 745-46 (stating that misperceptions about jury decision-making, and the level and frequency of damage awards, are strong).

litigiousness.[85] Where anecdote controls, it infects litigation risk management,[86] destroying the promise of rational theory.[87] This practice may result in business relinquishing control to insurance carriers, paying claims unnecessarily,[88] and settling claims at inflated dollar amounts.[89]

II. Discerning Consumer Legal Culture

A. *Acculturation to Litigation*

To more accurately predict consumer litigiousness, thereby rationalizing consumer-business litigation assessment, we must better understand the way in which social forces intersect with individual decision-making regarding litigation.[90] How do they contribute to, or reflect, legal culture? An enhanced understanding of the factors that influence disputant decision-making, and an analysis of the heuristic devices that affect them, can increase our ability to predict how people will behave when faced with the possibility of litigation.[91] This heightened awareness

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85 *See* Daniels & Martin, *supra* note 5, at 466-72 (recounting business's anti-punitive damages and anti-litigation advertisements). Ironically, business itself contributed to the mythology of the litigation crisis. Burke, *supra* note 1, at 3. Valerie Hans posits that the "litigation explosion" rhetoric has been promulgated by business seeking to influence public consciousness. Hans, Business, *supra* note 4, at 50. Finzen and Tassoni concur that business conducted its own public relations campaign to convince the media, the public, and Congress that a litigation explosion was undermining corporate America. Finzen & Tassoni, *supra* note 6, at 524-25.

86 Saks, *supra* note 9, at 1147-61 ("anecdotes contribute little to developing a meaningful picture of the situation about which we are concerned").

87 *See* Cass R. Sunstein, *How Law Constructs Preferences*, 86 Geo. L.J. 2637, 2639 (1998) ("If people's choices are based on incorrect judgments about their experiences after choice, there is reason to question whether respect for choices, rooted in those incorrect judgements, is a good way to promote utility or welfare.").

88 Lucian Arye Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. Legal Stud. 1, 4-8, 14-15 (1996) (analyzing ways in which plaintiffs with low likelihoods of success can threaten defendants into settlement); Suzanne Oliver, *Let The Loser Pay*, Forbes, March 18, 1991, at 96 (explaining that businesses will do anything to avoid lawsuits); *see also* Robert L. Kidder, Connecting Law & Society 47-48 (1983) (describing strategies and decision-making regarding legal settlements); Galanter, *supra* note 7, at 747 (may induce corporate functionaries to overestimate threat and make settlement and business decisions that cannot be accounted for in terms of the actual propensities of juries).

89 Neil Vidmar, *The Performance of the American Civil Jury: An Empirical Perspective*, 40 Ariz. L. Rev. 849, 880 (1998) (noting studies suggesting that less serious injuries are overcompensated). Plaintiffs' attorneys have acknowledged that fear of punitive damages provides leverage in settlement negotiations with business. Koenig & Rustad, *supra* note 9, at 176 (acknowledging that punitive damage claims provide important leverage for clients). Ninety percent of all civil suits filed settle. Marc S. Galanter, *Most Cases Settle: Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1340 n.2 (1994).

90 *See* Sunstein, *supra* note 66, at 1296 (it is necessary to know about the interaction between social forces and cognition).

91 *See* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. Legal Stud. 107, 107 (2001) (discussing risk assessment).

will help business quantify factors of rational theory, and implement the best strategies in responding to consumer disputes.[92] Research about civil litigation, however, tends to exclude the transformative process by which potential plaintiffs choose to avoid or pursue litigation.[93]

A number of factors influence an individual's propensity to avoid or pursue litigation.[94] Although some are structural, such as procedural barriers,[95] filing fees, or the ease of obtaining counsel,[96] cultural factors[97] are perhaps the most pervasive.[98]

A cultural environment surrounds litigation.[99] That environment provides signals to us regarding what amounts to an injury, what to do about it, and what society's reaction will be. It includes values and attitudes about the legal system, opinions about the acceptable ways to resolve disputes, and beliefs about the circumstances under which litigation is appropriate.[100]

This legal culture[101] is comprised of norms.[102] Norms are

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92 *Cf.* Bryant G. Garth, *Observations on an Uncomfortable Relationship: Civil Procedure and Empirical Research*, 49 ALA. L. REV. 103, 106 (1997) (empirical measurement allows selection and implementation of most effective reforms).

93 *See* MacFarlane, *supra* note 15, at 668 (civil justice reform scholarship focuses on the adjudicative system and its agents rather than claimants).

94 *See* HANS, BUSINESS, *supra* note 4, at 5-8.

95 Among those developments: the Supreme Court interpreted law to make summary judgment on the behalf of tort defendants more readily available. *See, e.g.*, Celotex Corp.v. Catrett, 477 U.S. 317, 323-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). State courts increased sanctions against frivolous lawsuits, and The Advisory Committee on the Federal Rules of Civil Procedure amended Rule 11. Guthrie, *supra* note 28, at 164.

96 *Cf.* Michele Taruffo, *Some Remarks on Groups Litigation, A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 405, 405-8 (2001) (describing how class action permits the harms of more individuals to be grieved); *id.* at 409 (noting the procedural elements of class action litigation).

97 *See* James L. Gibson & Gregory A. Caldeira, *The Legal Cultures of Europe*, 30 LAW & SOC'Y REV. 55 (1996); *see also* MacFarlane, *supra* note 15, at 669 (the cultural, cognitive, psychological, and affective orientations of disputants impact decision-making regarding disputes).

98 *See* Podlas, *As Seen on TV*, *supra* note 4, at 18 (norms define the cultural environment of litigation); Sarat, *supra* note 10, at 452 n.2, 427 (the emergence of civil disputes is cultural, not legal); *see also* Korobkin, *supra* note 28, at 1222 (presenting the pervasive normative aspect of weight-added decision-making).

99 Our legal system is not a set of substantive and procedural rules but a synthesis of cultural products. Gunter Bierbrauer, *Toward an Understanding of Legal Culture*, 28 LAW & SOC'Y REV. 243 (1994); Sarat, *supra* note 10, at 452 n.2, 427 (the emergence of civil disputes is cultural, not legal).

100 *See* Podlas, *As Seen On TV*, *supra* note 4, at 18-19; W. BARNETT PEARCE & S.W. LITTLEJOHN, MORAL CONFLICT: WHEN SOCIAL WORDS COLLIDE 50 (1997); Daniels & Martin, *supra* note 5, at 457 (the culture of litigation contemplates people's ideas about the world around them); *id.* at 453 (the cultural environment of litigation defines what is an injury, whom to blame, and what to do about it).

101 The definition of "legal culture" varies widely. *See* Gibson & Caldeira, *supra* note 97, at 55-56.

102 *See* Tom R. Tyler & John M. Darley, *Is Justice Just Us?*, 28 HOFSTRA L. REV. 707, 719 (2000) (social values underlie social behavior); Dan Coates & Steven Penrod, *Social*

comprised in part from common cultural behaviors and understanding,[103] and define social expectations of how to act.[104] They inform us of what others deem right or wrong, and what reactions are "normal."[105] Consequently, norms also guide responses and actions toward law. Norms guide our "willingness to turn to legal institutions for the management of private conflicts,"[106] thereby structuring our expectations regarding disputing.[107]

1. Socialization

One rubric for understanding this influence on attitudes about litigation is socialization. Socialization is a broad term referring to the process by which society teaches its members its core beliefs, attitudes, and behaviors.[108] Socialization is a term used by a variety of social scientists. For instance, anthropologists use enculturation to describe the process by which members of society acquire and internalize various aspects of society. These aspects can be cultural, mystical, or linguistic.[109] Psychologists use socialization to label learning of appropriate behaviors that enable us to co-exist with others in the social group.[110] Sociologists employ the term to refer to how we learn to participate in group

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Psychology and the Emergence of Disputes, 15 LAW & SOC'Y REV. 655, 666-67 (1980-1981) (social comparisons influence the "naming and blaming" stages of legal disputing); Bierbrauer, *supra* note 99, at 244; Gibson & Caldeira, *supra* note 97, at 56 (the definition of "legal culture" as an analytical construct varies widely).

103 *See* Bierbrauer, *supra* note 99, at 243.

104 *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 914 (1996). There are many definitions of "norm." *Id.* (social norms are understood in many different ways); *see also* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 351 (1997).

105 JOEL CHARON, THE MEANINGS OF SOCIOLOGY 61-62, 107 (4th ed. 1993) (norms signal society's rules or expectations). According to Sunstein, norms are "social attitudes of approval and disapproval, specifying what ought to be done and what ought not to be done." Sunstein, *supra* note 104, at 914.

106 *See* Gibson & Caldeira, *supra* note 97, at 59; Hoffman, *supra* note 13, at 694 (the legal consciousness is collectively constructed and defines the appropriate method for addressing disputes).

107 *See* Amitai Etzioni, *Social Norms: Internalization, Persuasion, and History*, 34 LAW & SOC'Y REV. 157 (2000); *see also* CHARON, *supra* note 105, at 167 (noting the importance of socialization in following society's rules of law); Daniels & Martin, *supra* note 5, at 543-45, 560; Sunstein, *supra* note 104, at 914 (norms define what actions are to be taken); Ted Rohrlich, *We Aren't Seeing You In Court; Americans Aren't Suing Each Other As Often As They Did A Decade Ago. California, In Particular, Has Seen A Steep Decline In High-Stakes Personal Injury Suits*, L.A. TIMES, Feb. 1, 2001, at A1 (litigation-oriented decisions are made with reference to the social norms of suit and plaintiffs).

108 *See* DAVID CROTEAU & WILLIAM HOYNES, MEDIA SOCIETY 14-15 (3d ed. 2003).

109 *Id.* at 209.

