ADVOCACY AND RHETORIC VS. SCHOLARSHIP AND EVIDENCE IN THE DEBATE OVER CONTINGENCY FEES: A REPLY TO PROFESSOR BRICKMAN

HERBERT M. KRITZER[*]

I. INTRODUCTION

In December 2001 I received a telephone call from a lawyer at a firm representing Baxter International, Inc. At that time, Baxter was facing lawsuits over a number of dialysis-related deaths that had occurred in Europe. Apparently dialysis filters manufactured at a Baxter plant in Sweden had been contaminated by a processing chemical resulting in adverse consequences when used with dialysis machines. Baxter had settled death claims involving ten Spanish patients who had died (for $289,000 each), but was facing claims in as many as another 40 cases.[1] American contingency-fee lawyers had begun to contact families in Europe and the possibility of lawsuits in the United States was looming,[2] with the prospect of damage payments far greater than roughly $300,000 per person.

The lawyer who contacted me was seeking someone to whom his firm, or the firm's client, could refer European journalists who would tell them about the problems with American contingency fees. He had in mind horror stories, including the supposed likelihood that the lawyers would end up with more of the proceeds than their clients. I told the lawyer that I would certainly be happy to speak with any journalists who contacted me, but I also asked whether the lawyer had visited my website to review my writings on contingency fees. When the lawyer indicated that he had not, I suggested that he just might want to do so, because he would probably determine that I was unlikely to say the kinds of things his firm's client was hoping the journalists would hear.

---

   1. Bruce Japsen, *Baxter Settles in Deaths in Spain*, CHI. TRIB., Nov. 29, 2001, at 1; *see also* Emma Daly, *Baxter Settles Suit Over Dialysis Deaths in Spain*, N.Y. TIMES, Nov. 29, 2001, at C4.

   2. Sarah A. Klein, *Legal Eagles Eye Wounded Baxter; Lawyers Scouring Globe to Find More Filter Victims*, CRAIN'S CHI. BUS., Nov. 26, 2001, at 4.

I went on to suggest that if he was looking for someone who would bad-mouth contingency fees, he might want to contact Professor Lester Brickman ("Brickman"). Brickman had established himself as the leading proponent of the view that contingency fees were a problem and that they needed to be substantially limited so that lawyers would not, supposedly, take advantage of naive clients and reap windfall fees.

I do not know whether the lawyer contacted Professor Brickman or, if he did, whether the lawyer indicated that I had made the referral. Professor Brickman's recent article in this law review suggests the kinds of things that he might have been expected to say. Regrettably, while his claims make good material for journalists, they also demonstrate his inclination to let his advocacy distort his scholarship. He also demonstrates a naiveté, perhaps resulting from a lack of training, about the norms and practices of social science. Rather than critiquing my work from within those norms, Brickman falls back on the use of anecdotes and horror stories, which while interesting, are the tools of the advocate not the social scientist.[3]

II. BACKGROUND

In 1994 the Manhattan Institute, a conservative think tank funded in significant part by conservative foundations associated with corporate interests, published a proposal to change the way that contingency fees operate in the United States.[4] Professor Brickman was the lead author of that proposal.[5] The proposal contained a variety of assertions about contingency fees that seemed inconsistent with extant empirical research that had provided systematic data about contingency fees and inspired me to develop a research project to focus specifically on contingency-fee practice in the United States.[6] The multi-faceted research project went into

---

3. *See* Herbert M. Kritzer, Lawrence C. Marshall & Frances Kahn Zemans, *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269 (1992).

4. Tamar Lewin, *Three Conservative Foundations Are in the Throes of Change*, N.Y. TIMES, May 20, 2001, at 30. On the role of the Manhattan Institute in promoting "tort reform," see Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1707–22 (1993).

5. LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES (1994) [hereinafter BRICKMAN, RETHINKING CONTINGENCY FEES].

6. In preparing for that research project, I wrote a paper, never published but available for many years on my web site, that sought to bring together any and all available information about the nature of contingency fees. *See* HERBERT M. KRITZER, RHETORIC AND REALITY . . . USES AND ABUSES . . . CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION, (Univ. of Wis. L. Sch., Inst. for Legal Studies, Disputes Processing Research Program, Working Paper No. 12-2, 1996), *at* http://www.polisci.wisc.edu/~kritzer/research/contfee/rhetoric.pdf [hereinafter KRITZER, RHETORIC AND REALITY].

