ing the companies to sharply increase their rates. Huber cites as evidence the growth in the number of product liability suits in the federal district courts from 6,132 in 1979 to 13,554 in 1985, "an average annual litigation growth rate of 20 percent." These figures seem to match those that can be derived from the annual reports of the Administrative Office of the United States Courts, although Huber cites secondary sources. However, they have been examined closely by Galanter (*1*), who found that in 1985, 31.3% of the products liability cases were related to asbestos. Noting that the Dalkon Shield cases also were in the courts during some of this period, Galanter suggests that the increase in federal cases may not represent a general growth in litigation so much as several "epidemics" of suits about specific products. These mass injury suits may cause temporary distress to some insurers, but they cannot be seen as causing a general rise in rates. Such an "epidemic" will tail out as the suits are settled, a pattern exhibited by the "black lung disease" cases of the 1970s (*1*).

As this example tells us, the use of aggregate figures on increases in court case loads can be misleading unless we know what kinds of cases are included. In fact, the idea that there has been an "explosion" of litigation in this country has been criticized in a number of works (*1, 2*) not mentioned by Huber. Most injury cases are actually filed in state, rather than federal courts and tort cases in the state courts over the period 1978 to 1984 showed a rate of increase only slightly greater than that of the population (*1*). For this reason, other aggregate figures cited by Huber, such as a 50% increase since 1980 in personal injury lawsuits between private parties in the federal courts, should be viewed as possibly indicative of wider trends, but requiring further investigation.

The representativeness of other data used by Huber can be questioned in light of recent research. For example, he refers to a widely cited study of jury verdicts in Cook County, Illinois, that indicates a high rate of growth in average liability judgments there. However, research by Daniels and Martin on jury verdicts in the early 1980s in 43 counties in 10 states (*3*) lowers the impact of these data for two reasons. First, median figures are more appropriate than means in this context and, while median jury awards may be "drifting" upward, there is no skyrocketing trajectory (*3*). Second, the study by Daniels and Martin argues that there is no way that the data from one county can be seen as indicative of general trends in the country.

The findings of Daniels and Martin also lead one to question the representativeness of one of Huber's specific examples, the experience of New York City in paying out nearly twice as much in liability claims in 1985 as in 1983. Their data indicate that New York City is indeed a hotbed of litigation and high awards, but that it is unusual in this regard and not representative of conditions in the rest of the country.

Huber bases much of his argument on a model of the insurance system. However, the derivation of this model is not clearly specified. Further, the model includes statements of the respective contributions to inflows and outflows of capital within the system, but does not specify a source for the stated percentages.

Huber seems to imply that the fundamental causes of increasing rates in the insurance business are external to that business, that insurance companies are reacting to changes in the legal environment. Others have suggested that the fundamental causes of sharp fluctuations in rates lie in the actions of the insurance industry itself. Huber mentions the so-called "insurance cycle" as a potential cause of such fluctuations, but does not give that cycle serious analysis and in the end rejects it more or less out of hand as a major explanation.

That shrift is overly short, however, in light of the phenomenon of "cash-flow underwriting," a practice not discussed by Huber but generally given credence by such normally pro-business journals as *The Economist* (*4*). This practice occurs during times of high interest, when the insurance companies try to make short-term profits on premium dollars and accept dubious risks in their competition for those dollars. When interest rates go down, the companies are left paying the claims derived from the doubtful risks. There is evidence that this competitive cycle has recurred for at least the past half century; it is even acknowledged by insurance company executives (*5*).

In earlier instances of this cycle, attempts have been made to blame the ills of the liability insurance system on the courts. In this regard, it should be noted that "crises" are often political creations aimed at deflecting public attention from a recurring situation by blaming it on supposedly unique circumstances outside of the control of the party otherwise likely to be blamed (and who is, of course, trying to establish the existence of the "crisis") (*6*). In the present "crisis," the insurance industry is running a $6.5-million public relations campaign that appears to put the blame for the current crisis on the courts rather than the companies (*7*). Insofar as this campaign succeeds, political demands for a solution to the crisis will focus on reforming the courts rather than regulating the insurance industry.