110 *Id.* at 209-10. In other words, through socialization people learn to control their innate drives which, if developed unchecked, would be socially disruptive.

life.[111] Media theorists use the concept of socialization to explain the way in which the media impacts our lives.[112] Though each discipline adapts the notion to its unique understanding of the world, all employ the concept of socialization to explain how society's rules and values are learned and integrated into individual actions.[113]

In legal culture, socialization demonstrates what the norms are and what constitutes a "litigable moment."[114] When an individual believes that she has been wronged, she must decide whether she should pursue it in a legal forum, how, and for what remedy.[115] This assessment is made within the legal culture. For example, the aggrieved will compare her situation with those of others, considering what they have done and how society has responded.[116] Where the public image of litigation implies that it is demeaning or embarrassing,[117] or its plaintiffs greedy,[118] potential

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111 *Id.* at 210-11; W. PHILLIPS DAVISON ET AL., MASS MEDIA: SYSTEMS AND EFFECTS 176 (2d ed. 1982) (through socialization we learn a basic minimum knowledge of the society in which we live, along with a number of attitudes and beliefs held by that society).

112 *See* CROTEAU & HOYNES, *supra* note 108, at 13-16 (describing the role of mass media in socialization); *see also* MELVIN DEFLEUR & SANDRA BALL-ROKEACH, THEORIES OF MASS COMMUNICATION 225-26 (5th ed. 1989) (noting that a more parsimonious theory of socialization and media influence is social expectations theory). Social expectations theory is based on the idea that the media conveys information regarding the rules of social conduct and that this shapes overt behavior directly. In other words, social expectations theory portrays the media as an agent of social instruction. *Id.* With regard to law, anthropologists often focus on the culture's law; sociologists concern themselves with criminal behavior and law-related business practices; political scientists study law-making, implementation, and judicial dispute resolution; and economists are concerned with the transactions that law governs, and the effects of the laws that govern them. Edward L. Rubin, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Law and Methodology of Law*, 1997 WIS. L. REV. 521, 536-37 (1997).

113 Etzioni, *supra* note 107, at 161-63 (people try to comply with legal norms); DEFLEUR & BALL-ROKEACH, *supra* note 112, at 225 (explaining how various aspects of culture that begin as external to the individual eventually become internal).

114 *See* William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 LAW & SOC'Y REV. 631, 631-32 (1980-1981) (describing disputes as social constructs). According to these authors, individuals, *inter alia*, must first perceive a wrong and then transform this perception of "wrong" into a grievance. This process references social factors. *Id.* at 633-35. Here, "litigious moment" designates the point at which, through legal acculturation/socialization, the plaintiff deems an event as a "suit-worthy" wrong.

115 *Id.* at 633-35; MacFarlane, *supra* note 15, at 635 (describing the transformation of a grievance upon voicing it and requesting a remedy); Sloan & Hsieh, *supra* note 41, at 431 (the choice to pursue or forgo suit includes an assessment of social costs).

116 Coates & Penrod, *supra* note 102, at 669-71 ("blaming" requires some measure of social comparison); Hoffman, *supra* note 13, at 692-93 (explaining that grieving is influenced by cultural markers and describing the transformation of the employment grievance); Felstiner et al., *supra* note 114, at 633-35 (a comparison to others is critical in the transformation of a harm into a legal dispute); Sunstein, *supra* note 104, at 916 (social norms impact one's self-conception and choices); Sarat, *supra* note 10, at 426-27 (describing the cultural process of naming, blaming, and claiming).

117 Saks, *supra* note 9, at 1189 (potential plaintiffs avoid suit because of the stigma associated with litigation); Julie Pacquin, *Avengers, Avoiders and Lumpers: The Incidence of*

grievants will perceive a social norm disfavoring litigation. Conversely, where the public image of litigation or litigants is positive, it develops a norm favoring litigious action. Whether correct or not,[119] if the aggrieved believes that this is not the type of dispute that should be litigated, the wrong will not mature into a legal dispute.[120]

2. Socialization and the Media

Societies communicate their norms in myriad ways. In contemporary American society, the media—most prominently television—is our primary conduit for normative information.[121] Its images show us how to act and what is normal behavior.[122] Regardless of truth or falsity, these stories and images shape our beliefs.

Television's features make it an unusually potent messenger.[123] Formation of a norm[124] requires both an apparent

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Disputing Style on Litigiousness, 19 WINDSOR Y.B. ACCESS JUST. 3, 17 (2001) (people think of litigation as a disagreeable experience); Lande, *supra* note 37, at 1 (the media's image of litigation is largely negative).

118 Daniels & Martin, *supra* note 5, at 454 (a significant portion of the public believes plaintiffs bring unjustified lawsuits); Galanter, *supra* note 2, at 664 (litigants are portrayed as "petty, oversensitive, obsessive, exploitative and sociopathic").

119 A common but unsupported assumption in [rational assessment] is that "individual actors know the law." Pauline T. Kim, *Norms, Learning, and Law: Exploring Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447, 448 (1999). Authors have asserted that Americans have an unrealistically high expectation of legal rights and when wrongs deserve legal redress. David M. Engel & Frank W. Munger, *Rights, Remembrance and the Reconciliation of Difference*, 30 LAW & SOC'Y REV. 7, 8-9 (1996) (contrasting perspectives on rights consciousness and litigation aversion).

120 MacFarlane, *supra* note 15, at 663; Coates & Penrod, *supra* note 102, at 668-69 (discussing problem perception, and "naming" via social comparison); *cf.* Sarat, *supra* note 10, at 427 (naming and blaming are critical to transform a wrong into a dispute). If an experience is not deemed injurious, it will not mature into a claim. *Id.* at 427.

121 *See* Richard Petty et al., *Media Mass Attitude Change: Implications of the Elaboration Likelihood Model of Persuasion*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH 155, 188 (Jennings Bryant & Dolf Zillman eds., 2d ed. 2002); JAMES SHANAHAN & MICHAEL MORGAN, TELEVISION AND ITS VIEWERS, CULTIVATION THEORY AND RESEARCH 1, 20 (1999) (the hours spent watching television are second only to those spent sleeping and working); GEORGE COMSTOCK & ERICA SCHARRER, TELEVISION, WHAT'S ON, WHO'S WATCHING, AND WHAT IT MEANS 8 (1978); Peter K. Manning, *Semiotics and Justice*, *in* SOCIAL JUSTICE, CRIMINAL JUSTICE 133 (Bruce A. Arrigo ed., 1999); Angelique M. Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?* 58 OHIO ST. L.J. 655, 656 (1997) (Americans get the majority of their information from television).

122 George Gerbner et al., *Growing Up with Television: Cultivation Process*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra* note 121, at 57 (television is the source of the most broadly shared images and messages in history).

123 Scott L. Althaus & David Tewksbury, *Agenda Setting and the "New" News, Patterns of Issue Importance Among Readers of the Paper and Online Versions of the* New York Times, 29 COMM. RES. 180, 181 (2002) (television is the dominant mechanism for disseminating information).

124 Although there is no universally accepted theory of how norms originate, these are generally agreed to be prerequisites. McAdams, *supra* note 104, at 391, 400.

consensus of behavior or attitude within a target population and knowledge of that consensus among the general population.[125] Only with knowledge of a consensus among individuals is a norm established.[126] Through its programming, television publicizes a supposed consensus. Since almost every American watches television,[127] millions of people[128] see the behaviors and opinions of others.[129] As television displays an apparent consensus of behavior, it provides individuals with a public standard to guide their actions.[130]

3. Cultivation

Cultivation theory helps explain the transmission of cultural knowledge via the television.[131] Cultivation[132] investigates the relationship between television exposure[133] and holding beliefs about the world[134] that are consistent with the imagery and

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125 *Id.* at 360 (esteem-based norms require publicized consensus). The publicity condition is difficult to satisfy and is "[t]he determinative obstacle to societal norm formation." *Id.* at 400-01.

126 *Id.* at 362 (ignorance of a consensus cannot produce norms).

127 Since 1983, the average household watches seven hours of television daily, the average adult watches over four hours of television each day, and children watch even more. *See* TODD GITLIN, MEDIA UNLIMITED 15-16 (2003). Adults over fifty-five years of age watch the most television, approximately 5.5 hours daily. Gary R. Edgerton & Michael T. Marsden, *The Teacher-Scholar in Film and Televisions, Introduction: Media Literacy and Education,* J. POPULAR FILM & TELEVISION 2, 3 (2002); L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewer's Perceptions of Reality: A Psychological Process Perspective,* 22 LEGAL STUD. F. 257 (1998) (noting that television comprises more than four hours per day for individuals, and seven hours per day for households).

128 Paul, *supra* note 121, at 656 (Americans get the majority of their information from television).

129 Dan M. Kahan, *Social Influence, Social Meaning and Deterrence,* 83 VA. L. REV. 349, 351 (1997) (we draw inferences from the behavior of others).

130 *Id.*; CHARON, *supra* note 105, at 98 (individuals draw inferences from the popularity of the behavior of others).

131 In addition, some have explained the media's influence on behaviors and attitudes through social learning. Social learning theory posits that viewers will look to the symbols and stories on television, and use these as schemata for their own behavior. In other words, media messages will teach and influence young people by providing explicit, concrete "models" for behavior, attitudes, and feelings. *See* ALBURT BANDURA, SOCIAL LEARNING THEORY 1-28, 73-130 (1977).

132 Although George Gerbner and his colleagues envisioned cultivation as a more limited concept, its emphasis shifted "from individual short-term effects to the long term cultural-ideological socialization role of repetitive messages found in television programming." John L. Sherry, *Media Saturation and Entertainment-Education,* 12 COMM. THEORY 206, 211 (2002).

133 Jonathan Cohen & Gabriel Weimann, *Cultivation Revisited: Some Genres Have Some Effects on Some Viewers,* 13 COMM. REP. 99, 101-02, 107-08, 212 (2000). Cultivation accounts for the effects of the dominant messages on television.