the field in the fall of 1995 with funding from the National Science Foundation,[7] and the data I collected served as the central basis of the material presented in my 2002 article in this law review entitled *Seven Dogged Myths Concerning Contingency Fees*.[8] Because that article challenged many of the presumptions underlying Professor Brickman's many-year crusade, his recent attack in this law review on my article—and the research that underlies it—did not come as a surprise.[9]

Professor Brickman and I approach the question of contingency fees from very different perspectives. He describes his concerns as flowing from problems that he sees in the ethics of contingency fees and the lawyers who work on that basis.[10] My interest in contingency fees follows from a broad interest in empirical research on civil justice[11] and a particular concern about access to justice. To me, the first question is understanding how contingency fees work in practice, and I try to answer this question from the ground rather than from the ivory tower of an office in a law school in Manhattan. My research has involved *scientific*, systematic surveys of contingency-fee practitioners; surveys of clients and potential clients of contingency-fee practitioners; semi-structured interviews of contingency-fee practitioners and those who work opposite those practitioners (insurance adjusters and insurance defense lawyers); and extended observation of contingency-fee practitioners going about their day-to-day work.

Professor Brickman decidedly dislikes the results of my research because they do not support the claims he makes in calling for changes to the workings of the American contingency-fee system. In attacking my work, he misquotes me, misrepresents what I have reported, makes assertions about what I am and am not aware of, and then tries to

---

7. NSF Grant No. SBR-9510976; additional funding was provided by the Research Committee of the University of Wisconsin Graduate School.

8. Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739 (2002) [hereinafter Kritzer, *Seven Dogged Myths*].

9. Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653 (2003) [hereinafter Brickman, *Effective Hourly Rates*].

10. *Id.* at 655–60; *see* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996); Lester Brickman, *Contingency Fee Abuses, Ethical Mandates, and the Disciplinary System: The Case Against Case-By-Case Enforcement*, 53 WASH. & LEE L. REV. 1339 (1996); Lester Brickman, *Contingent Fees Without Contingencies: Hamlet without the Prince of Denmark?* 37 UCLA L. REV. 29 (1989) [hereinafter Brickman, *Contingent Fees*]; *see also* BRICKMAN, RETHINKING CONTINGENCY FEES, *supra* note 5.

11. I have been conducting empirical research on civil justice for over twenty-five years and have considered a broad range of topics from guardianship processes, to notification in class actions, to the use and impact of Rule 11 sanctions. All of my research articles can be found on my website at http://www.polisci.wisc.edu/~kritzer/research/research.htm.

demonstrate with other evidence that my findings could not be correct. In this brief response, I point out the errors Professor Brickman has made in his supposed critique.

III. DISTORTIONS AND OMISSIONS

A. *The Nature of the Wisconsin Contingency-Fee Study*

The core of my own empirical research has been conducted in Wisconsin because that is where I teach and live. My Wisconsin Contingency-Fee Study involved observation of lawyers over a three month period, a survey of Wisconsin practitioners producing 511 responses,[12] semi-structured interviews with Wisconsin contingency-fee practitioners and their "opponents" (insurance adjusters and defense lawyers), a general survey of the Wisconsin population, and a survey of Wisconsin injury victims who were the recipients of direct mail solicitations.[13] The research was funded by the National Science Foundation after peer review by experts in social-science research related to legal phenomenon.

Despite the careful scientific design of this research, Brickman alleges that my findings about what I term effective hourly rates (the fee lawyers receive divided by the hours devoted to the case) are based in part on my "own assertedly 'unscientific study' ('The Wisconsin Contingency Fee Study')."[14] He asserts that I referred to my "'Wisconsin Contingency Fee Study' done in 1995-1996 as an 'unscientific survey.'"[15] While these claims might be good rhetoric, they are at best questionable scholarship.

Brickman attributes these supposed acknowledgments of a lack of scientific basis to my research (and, hence, to my findings) to an article published in the *DePaul Law Review*.[16] That article reported the first analyses of effective hourly rates based on my *scientific* survey of Wisconsin. The article drew on other sources of data to bolster the survey results—such as preliminary data I had assembled from a variety of

---

12. Brickman incorrectly states that the data from my survey of Wisconsin lawyers was "provided by 1192 Wisconsin lawyers." Brickman, *Effective Hourly Rates*, *supra* note 9, at 676. I received responses from additional lawyers telling me that they did not do contingency fee work or, in a few cases, declining to participate in the survey.

13. This last component was not a formal part of my research but was conducted simultaneously with it, and I had some input into its design.