Huber's conclusions are not necessarily wrong, but the available data do call into question what Huber views as the "most obvious" cause of rate increases: the actions of the legal system. Why are the courts, rather than the insurance companies themselves, so "obviously" the cause of insurance company actions? In a recent paper (*8*), I argue that the insurance industry has been able to blame the current "crisis" on the legal system by playing on an American cultural belief that noncontract civil litigation, such as product liability and personal injury suits, is a priori improper. Such cases seem to violate fundamental American values and principles, such as the importance of self-reliance and personal responsibility, and their acceptance by courts means to many people that the judicial system rewards improper behavior. Thus the court system is seen as flawed and in need of reform, and attention is diverted from the activities of the insurance companies themselves in raising their rates. By pursuing the "obvious cause" rather than looking deeper, Huber's article may be simply the latest addition to this genre.

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REFERENCES AND NOTES

1. M. Galanter, *Maryland Law Rev.* **46**, 3 (1986). Galanter had earlier challenged the widely held view that the United States has undergone a "litigation explosion" in a widely publicized article [M. Galanter, *UCLA Law Rev.* **31**, 4 (1983)].
2. *Justice Syst. J.* **11** (no. 3) (entire issue) (winter 1986).
3. S. Daniels and J. Martin, *ibid.* p. 321.
4. *Economist* **303** (Insurance survey, p. 4) (6–12 June 1987); *Consum. Rep.* **51**, 544 (August 1986).
5. Speech delivered by John P. Mascotte, Chairman and Chief Executive Officer, Continental Corporation, to the faculties of the Department of Economics and the Graduate School of Public and International Affairs, University of Pittsburgh, Pittsburgh, PA, 29 September 1987.
6. M. Edelman, *Political Language: Words That Succeed and Policies That Fail* (Academic Press, New York, 1977). This point is explored in another context in P. Brass, *J. Asian Stud.* **45**, 245 (1986).
7. *Insurance Review* **47**, 58 (April 1986).
8. R. Hayden, revised version of a paper presented at the annual meeting of the Law and Society Association, Washington, DC, 10 June 1987.

Response: Hayden is right in stating that tort law is ultimately a political issue. This is itself a matter of some concern, because modern tort law has been constructed entirely by the courts, not by the political branches of government. But how changes in tort law have affected insurance costs is an apolitical question of markets, bookkeeping, and economics.

Hayden suggests that my numbers were not representative of larger trends, but he does not present any positive case of his own, except by vague reference to others. For good reason. The overwhelming weight of the evidence today supports the conclusions of my article.

There are three subsidiary trends to consider here: (i) the number of suits filed, (ii) the probability that a filing will conclude in an award, and (iii) the average award. Each trend must be analyzed line by line: the story for auto insurance is not relevant to the story for product liability. The best studies of the three major trends, broken down by insurance category, have been conducted by the Rand Institute for Civil Justice. An excellent, recent summary of that definitive body of work appears in (*1*).

The facts are these. Federal tort filings have grown at an average annual rate of about 4% in recent years; state filings have grown at an average annual rate of somewhere between 2.3% and 3.9%. Compounded over the years, these modest growth rates are significant in themselves. But about half of state tort cases involve routine car accidents, and claims of this kind have been steady or declining. Product liability and other personal injury suits have increased moderately in state courts and dramatically in federal courts; mass latent injury cases have grown explosively across the board.

The plaintiff's probability of winning has also risen steadily. The Rand studies show, for example, the likelihood of success rising from 20% to 30% in a product case in the 1960s, to better than 50% in the 1980s, with similar increases in other, nonauto lines.

Awards have increased in size as well. As Hayden states, overall median tort awards have been quite stable. But the picture changes entirely when one separates out auto cases. The median awards in product and medical malpractice cases have risen steeply; mean awards have grown more steeply still. Hayden contends that median awards are more relevant than means, because most cases conclude in settlement. Even if the assertion is correct, the median story is still one of inexorable inflation in nonauto lines, but there is more to the mean-median debate than Hayden acknowledges. Total insurance payouts on cases that go to trial certainly depend on means, not medians. For this reason, both insurers and plaintiffs' lawyers, who are in tort litigation for the long term, will surely negotiate settlements with an eye to mean jury awards, not medians. Risk-averse plaintiffs, however, probably do discount the occasional jackpot awards that pull the means far above the medians. The full story on awards thus requires a look at both, which is what I provided, although necessarily briefly, in my article.