134 Woo & Dominick, *supra* note 81, at 110. Cultivation analysis is the theoretical approach and research strategy that emerged from The Cultural Indicators Project, which studied television policies, programs and impacts. Gerbner et al., *supra* note 122, at 43, 45-47.

messages of televisions.[135] The theory is unconcerned with the short-term effect (where watching a particular television show directly causes a certain effect), but instead with the long-term impact of stable, repetitive images on perceptions of social reality.[136]

Cultivation theory presumes heavy viewers derive their perception of reality from the representations on television.[137] Hence, when an audience sees a behavior constantly repeated on television, it comes to believe that those behaviors are normal or socially correct[138] (or imbued with the values consistent with that portrayal).[139] When audience members seldom see a behavior on television, they believe that behavior to be abnormal or socially disfavored.[140] Even if viewers forget the particular elements of what they have seen on television, they retain and integrate general impressions that influence decision-making.[141] Admittedly, the world as seen on television may bear little resemblance to reality.[142] Thus, regular television viewers may cultivate a distorted view of the world.[143]

Shrum and O'Guinn have proposed a "file cabinet" model of

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135 Thomas C. Guinn & C.J. Shrum, *The Role of Television in the Construction of Consumer Reality*, 23 J. CONSUMER RES. 278, 280 (1996). Cultivation analysis quantifies and tracks the most recurrent images in television content (i.e., message system analysis), and investigates whether and how television contributes to viewers' conceptions of social reality. MEDIA EFFECTS: ADVANCES IN THEORY & RESEARCH, *supra* note 121. As originally posited, cultivation referred to exposure to television in general, rather than exposure to a specific genre of programming. CROTEAU & HOYNES, *supra* note 108, at 246. According to Gerbner and Signorielli, immersion in the television culture produces a mainstreaming effect, wherein differences in heterogeneous populations are homogenized by television viewing. Gerbner et al. *supra* note 122, at 17; George Gerbner, Larry Gross, Michael Morgan, and Nancy Signorielli, *Charting the Mainstream* 32 J. COMM. 100 (1982).

136 Gerbner, Gross, Morgan, and Signorielli, *supra* note 135, at 43-44 (discussing the medium's contribution to perceptions of social reality).

137 Patrick Rossler & Hans-Bernard Brosius, *Do Talk Shows Cultivate Adolescents' Views of the World? A Prolonged-Exposure Experiment*, 51 J. COMM. 143, 146 (2001).

138 Cohen & Weimann, *supra* note 133, at 99.

139 Generally, viewing television gradually leads viewers to adopt beliefs about the social world that match the stereotyped and selective view of the reality portrayed systematically on television. Woo & Dominick, *supra* note 81, at 110; *see also* DEFLEUR & BALL-ROKEACH, *supra* note 112, at 216-17.

140 SHANAHAN & MORGAN, *supra* note 121, at 72 (watching a significant amount of television will lead viewers to hold beliefs consistent with the stories depicted by this medium).

141 This is reflected in cultivation's "mainstreaming" process, where viewers learn facts about the world and are socialized by observing them on the television screen. Cohen & Weimann, *supra* note 133, at 102, 108 (significant exposure to television can lead to perceptions of reality that differ from those held by non-viewers); Gerbner et al., *supra* note 122, at 17, 23-25 (television does not merely reflect beliefs, but cumulative exposure to it generates a unique set of beliefs in viewers).

142 Shrum, *supra* note 127, at 261.

143 *See generally*, Gerbner et al., *supra* note 122, at 25.

cultivation based on the bin theory of memory.[144] When we search for information, we are most likely to find the information in the front of the cabinet. According to Shrum and O'Guinn, a "heavy" television viewer might group a large number of stereotyped television images at the front of the file, and, when judging social reality, access these images first (or exclusively).[145] Thus, cultivation theory intersects with the development of decision-making heuristics.

The first cultivation studies considered the connection between heavy television viewing and beliefs about violence in the world. Due to the plethora of violence on television, cultivation posited that heavy television viewing would be associated with exaggerated beliefs about the amount of violence in society.[146] Thus, frequent television watchers are likely to believe that crime is pervasive in society.[147] Indeed, despite declining crime rates, Americans continue to believe that crime is rampant.[148]

Cultivation has been extended to other areas, including the study of daytime talk shows. One study showed that adolescents who were heavy viewers of daytime talk shows overestimated the incidence of behaviors highlighted on those shows.[149] Studies have shown a similar cultivation effect on international populations. International students who were heavy viewers of daytime talk shows exhibited beliefs consistent with the reality of American culture broadcast.[150] Presumably, these shows make the abnormal seem normal and cause viewers to trivialize complex social issues.[151] Additionally, a substantial body of literature has shown the media's impact, via story and focus, on the formation and change of political opinions,[152] the likelihood of resorting to

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144 *See* Woo & Dominick, *supra* note 81, at 112 (describing the "file cabinet" model); Shrum & O'Guinn, *supra* note 81, at 436.

145 Woo & Dominick, *supra* note 81, at 112.

146 Gerbner et al., *supra* note 122, at 43, 49-51. This was due to the belief that television's programs represented the world as a violent place. Gerbner et al., *supra* note 122, at 52-53 (outlining the "mean world" syndrome).

147 *Id.* at 38-39 (indicating that television exaggerates greatly the incidence of crime in society).

148 Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL'Y 37, 37-38 (1997) (outlining the "violence in society" syndrome).

149 Joseph R. Dominick & Hyung-Jin Woo, *Daytime Television Talk Shows and the Cultivation Effect Among U.S. and International Students*, 45 J. BROADCASTING & ELECTRONIC MEDIA 598 (2001).

150 *See id.* at 610; Woo & Dominick, *supra* note 81, at 113 (illustrating beliefs consistent with the imagery shown on television). In general, heavy viewers have more stereotyped thinking. DAVISON ET AL., *supra* note 111, at 177.

151 *See* Rossler & Brosius, *supra* note 137, at 145.

152 Douglas McLeod et al., *Resurveying the Boundaries of Political Communication Effects*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra* note 121, at 214, 226. Even if the media does not lead to a change in attitudes, it may still make the covered issues more

aggression,[153] misperceptions regarding the race of welfare mothers,[154] idealistic views about marriage,[155] and the public's perception of the "correct" judicial temperament and behavior.[156] Thus, cultivation holds promise for both the understanding and the development of beliefs about legal culture.

B. *Syndi-court, Our Legal Storyteller*

Individuals learn about the rules and norms of the law in different ways. Some learn through college coursework, others through direct experience like litigation, and still others through employment. Yet, most people do not have these types of one-on-one experiences, and therefore learn through other means.[157] Generally, that alternative means is television.[158]

Just as television is our primary messenger of culture, so is it our primary messenger of legal culture.[159] Both the bench[160] and

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salient to viewers. Petty et al., *supra* note 121, at 167; Doris A. Graber, *Seeing Is Remembering: How Visuals Contribute to Learning from Television News*, 40 J. COMM. 134 (1990).

153 L.J. Shrum, *Media Consumption and Perceptions of Social Reality: Effects and Underlying Processes*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND Research, *supra* note 121, at 69, 77-78; COMSTOCK & SCHARRER, *supra* note 121, at 64-71.

154 Mira Sotirovic, *Media Use and Perceptions of Welfare*, 51 J. COMM. 750, 765-67 (2001).

155 Chris Segrin & Robin L. Nabi, *Does Television Viewing Cultivate Unrealistic Expectations About Marriage?*, 52 J. COMM. 247, 259-61 (2002).

156 *See* Podlas, *As Seen On TV*, *supra* note 4, at 40-41. A media effect on attitudes and behaviors has also been found in legal contexts. First and foremost is the mythology of the litigation explosion. At the beginning of the twentieth century, litigation was uncommon. *See* Hans, *Illusions*, *supra* note 4, at 7; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 185-87 (2d ed. 1985). This infrequency was paralleled by media coverage that either did not report litigation or described it as inappropriate. HANS, BUSINESS, *supra* note 4, at 4-8. During the industrial revolution, when the number of industrial accidents began to skyrocket, media coverage shifted. Newspapers began publicizing accidents, but also focused on suits by the innocent workers harmed in their employ by big business. McAdams, *supra* note 104, at 391-92; HANS, BUSINESS, *supra* note 4; FRIEDMAN, *supra*, at 545 (describing how newspapers sensationalized high profile trials and accidents). The tone and content of these stories indicated that litigation of this ilk was just, and helped support social norms favoring litigation. Arthur F. McEvoy, *The Triangle Shirtwaist Factory Fire of 1911: Social Change, Industrial Accidents, and the Evolution of Common Sense Causality*, 20 LAW & SOC. INQUIRY 621, 637-38 (1995) (describing how the publicity related to the fire influenced public opinion regarding business's responsibility for accidents).

157 *See* Podlas, *Please Adjust*, *supra* note 18, at 3-4.

158 *Id.*; Kimberlianne Podlas, *The Monster in the Television: The Media's Contribution to the Consumer Litigation Boogeyman*, 44 GOLDEN GATE U.L. REV. 239, 260-61 (2004) (citizens obtain most information about legal system from television) [hereinafter, *The Monster*]; Elliot E. Slotnik, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (explaining that television provides the majority of the public with its only information about law); *see also* Bruce M. Selya, *The Confidence Games: Public Perceptions of the Judiciary*, 30 NEW ENG. L. REV. 909, 913 (1996) (demonstrating that "few individuals have direct experience with the justice system").

159 *See, e.g.*, Podlas, *Please Adjust*, *supra* note 18, at 7-8, 15; COMSTOCK & SCHARRER, *supra* note 121, at 190 (maintaining that there is extensive learning from television); Sarat, *supra* note 10, at 450 (claiming that mass media images of law are as powerful as any other social forces); *Civil Litigation and Popular Culture Sixth Annual Clifford Symposium on Tort Law and Social Policy*, 50 DEPAUL L. REV. 421, *Introduction* (2000).