14. Brickman, *Effective Hourly Rates*, *supra* note 9, at 668 (footnote omitted).

15. *Id*. at 676.

16. Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267 (1998) [hereinafter Kritzer, *Wages of Risk*].

sources, published studies of the economics of legal practice, and unpublished data from several of those studies.[17] In one part of the article, I tried to assess the issues that might be raised by the fact that many contingency-fee lawyers do not keep time records and hence had to estimate the amount of time they spent on the cases about which they gave me data.[18] In making that assessment, I used some data I had collected when planning the larger study (from lawyers who did keep time records and agreed to consult those records). I describe those data (and *only* those data) as based on an "unscientific survey."[19]

It is instructive to quote two successive paragraphs from the *DePaul Law Review* article:

> When I first thought about conducting the Wisconsin Contingency Fee Study, I had the impression that virtually no lawyers working on a contingency fee basis maintained time records. In conversations with several local attorneys, I became aware that there were at least some lawyers who did keep track of their time while doing work on a contingency fee basis. Drawing upon a list of attorneys who were likely to be in practices which required them to track their contingency fee time, I conducted an *unscientific* survey. I asked these attorneys to provide me with information on contingency fee cases closed over a recent time period. These lawyers provided me with information on a total of ninety-two cases (with gross fees received ranging from $0 to $910,000 and lawyer effort ranging from three hours to 7,000 hours). As before, dividing net fee by lawyer hours produced an estimate of the effective hourly rate. The median was $125; the mean effective hourly rate was $189.

> In the sample from the *scientific* survey, there were 151 cases with information on effective hourly rates for which the lawyers reported having consulted their case files and that those files contained time records. This represents only seventeen percent of the entire sample used to conduct the Wisconsin Contingency Fee Study and, consequently, the data needs to be treated with caution. For these 151 cases, the median effective hourly rate was $111 and the mean was $170. Looking separately at the unfiled, filed, and

---

17. *Id.* at 276–84.
18. *Id.* at 300–02.
19. *Id.* at 302.

tried cases, the respective medians/means are \$146/\$224 (n=51), \$109/\$170 (n=61), and \$95/\$99 (n=39).[20]

As a scholar, I find it very troubling that Professor Brickman used the reference to a preliminary "unscientific survey" in the first paragraph quoted above to brand the entire study "unscientific" when the *very next* paragraph refers specifically to the *scientific* survey upon which the core analysis was based.

B. Contingency Fee Specialists and Others Who Charge Contingency Fees

Professor Brickman claims that I have failed to represent the reality of contingency fees accurately because I did not focus on personal injury specialists: "If Kritzer had restricted the data upon which he based his calculations of effective hourly rates to lawyers who represented tort claimants exclusively on a contingent-fee bases, or at least very nearly so, the comparative data elicited would likely have been far different."[21] This argument seems to presume that the vast majority of contingency-fee cases are handled by such specialists. My estimate is that about half the cases handled on a contingency fee basis in Wisconsin are handled by lawyers who characterize the "primary nature" of their practices as "personal injury plaintiffs'" work.[22] Focusing exclusively on such specialists then would have missed about half of the contingency-fee universe.

More important, however, is that I in fact *do* report data for specialists in personal injury plaintiffs' work. For reasons of space these data were not reported in the article in this law review. They can be found in the *DePaul Law Review* article that Professor Brickman liberally cites.[23] While higher than other lawyers, the differences are not extreme: the median effective hourly rate for the specialist is about \$160 per hour compared to about \$115 per hour for other lawyers; specialists get more of the lucrative cases (or are able to handle larger cases more efficiently),

---

20. *Id.* at 301–02 (emphasis added) (footnotes omitted).

21. Brickman, *Effective Hourly Rates*, *supra* note 9, at 676–77.

22. An important, unanswered question is whether a much higher proportion of contingency-fee cases is handled by "personal injury plaintiffs specialists" in other states. In a study of the personal injury bar in Cook County, Illinois, Sara Parikh found that only 50–60% of lawyers identified from the court records as handling personal injury cases were members of the Illinois Trial Lawyers Association. Sara Parikh, Professionalism and Its Discontents: A Study of Social Networks in the Plaintiff's Personal Injury Bar 48–49 (2001) (unpublished Ph.D. dissertation, University of Illinois at Chicago) (on file with author) [hereinafter Parikh, Professionalism and Its Discontents].