Any one of these three trends—in the number of filings, the probability of plaintiff success, or the size of the award—would be significant; taken together they represent very drastic change. What insurers pay in claims depends on the product of the three. Total insurer payouts on nonauto lines have in fact risen inexorably.

A standard method is generally used to obscure these facts. One lumps together car-accident cases—which have been notably stable and which account for about 40% of all tort cases—with others, where the real turmoil has occurred. One disaggregates the growing number of cases, the rising likelihood of plaintiff success, and the rising size of awards; this cuts all the numbers on the table by a factor of 3 or so. One dismisses the largest awards as atypical. One sets to one side mass injury claims (asbestos and the Dalkon Shield in particular) as out of the ordinary, not mentioning, of course, other mass claim episodes with formaldehyde foam, the Lippes loop intrauterine device, or Bendectin. And one then records all trends as annual growth rates, which obscures the large compound changes that accumulate over a decade or two. Anyone who wishes to explore the literature, including much of what Hayden cites, can observe the method in full flower.

As I noted in my article, an insurance company can, in theory, operate a cash-flow business, with minimal reserves, using today's premiums to satisfy today's claims and hoping that tomorrow's claims will be covered by future premium receipts. This approach is especially attractive when interest rates are high. The turmoil in financial markets in the late 1970s undoubtedly encouraged some insurer behavior of this character, which helped to mask, for a while, the effects of rising liability payouts on insurance rates.

There is no mystery, however, to the basic numbers on capital inflows and outflows. If an insurer is writing coverage on a line where premiums are collected an average of 3 years before claims are paid, it is trivial to estimate the proportionate contributions of premiums and investment income on that line of insurance. Investment income simply cannot be a large fraction of premium payouts unless we are to assume exorbitant rates of return.

A cycle, by definition, ends where it begins. While interest rates have gone up and down in the last decade, insurance rates on lines hardest hit by tort law inflation have gone only up. Insurance-cycle and cash-flow theories, which all depend on factors extrinsic to the legal system, do not explain why the insurance shocks have hit only specific insurance lines—products but not car accident insurance, medical malpractice but not fire insurance, environmental coverage but not first-party health. The theories likewise do not explain why the insurance shocks are unique to this country, although capital flows freely across national boundaries, and why many U.S. insurers now refuse to write certain lines altogether (*2*).

The real debate, Hayden concludes, concerns the courts' acceptance of legal principles antithetical to traditional American values of self-reliance and personal responsibility. Hayden refers here to noncontract civil litigation in product liability and personal injury suits, a body of law that is, overwhelmingly, of very recent vintage. His letter, in short, begins with the suggestion that nothing important has really changed in the law, and concludes with the suggestion that much has changed, in ways particularly unwelcome to certain traditionalists. He cannot have it both ways.

For better or for worse, much has in fact changed in U.S. tort law in the past three decades. The changes have, beyond serious doubt, transformed liability insurance costs and therefore liability insurance rates. Where liability law has expanded most aggressively, so has the price of insurance. Sadly, one cannot blame the barometer for the bad weather.

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1. D. Hensler, M. Vaiana, J. Kakalik, M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* (Special Report R-3583-ICJ, Rand Institute for Civil Justice, Santa Monica, CA, 1987).
2. For further discussion on this subject, see the appendix to Tort Policy Working Group, *An Update on the Liability Crisis* (Department of Justice, Washington, DC, March 1987).

Development in the Guinea Savanna

Merck & Co. is to be congratulated for its decision to give away free its new drug, Mectizan, to Third World sufferers of onchocerciasis (News & Comment, 30 Oct., p. 610). In combination with ongoing efforts to kill the parasite's blackfly (*Simulium* spp.) vector (News & Comment, 23 May 1986, p. 922), this will contribute significantly to rapid elimination of the disease from its endemic area.

Historically, onchocerciasis has been responsible for depopulating a vast region of West Africa, that is, the Guinea savanna, which is the climatic-vegetation zone intervening between the Sudan on the north and