Bar[161] have acknowledged television's impact on knowledge and perception about the legal system. Although law as broadcast on television has traditionally been confined to fictional dramas,[162] the last decade has witnessed the rise of syndi-court.[163] Today, syndicated television courtrooms like "Judge Judy" and "The People's Court" rule the daytime dial.[164] Watched by up to eight and a half million viewers per day,[165] syndi-courts have become more pervasive than any other type of legal information.[166] Consequently, their potential influence on audiences is tremendous.[167]

In addition to their Nielsen popularity, syndi-courts possess a number of characteristics that enhance their impact on audiences. First, they are accessible. Cable is not a pre-requisite, and the conflicts televised are distilled into easily digestible bite-sized nuggets. Second, the "facticity" of syndi-court's stories, i.e., their presumed correspondence to actual events, is quite high. After all, as syndi-court announces repeatedly, these are "real people" and "real cases."

Third, the editing techniques common to syndi-court also increase viewer memory. On syndi-court, the camera constantly

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160 Symposium, *Rethinking Traditional Approaches*, 62 ALB. L. REV. 1491, 1493 (1999); *see* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (noting the "educative effect" of televised proceedings on the public); Chandler v. Florida, 449 U.S. 560, 571 (1981) (explaining the state's interest in televising trials).

161 Symposium, *American Bar Association Report on Perceptions of the US Justice System*, 62 ALB. L. REV. 1307, 1315 (1999), *reprinted in*, PERCEPTIONS OF THE US JUSTICE SYSTEM, sponsored by the American Bar Association (arguing that the media impacts some people's knowledge of the law).

162 Symposium, *Law/Media/Culture: Legal Meaning in the Age of Images: Accidents as Melodrama*, 43 N.Y.L. SCH. L. REV. 741, 742 (1999/2000) (demonstrating that televised legal events, both fictional and real, show pop culture visions of the justice system).

163 *See Civil Litigation and Popular Culture Sixth Annual Clifford Symposium on Tort Law and Social Policy*, *supra* note 159, at 421; *see also* Sarat, *supra* note 10, at 452 (noting that television is packed with stories about civil litigation and that the law now appears in media imagery). The term syndi-court was coined by Kimberlianne Podlas in her article *Please Adjust* , *supra* note 18. Since that time, others have adopted the term.

164 Mark Jurkowitz, *Hour of Judgment*, BOSTON GLOBE, Dec. 3, 2000, at 9 (stating that syndi-court is the "hottest trend in daytime television"); Podlas, *Please Adjust*, *supra* note 18, at 1 (documenting the popularity of syndi-court).

165 USA TODAY, Mar. 25, 1999, at D; Joe Schlosser, *Another Benchmark for* Judge Judy, BROADCASTING & CABLE, Mar. 29, 1999, at 15; ENT. WKLY., Feb. 22, 2002, at 133 (indicating that from January 21-27, 2002, *Judge Judy* had 8.4 million viewers and *Judge Joe Brown* had 4.4 million viewers).

166 Marc Gunther, *The Little Judge Who Kicked Oprah's Butt; Daytime Television's Hottest Property*, FORTUNE, May 1999, at 32 (explaining that in 1997, *Judge Judy* was the number-one ranked syndicated program); Schlosser, *supra* note 165, at 15.

167 Speaking at a symposium at Albany Law School, New York State's Chief Judge asserted that what the public sees on television, such as *Judge Judy*, "play[s] a huge role in public perceptions of the justice system." *Rethinking Traditional Approaches*, *supra* note 160, at 1493; Podlas, *The Monster*, *supra* note 158, at 258.

moves between the litigant narratives and the judge's reaction.[168] This style of editing elicits an "orienting response," increasing viewer attention and memory.[169] Furthermore, because these devices make syndi-court more memorable, they contribute to syndi-court's ability to serve as a heuristic[170] and to cultivate audiences.[171] Accordingly, repeated exposure to syndi-court might influence the content of a viewer's "file" on law and litigation so as to conform to the predominant imagery of syndi-court.

III. MEASURING THE INFLUENCE OF SYNDI-COURT

The messages of syndi-court and their effect on legal consciousness deserve careful scrutiny.[172] As the preeminent messenger of legal culture, it is important to ascertain what stories syndi-court tells, what norms it promotes, and how these influence audiences in consumer-to-business litigation. Unfortunately, we know very little about legal "pop" culture because very few have bothered to examine it.[173] There has been little empirical analysis regarding the signals syndi-court sends or what potential influence on attitudes and behaviors it may exert.

Syndi-court's omnipresence makes it particularly appropriate for cultivation analysis. Moreover, as documented below, distorted and exaggerated content tend to be syndi-court's norm. Yet, syndi-court, like any text, is polysemic: it can have multiple interpretations.

Consequently, a set of studies investigated the content, the heuristic potential, and the normative influence of syndi-court on the public's legal consciousness. The investigation included two

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168 Annie Lang et al., *The Effects of Edit on Arousal, Attention, and Memory for Television Images: When an Edit Is an Edit Can an Edit Be Too Much?* 44 J. BROADCASTING & ELECTRONIC MEDIA 94, 96 (2000). This directs the viewer's attention to particular information presented. *Id.* Increasing the number of edits in a television "message" increases viewers' attention and their ability to remember the message. *Id.* at 105.

169 Stacy Davis, *The Effects of Audience Reaction Shots on Attitudes Towards Controversial Issues,* 43 J. BROADCASTING & ELECTRONIC MEDIA 476, 477 (1999); *see also* Podlas, *Please Adjust, supra* note 18, at 18-20 (showing empirical analysis demonstrating that jurors interpret judge reactions and use them to guide evidentiary determinations).

170 Woo & Dominick, *supra* note 81, at 112 (explaining that information that has been frequently repeated and recently acquired has the best chance of being remembered); Shrum, *supra* note 127, at 262.

171 *See* Michael D. Slater & Donna Rouner, *Entertainment-Education and Elaboration Likelihood: Understanding the Processing of Narrative Persuasion,* 12 COMM. THEORY 173, 179-80 (2002) (explaining that memory and the retrieval of information contained in narratives are quite efficient).

172 *Civil Litigation and Popular Culture Sixth Annual Clifford Symposium on Tort Law and Social Policy, supra* note 159, at 421 (television and movie narratives about litigation deserve special scrutiny due to their profound ability to influence litigants).

173 *See* Lawrence Friedman, *Popular Legal Culture: Law, Lawyers, and Popular Culture,* 98 YALE L.J. 1579, 1580, 1587 (1989) (indicating the importance of pop culture to the law).

main components. First, a content analysis identified and catalogued syndi-court content. This sought to identify the predominant messages of the genre. Second, two survey instruments translated this content into questions about syndi-court viewing and the propensity to hold beliefs consistent with syndi-court. This sought to determine whether heavy viewers of syndi-court were more, less, or equally inclined to hold views of litigation consistent with syndi-court.

A. *Method*

1. Content Analysis[174]

Before we can understand syndi-court's influence, if any, on audiences, we must discern the content of its messages. Cultivation analysis involves two phases: content analysis and survey of viewing.[175] The former identifies recurrent and stable themes, images, and portrayals in television content; the latter surveys the extent of television viewing and how it correlates to viewer beliefs, attitudes, and perceptions of the world.[176]

Accordingly, the four highest rated syndi-courts[177] were systematically monitored for one hour each, every day for four weeks, totaling twenty hours per show. Consistent with message systems analysis, each show was coded (here, by two groups of coders to provide a check) for the remedy sought by the litigants. The results of the 309 coded segments are charted below.[178]

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[174] As its name implies, content analysis is a research method favored by communications theory to establish and analyze the content of given media. *See, e.g.*, Bradley S. Greenberg et al., *Minorities and the Mass Media: Television into the 21st Century*, *in* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH, *supra* note 121, at 333-34; Gerber et al., *supra* note 122, at 43, 49 (observing that message system analysis identifies the most stable, consistent images on television); SHANAHAN & MORGAN, *supra* note 121, at 25-28 (explaining that content analysis requires study of how much television is viewed, ultimately analyzing relationships between the amount of viewing and the response to survey questions, and instructing to look at the overall pattern of the "story system"); OLI R. HOLSTI, CONTENT ANALYSIS FOR THE SOCIAL SCIENCES AND HUMANITIES (1969) (stating the "technique for making inferences by objectively and systematically identifying specific characteristics of messages").

[175] Woo & Dominick, *supra* note 81, at 110.

[176] *Id.*

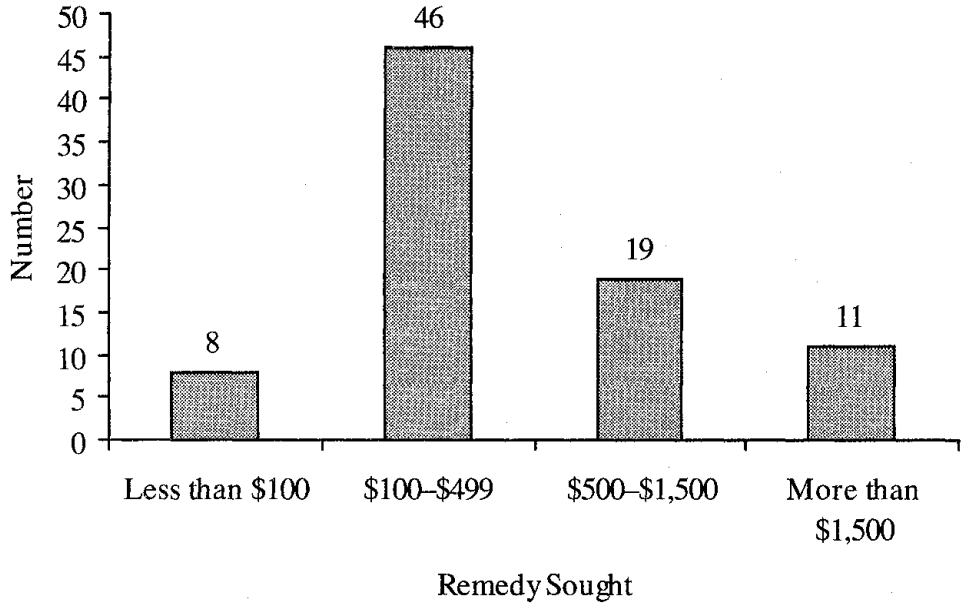
[177] Shows were chosen based on Nielsen ratings. According to Nielsen ratings, i.e., Nielsen Media Research, each day, up to 31 million people watch at least one syndi-court. VARIETY, April 18-24, 2000, at 12 (reporting Nielsen Media Research).