23. Kritzer, *Wages of Risk*, *supra* note 16, at 296 (Figure 3).

with the 75th percentile effective hourly rate falling at $330 per hour compared to $200–$250 per hour for most groups of nonspecialists.[24] More detail comparing various groups of lawyers is in my book[25] and can be found in a paper posted on my website since 2002.[26]

C. Absence of Cases Involving Large Fees

Brickman asserts that my findings must be biased because of the alleged absence of cases involving large fees: "Finally, it is clear from the data that Kritzer used that not a single responding attorney reported a multi-million dollar fee, or even multi-hundred-thousand dollar fees despite the fact that such fees in tort cases are not infrequent."[27] I have no idea how Brickman arrives at this conclusion about the frequency of such fees. Brickman's assertion in this regard demonstrates a lack of understanding of how data are analyzed and what particular analyses do and do not show.

How is it "clear from the data . . . that not a single responding attorney reported a multi-million dollar fee, or even multi-hundred-thousand dollar fees"? I do not include maximum values in reporting my data because experience says that if I do, someone will grab onto that information and fail to report the central tendency information that is more relevant.[28] In fact, the data I collected include several fees of $1 million or more.

Similarly, Brickman claims that "it is a mathematical certainty that none of the attorneys that Kritzer surveyed reported high-end contingency fees."[29] In fact there most certainly *are* high end (high effective hourly rate) fees in my data set. About 4% of the cases (unweighted) produced four figure ($1,000 or more) effective-hourly rates, with the highest being $4,473. There were no five figure ($10,000 or more) effective hourly rates. Professor Brickman presumably believes that such fees are common. Of

---

24. *Id.*

25. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 194, 198, 200 (2004) [hereinafter KRITZER, RISKS, REPUTATIONS, AND REWARDS].

26. Herbert M. Kritzer, What Are Contingency Fees Really Like? (Mar. 2002) (paper prepared for the 2002 F. Hodge O'Neal Corp. and Sec. Law Symp.), *at* http://www.polisci.wisc.edu/~kritzer/research/contfee/ilep.pdf [hereinafter Kritzer, What Are Contingency Fees Really Like].

27. Brickman, *Effective Hourly Rates*, *supra* note 9, at 678.

28. When I was working on a study of Rule 11 sanctions, see Lawrence C. Marshall, Herbert M. Kritzer & Frances Kahn Zemans, *The Use and Impact of Rule 11*, 86 NORTHWESTERN L. REV. 943 (1992), I received a call from a reporter at *Businessweek*. The reporter wanted to ask me only one question: what was the largest sanction we had found in our study? In fact, I had not even looked to see what that figure was, because my interests are not in the atypical but in the typical.

29. Brickman, *Effective Hourly Rates*, *supra* note 9, at 677 n.74.

course, the alternate interpretation is that five-figure fees are extremely rare, and hence it is not surprising that no such fees appeared in my data set.[30]

Very large cases and the resulting large fees loom large in the public's mind and apparently in Professor Brickman's mind as well. This is not surprising given that the media focuses on the big cases, as amply shown by research comparing news reports and systematic data on verdicts.[31] The fact that large cases and the accompanying large fees are made highly visible by the media does not mean that they comprise a significant fraction of contingency fee cases.

In fact, all statistical evidence shows that very large cases that produce big fees are a very small fraction of contingency fee cases. For example, a quick analysis of bodily injury claims from the 1997 Insurance Research Council ("IRC") *Closed-Claims Study of Auto Injury Claims* shows that only three cases involving attorney representation (out of a total of 22,826 such cases—that is 0.013%) involved *payments* of a million dollars or more; in other words, there is not a single case in the closed-claim study where the lawyer received a fee of a million dollars or more.[32] In some ways, this is not surprising because relatively few individuals have insurance coverage exceeding $1 million dollars.[33]

Texas is often held out as a state where the plaintiffs' bar is especially aggressive and successful. The Texas Department of Insurance ("TDI") publishes an annual report analyzing closed-claims involving commercial-liability insurance where the insurance limits are much less likely to limit the size of claims to under $1 million.[34] The data upon which these reports

---

30. Professor Brickman seems unable to resist rhetorical flourishes, even to the point that he believes he can read my mind, and know what I am and am not aware of: "Kritzer's lack of awareness of the incidence of medical cost build-up as a function of contingent-fee claiming." *Id.* at 674 n.61. How does Brickman know what I am and am not aware of? In fact, in my recent book I discuss the role of contingency-fee lawyers in directing clients to get medical providers and medical care; see KRITZER, RISK, REPUTATIONS, AND REWARDS, *supra* note 25, at 114–18; while I have no doubt that there are lawyers (and clients and medical providers) who encourage unnecessary medical treatment, I show that there are also good reasons why represented injury victims might have received more medical treatment than unrepresented injury victims.

31. *See* Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 772–74 (1995); Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide*, 80 JUDICATURE 64 (1996); WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS 165–68 (2004).

32. The figures above are from my own analysis of the IRC data set. *See* INS. RESEARCH COUNCIL, INJURIES IN AUTO ACCIDENTS: AN ANALYSIS OF AUTO INSURANCE CLAIMS (1999) [hereinafter IRC, INJURIES IN AUTO ACCIDENTS].

33. Based on my own analysis, only about 1% of the cases in the 1997 IRC data set involved bodily-injury policies with coverage of $1 million or more.

34. TDI has published these reports since at least 1988; reports starting with 1997 are available

are based can be obtained from the TDI website.[35] Using the 1997 data and the corresponding report, one finds that payments were made in 30,471 claims under commercial auto liability policies; a total of 58 of these claims involved payments of $1 million dollars or more.[36] Across all lines of commercial liability insurance in Texas, payments were made in 58,168 claims; 248 involved payments of $1 million or more.[37] Assuming a one-third contingency fee, a case would need a payout of $3 million or more to produce a $1 million fee; a total of 45 out of 58,168 commercial liability claims in Texas in 1997 produced such payments; assuming a 40% fee, the number of million dollar fees increases to 65. This is a sizable number of such fees in absolute terms, but represents (using the higher contingency-fee percentage) about one-tenth of one percent of the commercial liability claims closed with payments.[38]

An area where one might expect there to be a large proportion of very large fees is medical malpractice. In a study of over 21,000 *paid* medical malpractice claims in Florida closed during the period between 1990-2003, Neil Vidmar and his colleagues found that only 4% involved payments of $1 million or more. Only 0.6% involved payments of $2.5 million or more (which would produce seven-figure fees if the percentage were 40%).[39]

I know of no evidence that a large proportion of contingency-fee cases produce seven figure (or even six figure) fees.[40] A 1996 U.S. Justice

---

on the TDI website at: http://www.tdi.state.tx.us/general/forms/tdirpts.html#pandc.

35. Texas Department of Insurance, *TDI Online Reports and Studies*, *at* http://www.tdi.state.tx.us/general/forms/tdirpts.html#closed (last visited Aug. 29, 2004).

36. This figure is based on my own analysis of the TDI data. *See* 1997 TEX. DEPT. OF INS. TEX. LIABILITY INS. CLOSED CLAIM ANN. REP., *available at* http://www.tdi.state.tx.us/general/pdf/taccar97.pdf. Some fraction of these cases involve property damage only, but the Texas data do not split out this subset.

37. *See id.*

38. The most recent report and data are for 2001. 2001 TEX. DEPT. OF INS. TEX. LIABILITY INS. CLOSED CLAIM ANN. REP., *available at* http://www.tdi.state.tx.us/general/pdf/taccar01.pdf [hereinafter TDI, 2001 CLOSED CLAIM ANN. REP.]. The comparable figures for 2001 are 303 settled claims of $1 million or more out of 62,810 overall; for commercial auto liability insurance claims, there were 65 settled claims of $1 million or more out of a total of 36,016 claims; 71 claims would have produced fees of $1 million or more assuming a one-third contingency fee, and 86 claims would have produced fees of $1 million or more assuming a 40% contingency fee. *See id.*

39. Email correspondence between Neil Vidmar and Herbert M. Kritzer (Sept. 18 & 19, 2004) (on file with author). The report of the analysis from which these figures are drawn is forthcoming in Neil Vidmar et al., *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights from Florida*, DEPAUL L. REV. (forthcoming 2004 or 2005).