Data collected from this study was also reported in Podlas, *The Monster*, *supra* note 158, at 263-70.

[178] Because the key was to discern the messages that the audience would take away from syndi-court, rather than technical, legal accuracy, eighteen syndi-court episodes that were coded differently by the two groups (representing 5% of the total number) were excluded from the final tally.

	Judge Judy	Judge Joe Brown	Judge Mathis	People's Court	Total
Remedy Sought					
Less than $100	2	15	8	11	30
$100 - $499	45	35	42	48	170
$500-$1,500	19	14	18	19	70
More than $1,500	7	12	11	9	39
Plus Apology[179]	7	12	21	22	62

The proportion of the monetary remedies sought is also charted below:



2. Survey

a. Sample

The next phase of study surveyed two groups of respondents, prospective jurors (prior to entering the courtroom) and college-enrolled jury-eligible adults.

First, 241 prospective jurors from Manhattan, the District of Columbia, and Hackensack, New Jersey completed a survey (the basic survey)[180] that measured syndi-court viewing habits,[181] self-

[179] In addition to a monetary award, the plaintiff also explicitly requested an apology or explained her motivation for suit was to obtain an apology.

[180] While waiting to enter courthouses (and, in some instances, during breaks), individuals were approached, identified as appearing for jury duty, and asked to complete a questionnaire (no individual believed to be a juror was excluded). In exchange for their participation, jurors received the elite pens used to complete the questionnaires, as well as candy bars.

[181] Syndi-court television viewing was measured in two ways. First, respondents were asked "How many times per week do you watch syndi-court?" A Likert-type scale listed five

expressed likelihood of pursuing *pro se* litigation, and self-expressed likelihood of pursuing litigation. After incomplete surveys and those demonstrating obvious English language barriers were discarded, the remaining 225 (93.3%) were analyzed.

Next, 326 jury-eligible adults enrolled in their first or second year of college completed an enhanced survey.[182] One hundred forty-nine students were drawn from an introductory business law course (in a northeastern college) and 187 were drawn from an introduction to law course (in a west coast college). After incomplete or internally inconsistent surveys were discarded (n=5), the remaining 321 (97%) were analyzed.

b. Instruments

Two survey instruments were used: a basic survey and enhanced version of that survey (the basic survey plus one additional page of queries). The basic survey measured syndi-court viewing habits and attitudes about litigation. Thus, all respondents answered the basic survey. Among others, that survey posed the following forced-choice questions:

> Do these shows help you learn about the legal rules/ law?
> ___ yes
> ___ no
>
> I
> ___ would consider bringing a claim in court
> ___ would NOT consider bringing a claim in court
>
> I
> ___ would bring a claim in court
> ___ would NOT bring a claim in court
>
> I
> ___ would consider representing myself in court without the aid of an attorney
> ___ would NOT consider representing myself in court without the aid of an attorney
>
> If I was unable to afford an attorney, I
> ___ would appear in court without the aid of an attorney
> ___ would NOT appear in court without the aid of an attorney

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response categories. Second, respondents were asked to label themselves in terms of frequency of viewing. Respondents ticked one box among the following response categories: (more than five times per week; five times per week; two to three times per week; one time per week; less than one time per week).

182 The surveys were administered over four academic semesters (2001-2003).

I have
___ never attended (or testified in) a court proceeding (includes prior jury service)
___ previously attended a court proceeding

After the basic survey instrument was administered to the prospective jurors and analyzed, the instrument was expanded to include additional queries so as to clarify the above results. This enhanced instrument was administered to the Jury Eligibles group. As noted, this second study used the very same survey that was administered to the Prospective Jurors group, but added one page of questions exploring whether the attitudes and propensities toward *pro se* representation were mediated by the degree of risk/jeopardy.

B. *Survey Results*

Preliminarily, a comparison of means was conducted to ensure that there was no statistically significant deviation/variance between the east and west coast samples of the Jury Eligibles group. Similarly, an ANOVA was conducted to ensure that there was no statistically significant deviation among the four samples. Finding no such variations, analysis continued on the 321 responses collected.

1. Results According to Frequency of Viewing

Respondents were labeled as either frequent viewers (FV) or non-frequent viewers (NV), consistent with the Gerbner typology.[183] A "frequent viewer" was defined as an individual who watched syndi-court between two to three times and more than five times per week (and checked the corresponding response on the descriptive scale of viewing); a "non-frequent viewer" was defined as an individual who watched syndi-court no more than once per week (and checked the appropriate response on the corresponding descriptive scale). Of the 225 prospective juror responses analyzed, 149 (66.2%) were FV and 76 (33.78%) NV. Of the 321 jury-eligible responses analyzed, 200 (62%) were FV, and 121 (38%) were NV.

Statistically significant differences were found between the frequent and non-frequent viewers ($P<0.05$) in low risk situations. No difference, however, was found in high risk/jeopardy situations. Rather, it appeared that respondents rejected the

[183] That is, consistent with cultivation theory's division of society into heavy viewers and non-heavy viewers.

potential of *pro se* representation in high risk/jeopardy situations, notwithstanding viewing profile. It did not appear that prior court service mediated these findings. Moreover, there was a sharp contrast in court experience between the two samples (Prospective Jurors and Jury Eligibles). Presumably, this is a function of the age, automobile license, and voting registration of the two groups. As college students in their first or second year, these jury-eligible adults are far less likely to have ever been involved in the legal system.

As summarized below, several statistically significant differences ($P<0.05$) emerged between the frequent viewer and non-viewer responses to questions measuring propensities toward legal claiming, *pro se* representation, and learning from syndi-court. Additionally, within the jury-eligible sample, statistically significant differences ($P<0.05$) emerged between FV and NV responses to questions measuring propensities toward *pro se* litigation in low risk situations. No difference was found in high risk situations. Rather, it appeared that, where respondents were faced with high levels of risk, they rejected the potential of *pro se* representation, notwithstanding viewing profile.

	Frequent Viewers		Non-Frequent Viewers	
	Prospective Jurors	Jury Eligible Adults	Prospective Jurors	Jury Eligible Adults
Learn about law and legal system	n=115 77%	n=160 80%	n=19 25%	n=22 29%
Would consider bringing claim	n=128 86%	n=164 82%	n=58 76%	n=58 77%
Would bring claim	n=112 75%	n=156 78%	n=38 50%	n=44 58%
Would consider pro se representation	n=88 59%	n=108 54%	n=14 18%	n=29 24%
Would represent self pro se	n=82 55%	n=105 53%	n=12 16%	n=23 19%
Would represent self pro se: HIGH RISK[184]	–	n=10 5%	–	n=2 3%
Would represent self pro se: LOW RISK[185]	–	n=112 56%	–	n=10 13%
Previously attended court proceeding	n=12 6%	n=34 23%	n=6 5%	n=14 19%

Finally, meta-analysis of the Prospective Juror and Jury

184 This is the mean of the high risk civil and high risk criminal.
185 This is the mean of the low risk civil and low risk criminal.

Eligibles data (total responses= 546; FV=349 (64%); NV=197 (36%)) yielded the following:

Proportions

	FV	NV
Learn about law and legal system	0.79	0.21
Would consider bringing claim	0.84	0.59
Would bring claim	0.77	0.42
Would consider pro se representation	0.56	0.22
Would represent self pro se	0.54	0.18
Previously attended court proceeding	0.13	0.10

IV. Discussion

The combined results of the content analysis and the survey analysis suggest that syndi-court viewing exacts a cultivation effect and may function as a heuristic model for litigation-related decision-making. First, data from the cultivation analysis indicate that the legal culture broadcast on syndi-court is one where it is normal to sue over relatively small sums of money or for the principle. Stunningly, a full 64% sued for less than $500, and 87% for less than $1,500. Second, the survey data strongly suggests a link between the content and the opinions of syndi-court's regular audience. Simply, frequent viewers perceive the possibility and appropriateness of litigation differently than do non-viewers, and these perceptions conform to the predominant imagery of the genre.

A number of statistically significant differences emerged between the responses of frequent and non-frequent viewers. For instance, a far greater proportion of frequent viewers than non-frequent viewers confessed that they looked to syndi-court representations to learn about the rules and procedures of the justice system. Also, a higher proportion of frequent viewers than non-viewers stated that they would engage in litigation and do so *pro se*. There also seemed to be a difference in the degree to which these respective opinions verged on litigious action. Frequent viewers were not only increasingly likely to state that they would consider litigation, but also were increasingly likely to say that they would move from mere rumination of litigation to actually litigating. This supports the possibility of syndi-court functioning as a heuristic that frequent viewers reference in making decisions regarding litigious actions.

Perhaps the particular attitudes regarding litigation that syndi-court appears to cultivate—attitudes normalizing litigious behaviors—are more important. The amount of litigation and small sums celebrated on syndi-court could have either of two disparate impacts. On the one hand, viewers might stigmatize litigious behavior as contributing to the downfall of the economy and small business, and recoil from litigation to avoid this stigma.[186] On the other hand, viewers might form a contrary view, i.e., that syndi-court's slew of litigation and de minimus lawsuits endorse litigation. Yet, the data here support the latter: syndi-court defines a cultural environment in which litigation is normal, and may even advocate litigation.

Apparently syndi-court's cases are exemplars of American litigation, and these exemplars have been exalted within popular legal culture. One way of thinking about cultivation is as the result of presenting a vast number of exemplars that stand for the cultural phenomenon.[187] For example, news material shows that the distribution of exemplars can accurately predict one's perception of reality.[188] Therefore, the propensity of frequent viewers toward litigation and *pro se* representation might be a function of syndi-court's portrayals. By celebrating frequent suits over small sums, syndi-court demonstrates that this type of low-end litigiousness is common or normal and that many people choose this path. Although the public may not interpret syndi-court as telling us that litigation is honorable, it subliminally, if not overtly, encourages litigation.[189] In the end, it does not matter whether the public perceives litigation to be good or bad, but only that it believes it to be normal.

Syndi-court as an exemplar is furthered by the mythology of societal litigiousness. Indeed, the situations exhibiting a strong *pro se* propensity among frequent viewers were those that resembled scenarios on syndi-court. By contrast, scenarios not broadcast on syndi-court, such as criminal trials, which would not function as

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186 *See* Saks, *supra* note 9, at 1189 (stigma deters suit); KIDDER, *supra* note 88, at 4; Rohrlich, *supra* note 107, at A1 ("Corporations have created a stigma for people [who sue].").

187 *See* Shrum, *supra* note 153, at 78. In short, television viewing enhances construct accessibility, and because particular televised concepts are accessible to viewers, viewers tend to overestimate the frequency or likelihood of those events. *Id.* at 78-79.

188 *See* Rossler & Brosius, *supra* note 137, at 160. To a lesser degree, participants' attitudes and opinions are influenced by the number and the distribution of exemplars. *Id.*

189 Subliminal advertising consists of transmitting an appeal below the threshold of the conscious person. COMSTOCK & SCHARRER, *supra* note 121, at 39-40. It refers to the use of symbols and cues. *Id.*

exemplars, were the situations in which neither frequent nor non-frequent viewers imagined self-representation. This could be because only the low risk *pro se* exemplar exists or because risk/jeopardy is high in such situations. Alternatively, it might be that when risk is too high, it precludes any potential for *pro se*, or that when risk is low, *pro se* tendencies go unchecked. This supports a heuristic processing model of cultivation.[190]

A. *Altering Legal Culture*

Syndi-court's norms not only favor litigation and *pro se* representation, but also reduce barriers to litigation and promote certain types of consumer complaining. The disputes common to these shows also enhance the potential for certain types of legal complaining and also reduce barriers to the courtroom. The plaintiffs and stories of syndi-court are legal fables that provide viewers with social rules of litigation, while the specific claims are heuristics that provide a "short-cut" to the cost-benefit analysis of litigation. One can read the stories of syndi-court—where a majority of syndi-court plaintiffs sue for less than $500—to mean that even disputes over small monetary sums and apologies justify a day in court. By exalting litigation over relatively trivial or solely moral issues or by portraying it as normal redefines the litigious moment, lowering the threshold to lawsuit.

Furthermore, redefining the normative firmament on which people assess whether their disputes rise to the level of a legal claim, enhances claims consciousness. Upon comparing their own disputes to those broadcast on syndi-court, viewers will conclude that suing for amounts over $100 is normal and not stigmatic. This may lead individuals who would not otherwise have considered their issue worth pursuing through litigation to decide theirs also merits judicial redress. Moreover, to the extent that syndi-court presents litigants who are of questionable intelligence or emotional maturity, viewers may think, "if they can do this, anyone can."[191]

Relatedly, the nature of some disputes may alter the cultural understanding of the role of law. Themes of morality and apology dominate the crucible of syndi-court.[192] This may communicate

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[190] *See supra* text accompanying note 187.

[191] Podlas, *The Monster, supra* note 158, at 271-72.

[192] The president of the California Judges Association stated that sitting judges are reported to the commission, and that some litigants are disappointed when they win the case but the judge has not humiliated their opponent. Gail Diane Cox, *Judicial Watchdog Agency Wants to Protect Public from TV "Judges,"* FULTON COUNTY DAILY REP., June 9, 2000.

that litigation "because of the principle" is socially appropriate. Thus, the failure to abide by our moral code becomes the wrong and the desire to be adjudicated morally right becomes the motivation for suit.[193] The courtroom is the public forum for this therapeutic declaration.[194]

B. *Reducing Gatekeepers to the Courtroom*

In addition to its transformative potential on legal culture, syndi-court may reduce social or economic barriers to litigation. As those barriers are eliminated, the number of lawsuits will increase.

American society has erected several social gatekeepers that effectively limit the number of legal claims filed. The most notable barriers are the cultural stigma attached to being involved in or initiating a lawsuit, the expense attendant to litigation, and the inability to retain counsel due to monetary constraints or a poor claim.[195]

For example, where a putative plaintiff has a claim, but fears the social rebuke associated with litigation, she will avoid suit in order to avoid that stigma. Thus, stigma becomes a gatekeeper to the legal system. Similarly, where an individual does not have the financial resources to pursue a legal claim, cost prevents her from litigating. Expense is therefore another barrier to entering the legal system. Indeed, some people are immediately priced out of the system, because they cannot afford to retain counsel.[196] Additionally, where a potential plaintiff cannot obtain counsel—because counsel assesses the claim to be weak or the likely recovery to be low[197]—she is typically forced to abandon her claims and

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193 Podlas, *The Monster, supra* note 158, at 271-72.

194 Thus, the purpose of suing is therapeutic. A number of scholars have explored litigation as therapy, or "therapeutic justice." Therapeutic justice conceptualizes the role of law as a therapeutic agent. For a discussion of the role of therapeutic justice in dispute settlement, see Ellen A. Waldman, *The Evaluative-Facilitative Debate in Mediation: Applying The Lens of Therapeutic Jurisprudence,* 82 MARQ. L. REV. 155, 158-60 (1998); Ellen A. Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach,* 48 HASTINGS. L.J. 703, 705-06, 714-16 (1997).

195 *See* Sanders, *supra* note 7, at 723 (the costs of litigation and legal representation cause individuals with meritorious claims to forgo suit).

196 *See* Russell Engler, *And Justice For All—Including the Underrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks,* 67 FORDHAM L. REV. 1987 (1999); Janet Reno, Address Delivered at the Celebration of the Seventy-Fifth Anniversary of Women at Fordham Law School, *in* 63 FORDHAM L. REV. 5, 8 (1994) (the poor and "working poor" have little access to legal services).

197 A lawyer will often refuse representation where a claim is specious and/or the likelihood of success is low. *See* Herbert M. Kritzer, *Contingency Fee Lawyers As Gatekeepers in the Civil Justice System,* 81 JUDICATURE 22 (1997) (attorneys tell litigants to stop); *id.* at 23 (attorneys reject cases that do not satisfy risk and return criteria); Daniels & Martin, *supra* note 5, at 484 (in light of the strength of cases, 57% of average lawyers retain fewer clients

desire to bring the issue to court. Consequently, attorney refusal becomes an institutional barrier to lawsuit.

Syndi-court might help diminish those barriers. First, by making litigation and *pro se* representation seem statistically average, indeed, normal, syndi-court reduces the stigma associated with suit. It may even replace this social reprobation with an endorsement of litigation. Syndi-court's constant parade of litigants might lead viewers to conclude "everybody's doing it—why not me?" Consequently, people who would have previously avoided litigation out of embarrassment would no longer be deterred. As fewer people are actively deterred from litigious behavior, and as more people are encouraged to adopt this behavioral paradigm as appropriate, more people are likely to enter the legal system.

Second, by demonstrating that *pro se* representation is a reasonable alternative to paid counsel and something that anyone can handle,[198] syndi-court circumvents the hurdles of attorney expense and attorney refusal. Very simply, *pro se* representation eliminates the expense of counsel by eliminating counsel. It avoids attorney refusal due to a weak claim by also eliminating counsel. Now, a plaintiff can skip the middleman and simply represent herself. This transforms litigants into individuals who would otherwise be economically-barred or thwarted by a frivolous claim.[199]

Anecdotal evidence from those employed in the justice system suggests this very interaction between frequent viewing of syndi-court and resort to *pro se* representation. Several authors have asserted that the increase in *pro se* litigation is due to the lack of affordable legal services.[200] For example, a New York State Bar Association survey concluded that middle-income New Yorkers represented themselves *pro se*, because they could not afford or

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than five years ago). Consequently, individuals with small, yet legitimate claims may be unable to obtain a competent attorney. *Id.* at 485.

198 In one national survey, 58% of respondents agreed or strongly agreed with the statement, "It would be possible for me to represent myself in court . . . ." Jona Goldschmidt, *The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance,* 40 FAM. CT. REV. 36, 37 (2002) [hereinafter Goldschmidt, *Struggle for Access*]; Dante Chinni, *More Americans Want to be Their Own Perry Mason,* CHRISTIAN SCI. MONITOR, Aug. 20, 2001, at 1 (television makes self-representation look simple enough; Chinni reports "a 1999 survey from the National Center for the State Courts finding that 58% of Americans believe that they could represent themselves if necessary").

199 *See* Chinni, *supra* note 198 (some litigants represent themselves *pro se* because they cannot afford a lawyer).

200 *See* Engler, *supra* note 196; Reno, *supra* note 196.

qualify for legal services.[201] Moreover, since the rise of syndi-court, several employees of the justice system have noted an increase in *pro se* litigants.[202] Judges have opined that syndi-court contributes to the trend of *pro se* litigation[203] by convincing people that they are capable of litigating on their own behalf.[204] In support of this, one *pro se* litigant explained that he all of his knowledge about the legal system came from watching Judge Judy.[205] Yet, while the *pro se* option can rightfully transform some aggrieved individuals into litigants, it might produce litigiousness in others.

C. *Significance to Litigation Risk Management*

The significance of syndi-court on the legal system lies primarily in its indirect, long-term influence.[206] The results forecast residual effects in consumer-business litigation, particularly low-end claiming. Therefore, as a business seeks to quantify a consumer's litigious propensities via individual rationality, it must reference the legal culture as communicated by syndi-court.[207] The degree to which people appear to behave irrationally as calculated by traditional litigation management models can be explained by reference to this normative firmament.

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201 Gary Spencer, *Middle-Income Consumers Seen Handling Legal Matters Pro Se,* N.Y. L.J., May 29, 1996, at 1. "Middle income" was defined as $25,000 to $95,000. *Id.*

202 Jona Goldschmidt, *How Are Courts Handling Pro Se Litigants?*, 82 JUDICATURE 13, 13, 15 (1998) (noting the growing *pro se* phenomenon); Kathleen M. Sampson, *Meeting the Pro Se Challenge: An Update,* 84 JUDICATURE 326 (2001) (self-representation continues to grow); John M. Graecen, *Legal Information vs. Legal Advice,* 84 JUDICATURE 198 (2001) (describing the nationwide increase in *pro se* litigants); Alan Feuer, *More Litigants Are Taking a Do-It-Yourself Tack,* N.Y. TIMES, Jan. 22, 2001, at B1 (*pro se* litigants are increasing, quoting New York State Deputy Chief Administrative Judge Juanita Bing Newton. Court-watchers attribute the increase in *pro se* litigation, in part, to the abundance of court programs on television); Chris Mahoney, *Verdict: Litigants Without Attorneys Are on the Rise,* 20 BOSTON BUS. J., Sept. 1, 2000, at 13 (recounting claims of court officials); Engler, *supra* note 196; JONA GOLDSCHMIDT, MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 49 (1998); Goldschmidt, *Struggle for Access, supra* note 198, at 36-38; Peter J. Ausili, *Outside Counsel: Federal Court Statistics for Fiscal Year 1997,* N.Y. L.J., April 28, 1998, at 1 (since 1993 *pro se* filings have increased slightly each year).

203 Goldschmidt, *Struggle for Access, supra* note 198, at 37-38.

204 Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal For Better-Defined Roles,* 71 U. COLO. L. REV. 789, 816 (2000). "On television, it looks simple enough: You go to court. You make your case . . . [a]fter a few moments—and a commercial break—the judge renders a decision." Chinni, *supra* note 198, at 1.

205 Chinni, *supra* note 198, at 1.

206 *See* DEFLEUR & BALL-ROKEACH, *supra* note 112, at 202 (television's critical impact is its long-term one).

207 *See generally* JULES COLEMAN, RISK AND WRONGS 46-47 (1992) (conceptions of morality are influenced by cultural norms, and rationality is linked to norms). For instance, plaintiffs may believe that litigation is easy and inexpensive, harboring what Birke and Fox have called "positive illusions," essentially unrealistic optimism regarding outcomes. Birke & Fox, *supra* note 30, at 15.

Therefore, by incorporating syndi-court's norms of litigation, business can better rationalize rational choice and account for its apparent anomalies.

The study results suggest that the threat to business is not that consumer plaintiffs will embark on and prevail in a slew of high-stakes, class action litigation likely to bankrupt business,[208] but that people who previously would not have contemplated litigation as an option may now define it as such. Virtually every business lawsuit begins with a disgruntled consumer who complained to deaf ears or failed to recoup what they perceived to be a fair settlement or apology. And each of these complaints possesses the possibility of maturing into a expensive lawsuit or public relations nightmare spurring copycat litigation. Hence, the more complaints that go unaddressed, the more lawsuits (or legal complaints) that will result.

The results also forecast consumer complaints involving low monetary sums and/or some type of moral redress. This might yield consumer litigants increasingly prone to pursue relatively minor—at least in terms of rational economic assessments—litigation, either because they believe it is warranted or because they see the courtroom as a venue of last resort to take a business defendant who fails to respond, i.e., apologize. The inclination toward litigation[209] could even encourage putative plaintiffs to pursue novel claims.[210] Reviewing media reports, it appears that litigants are increasingly inclined to pursue unusual theories of liability,[211] and though novel claims excite law professors, they smack of unforeseen and unforeseeable risk. Ironically, it was

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208 *See* MacFarlane, *supra* note 15, at 665 (most cases filed do not result in trial).

209 Such litigiousness might reflect or interact with one's "claims consciousness." Vidmar and Schuller have identified personal "claims consciousness" that is affected by a range of factors, such as personality and socio-economic status. Neil Vidmar & Regina Schuller, *Individual Differences and the Pursuit of Legal Rights: A Preliminary Inquiry*, 11 LAW & HUMAN BEHAV. 299, 300-02 (1987).

210 This might also be "litigotiation." As coined by Marc Galanter, litigotiation is a combination of negotiation and litigation, or the strategic pursuit of settlement by mobilizing the court process. Marc Galanter, *Worlds of Deals: Using the Legal Process to Teach Negotiation*, 34 J. LEGAL EDUC. 268, 268 (1984).

211 There has been a recent rise in novel litigation. In the first class action lawsuit of its kind, two women sued McDonald's regarding the nutritional value and caloric excessiveness of their food. *Perlman v. McDonald's Corp.*, (Dist. Ct., S.D.N.Y.), Dkt. 02 Civ. 7821, June 22, 2003. Similarly, the state of Rhode Island recently sued lead paint manufacturers on a public nuisance theory. Peter B. Lord, *Jury Deadlock in Rhode Island Forces Mistrial in Suit Against Paint Firms*, PROVIDENCE J., October 30, 2002. In 2002, thirty-three cities sued gun manufacturers on strict liability theories. *See* David Abel, *Gun Control Forces Say Suits to Go On, Despite Boston's Choice to End Effort*, BOSTON GLOBE, March 29, 2002, at A3; Tom Schoenberg, *D.C. Judge Holds Fire: Still No Ruling in City's Novel Suit over Gun Violence*, LEGAL TIMES, May 20, 2002, at P1.

business that fueled the mythology of a litigious culture,[212] a constructed "reality" that now reinforces the stories and moral of syndi-court.[213] Taken together, consumers may believe that if anything goes wrong, they are entitled to compensation,[214] and would be foolish not to get what they are entitled to.

By grounding litigation risk calculations in these empirically-derived understandings of litigious propensities and contemporary legal culture, business can better rationalize its litigation assessments. Accordingly, the cost-benefit analysis integral to litigation risk management should shift from remote punitive damage awards to increases in low-end disputing.

V. PROPOSALS FOR LITIGATION RISK MANAGEMENT

Although business may believe that the most protective course of action is to deny, deflect, or decline all consumer complaints, that tactic will neither make the consumer believe that she has been heard[215] nor inspire an increasingly litigious consumerate to abandon their complaint. To the contrary, it may increase the fervor to complain.[216] Consistent with this, the content analysis of syndi-court remedies sought suggests that litigants are more motivated by the principal of the issue or fairness than by a large monetary recovery, and are willing to dispute for surprisingly low monetary sums.

Indeed, it may signal to the consumer that, like syndi-court litigants, she must take her concerns to the next level. This is particularly true where normative, rather than legal, issues dominate.[217] If syndi-court is any guide, "the principle of the matter" can sometimes overshadow what should be a simple, concrete dispute,[218] thus causing the substantive issue to change.[219]

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212 Galanter, *supra* note 7, at 747 ("[c]orporate investment in projecting an image of unrestrained litigiousness and rampant over-claiming may have the paradoxical effect of increasing the level of claiming"); *see also* Daniels & Martin, *supra* note 5, at 461-74 (business and industry allies created and marketed their vision of rampant litigation).

213 Studies show that viewers judge what they see on television based on what they already know of real life. DAVISON ET AL., *supra* note 111, at 183. Therefore, syndi-court's litigation is considered on the cultural backdrop of litigiousness.

214 *See* Galanter, *supra* note 7, at 747 (rhetoric makes people believe that if anything goes wrong, they can get significant compensation).

215 *See* MacFarlane, *supra* note 15, at 697. This feeling of fair treatment is critical. Being treated fairly can be more important to litigants than the ultimate outcome. Birke & Fox, *supra* note 30, at 38.

216 Compare disputants who see the agreement offered as fair are more likely to settle. Jennifer Shack, *Efficiency, Mediation in Courts Can Bring Gains But Under What Conditions?*, 9 DISP. RESOL. MAG. 11, 11 (2003).

217 MacFarlane, *supra* note 15, at 693.

218 MacFarlane describes the situation where "a straightforward claim on an unpaid

For example, one company's unusually aggressive response to consumer complaints resulted not in consumers dropping those complaints but in prompting them to embark in litigation.[220] Similarly, in another company, middle management so often insisted that it was right, that it caused disputes that could have been settled to mutate into litigation.[221]

Accordingly, business risk management plans should anticipate and dispose of low-sum consumer claims through ritualistic remediation. This remediation may be in the form of a refund, de minimus settlement, or an apology from the company. Though, at first blush, de minimus complaints may seem inconsequential, against the backdrop of a litigious culture, they are anything but. If syndi-court is a guide, a consumer who does not get some "fair" response to her complaint or who covets an apology may be prone to seek her day in court. Consequently, business should focus on preventing low-end disputes from mutating into full-blown litigation. Typically, resolving a dispute at a lower levels will be more cost-effective than litigation.[222] As testament to such a policy choice, some attorneys have altered their handling of small-dollar-amount disputes to provide for early settlement.[223]

Although each business must craft a response system unique to its products and complaints, due to the nature of complaints and costing them out, any response should consider the economic value of an apology. Apologies, expressions of concern, and minor dollar amounts can be valuable emotional currency for a consumer, and may go a long way toward ending a dispute. For example, business might replace refusal letters with letters expressing regret, but not guilt. These would include a check and waiver of future claims. The amount of the check could be based

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account develops into an argument over treatment of this particular client or customer, or assertions of discourtesy or rudeness." MacFarlane, *supra* note 15, at 692.

219 *Id.* (as the conflict develops over a period of time, the importance of the original issue may be replaced by subsequent issues of treatment).

220 *See* Craig A. McEwen, *Managing Corporate Disputing: Overcoming Barriers to the Effective Use of Mediation for Reducing the Cost and Time of Litigation*, 14 OHIO ST. J. ON DISP. RESOL. 1, 9-10 (1998).

221 *Id.* at 10 ("We're the defendant almost all of the time. Our business people think they're [always] right . . . .").

222 *Cf.* McEwen, *supra* note 220, at 17 ("If you fix it earlier and lower, you keep the dollars"); *see also* Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 703 (2001) (advocating that businesses implement dispute system design projects to avoid and manage disputes); Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. Rev. 1768, 1771 (2001) (describing the benefits of using ADR to resolve disputes with businesses without going to court).

223 *See* McEwen, *supra* note 220, at 19.

on a settlement matrix, a grid in which certain variables define a certain settlement amount.[224] Such matrices are commonly used in class action settlements and are characterized by varying degrees of injury among the class members.[225] Alternatively, the business could send an apology letter, the settlement matrix, and a waiver. The consumer would review the matrix in reference to her claim and, if she chose, send the waiver back, like a response postcard. Upon receipt, the business would issue a settlement check. This could also be accomplished online or in response to email.[226] This strategy gives the consumer an apology and where priced-out against product costs, ends any incentive to dispute. Appeasing consumers would then cost less than prolonging a dispute.[227]

Even though the consumer could reject the offer, economic and psychological reality suggests most small-value complainants would take a quick and easy settlement over pressing an individual claim.[228] In such a system, it is likely that complainants would systematically settle for less than their claims are worth. Moreover, making an initial offer permits business to exploit a consumer's anchoring biases. Research shows that people make numerical judgments, such as whether a proposed settlement amount is high or low, based on an initial value, i.e., the value first stated. This is known as anchoring bias.[229] Thus, once a monetary sum is stated, and regardless of whether it is arbitrary, all other assessments or negotiations are made with reference to this sum.[230]

Additionally, where payments represent only a portion of insurance and legal costs devoted to this class of complaints, such a strategy could reduce costs associated with litigation risk management and insurance. Although it is commonly claimed that societal litigiousness has caused insurance costs to skyrocket, Saks has argued that it is not litigation costs that have caused insurance costs to rise, but the irrational fear of lawsuits. Some

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224 Robert Alexander Schwartz, *Can Arbitration Do More For Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 842 (2003); Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VANDERBILT L. REV. 1571, 1626-27 (2004).

225 Schwartz, *supra* note 224, at 841-42.

226 A consumer would provide a few identifying features of her case, and the business would verify the claim, consult the matrix, and make an offer immediately. *Id.* at 843.

227 PR NEWS, *supra* note 31, at 1 (quoting a crisis litigation consultant: "The check you write today is the smallest check you're ever going to write."); *see also* Jeffrey O'Connell & Geoffrey Paul Eaton, *Binding Early Offers as a Simple, if Second-Best, Alternative to Tort Law*, 78 NEB. L. REV. 858, 859 (1999) (arguing in favor of early settlement offers by plaintiffs).

228 *See* Schwartz, *supra* note 224, at 842-43.

229 SUNSTEIN, *supra* note 4, at 5.

230 Birke & Fox, *supra* note 30, at 40. Of course, as argued above, business commonly anchors its estimates of likely jury awards in high figures.

insurers have bought into the litigation anxiety that their business clients exude, believing that the multi-million dollar judgment is right around the corner. Others use it to justify charging inflated premiums and insisting on excessive reserves.[231] Moreover, when confronting claims, insurance companies may choose tactics that increase animosity or delay settlement. All heighten insurance costs. Yet, putting more money into early settlement could better spend dollars, and, as fewer claims go to insurance (and as litigation anxiety among business lessens) this could eventually decrease insurance rates.[232] Like opting for a higher deductible in exchange for a lower insurance rate, this more accurately places money on risk; it allows dollars to be devoted to low-end claims and maintaining goodwill.[233]

VI. Empirical Concerns

Although both common sense and the data obtained support the presumed causal direction of the cultivation model, certain limitations inherent in the experimental design must be kept in mind. Cultivation analysis cannot distinguish causation from correlation. Consequently, some third variable might explain the connection between hours logged watching syndi-court and particular attitudes. For instance, pre-existing attitudes favoring litigious action or "adversarialness" may cause frequent viewers to seek out these programs. For instance, the type of person who opts for self-representation or litigation might also be the type of person who seeks out this type of programming. These personality types may also be more contentious by nature and, therefore, seek out television programs that are consistent with those tendencies.[234]

Nevertheless, there is no empirical evidence indicating that syndi-court viewers are different from television viewers generally. Research has demonstrated that most people who tend to be "heavy" viewers of any particular type of program, such as syndi-

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231 *See* Saks, *supra* note 9, at 1284-85 (business has fallen prey to its own rhetoric); Timothy R. Brown, *Group Puts Price Tag on Legal System*, Com. Appeal, April 17, 2002, at DS1 (consumer litigation leads to "increase[d] insurance rates").

232 *Cf.* Brown, *supra* note 231, at DS1 (consumer litigation causes insurance rates to increase); Saks, *supra* note 9, at 1284-85 (insurers insist on excessive monetary reserves to protect against the possibility of a lawsuit).

233 *See* Sarah D. Scalet, *See You in Court*, 15 CIO 62, 64 (2001) (it is cheaper for companies to make confidential settlements than to defend).

234 Data has also been collected from the Jury Eligibles sample regarding the influence of gender, if any, on disputing behaviors, to wit: propensities toward litigation and *pro se* representation. This will be addressed in future publications.

court, tend to be "heavy" viewers of a variety of programs overall.[235] Therefore, frequent viewers of syndi-court are likely frequent viewers of television as a whole.[236] Nor does data regarding overall television viewing substantiate that syndi-court viewing is related to socio-economic status. Although television viewing among white men is inversely related to socio-economic status, there is either no relation or a reversed one among black viewers.[237] Indeed, though the most powerful predictor of television viewing is education,[238] all of the respondents in the juror-eligible study—the group that ranked highest in syndi-court viewing—were college educated. Moreover, the three groups of prospective jurors studied were drawn from jurisdictions that have largely eliminated absolute exemptions from jury service. Thus, the sample of prospective jurors was a relatively accurate cross-section of their respective communities. These individuals were not solely the stereotypic group of people most likely to be sitting at home during the day, watching television. Nonetheless, a significant percentage of this population frequently watched syndi-court or exhibited some cultivation effect.

Relatedly, though samples in social science research are commonly criticized as not being representative enough, the juror sample here might be too diverse to accurately reflect the composition of the United States. As a result, future research should sample additional audiences, such as juror-eligible adults from other regions and/or defined socio-economic groups. It would be revealing to see whether the same pattern of results appears with these populations.

Finally, some may debate the genre-specific focus of the study. Traditional cultivation analysis assumes a uniform message across all television genres and a non-selective viewing pattern in the audience.[239] Gerbner and his colleagues measured overall television exposure because it offered a message system that was consistent over time.[240] Yet, in an age where television channels have multiplied beyond the three to five channels and eighteen hours daily that Gerbner studied, genres may be a more

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235 Gerbner et al., *supra* note 122, at 45; *see also* COMSTOCK & SCHARRER, *supra* note 121, at 93-94 (describing demographic similarities of viewers).

236 Nevertheless, even as cultivation researchers debate genre effects, several researchers agree that a particular type of program may exert a heightened or "focused" effect on viewers. COMSTOCK & SCHARRER, *supra* note 121, at 93-94.

237 *Id.* at 93.

238 *Id.*

239 Rossler & Brosius, *supra* note 137, at 146-47.

240 The constancy of these messages is related to the tendency to believe that television reflects what actually exists in the real world.

contemporary and adequate measure. Indeed, Potter and Chang propose a genre-specific measure of viewing rather than total viewing time.[241] Empirical evidence shows that cultivation as applied to genres not only is valid but may be a more precise measure of audience.[242] Hence, the number of syndi-courts broadcast and their hours on screen still permit study that can measure long-term exposure to a medium, endorsing their genre-specific measure.[243]

VII. CONCLUSION

Although a number of factors influence one's propensity toward litigiousness, perhaps the most important are an individual's perception of litigation and the norms that support or dispel those perceptions. In contemporary society, the norms comprising our legal culture are influenced heavily by syndi-court. Through the stories that syndi-court tells thousands of times per year, we learn when to sue, under what circumstances to sue, and, in fact, that we should sue.

By acknowledging syndi-court's contribution to legal culture, we can better understand when people will dispute as well as their motivation for doing so. This is particularly important in the area of consumer-business litigation, an area which promotes and sometimes falls prey to its own rhetoric of litigious reality. Accordingly, understanding the normative firmament cultivated by syndi-court is important in forecasting litigation and amortizing costs, as well as in managing litigation risk intelligently and developing the most cost-effective methods for responding to consumer claims. Consequently, though not the sole explanation of either litigiousness or legal consciousness, syndi-court plays a significant role in the construction of contemporary legal culture.

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241 W. James Potter & I.K. Chang, *Television Exposure Measures and the Cultivation Hypotheses*, 34 J. BROADCASTING & ELECTRONIC MEDIA 313 (1990); W. James Potter, *Cultivation Research: A Conceptual Critique*, 19 HUMAN COMM. RES. 564 (1993).

242 Rossler & Brosius, *supra* note 137, at 146 (relying on Potter, *supra* note 241, at 575).

243 *See id.* at 145 (noting the adequacy of design in genre-specific studies).