40. Repeatedly through his article Brickman makes reference to class actions and their impact on contingency fees. Brickman, *Effective Hourly Rates*, *supra* note 9, at 664, 696, 712–13. Undoubtedly class actions produce large fees in absolute terms; however, class actions (and the lawyers who litigate class action suits) are a very small piece of the contingency-fee world. My study, and my writings on

Department study of jury verdicts in 45 of the 75 largest counties in the United States found that only 3.0% of jury verdicts for plaintiffs in auto accident cases produced awards of $1 million or more and only 8.4% were $250,000 or more.[41] Even in medical-malpractice cases, only 22.1% of verdicts were $1 million or more and only 6.1% of plaintiffs' verdicts came in medical-malpractice cases compared to 61.5% in auto-accident cases.[42]

D. Top-Tier Lawyers

In several places Brickman implies that I have finally "come to recognize the existence of a top tier of contingent-fee lawyers earning substantially higher effective hourly rates than the rest of the pack."[43] I have not "come to recognize" this; I was fully aware of this at the beginning of my contingency-fee study. The first paper from the project, which Brickman liberally cites, observed:

> One last issue here worth noting is the likelihood of what I call skimming. That is, in some states there is a small group of lawyers who, due to reputation or some other factor, are able to be extremely selective in the cases they accept. The result of such selectivity might be the consistent generation of extremely high effective hourly rates.[44]

---

contingency fees, do not specifically address class actions. Fees in class actions are regulated through very different mechanisms, and including them along with the cases I look at is like trying to stuff a watermelon into a grocery sack containing a bunch of grapes: they do not mix. Recent work on fees in class actions indicate that the average fee percentages are well below the supposed "standard" 33% and that the percentage declines as the size of the case increases. *See* Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 51–54 (2004).

41. CAROL J. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, NCJ 173426, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 1996, at 8 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc96.pdf [hereinafter DEFRANCES & LITRAS, CIVIL TRIAL CASES AND VERDICTS]. This study was replicated for 2001, and found similar results, although the published report of the study does not separate out awards in jury and bench trials. *See* THOMAS H. COHEN & STEVEN K. SMITH, U.S. DEP'T OF JUSTICE, NCJ 202803, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, at 5 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf [hereinafter, COHEN & SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001].

42. DEFRANCES & LITRAS, CIVIL TRIAL CASES AND VERDICTS, *supra* note 41, at 8.

43. Brickman, *Effective Hourly Rates*, *supra* note 9, at 687 n.122, 699.

44. *See* KRITZER, RHETORIC AND REALITY, *supra* note 6, at 54. Since that time, I have written about the *growing* stratification in the plaintiffs' bar both in the U.S. and in England; see Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-first Century*, 51 DEPAUL L. REV. 219 (2001); and Herbert M. Kritzer,

Brickman seems to believe that this top tier of lawyers comprises a substantial portion of the contingency-fee bar.[45] I believe it represents a small segment of the bar, even among personal injury specialists. One place that is well-known for having such a top tier is Chicago, with the likes of Phil Corboy and Bob Clifford. A recent study of the plaintiffs' bar in Chicago identified a total of eleven lawyers falling into a top tier of "elite" lawyers (with an acknowledgment that some members of this elite may have been overlooked); at the time of the study, 1600 lawyers in the Chicago area belonged to the Illinois Trial Lawyers Association ("ITLA"), the association of plaintiffs' lawyers in Illinois.[46] Even if one extended the tier down to include the top 20%, the great bulk of personal-injury specialists do not fall into this upper tier; even though those plaintiffs' attorneys in the "upper tier" (top 20%) do handle significant cases and earn occasional very large fees.[47] Equally important, this researcher

---

The Fracturing Legal Profession: The Case of Plaintiffs' Personal Injury Lawyers, 8 INT'L J. LEGAL PROF. 225 (2001).

    45. As best I can tell, his only basis for this is that Stephan Daniels and Joanne Martin, in their study of the Texas plaintiffs' bar, divide lawyers into four groups of approximately equal size depending on the lawyers's reports of their average case value. This procedure will by its nature stratify by case size. It is also extremely important to note that Daniels and Martin used *average* case value not *median* case value; this means that a small number of very large cases in a relatively low volume practice can result in a large average case value. *See* Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiff's Practice in Texas*, 80 TEX. L. REV. 1781, 1786 (2002).

    46. Parikh, Professionalism and Its Discontents, *supra* note 22, at 48 n.1.

    47. In personal correspondence, the author of the Chicago study, Dr. Sara Parikh, reported the following:

> There are about 2100 plaintiff personal injury lawyers in Chicago (estimated number from the Chicago Lawyers project). This means that the elite comprise only about 1% of all practitioners. These elite (who include Corboy, Clifford, and the like) are stars by any measure. They handle mostly high-value cases, often specializing in medical malpractice cases. They have a career high average verdict or settlement of $26 million. They are leaders in trial lawyers associations, contribute heavily to democratic politics, etc.

> However, through my random sample of personal injury case filings, I also found a larger group of "high-end" practitioners. They look much like the elite in many respects. They handle higher value complex cases (often medical malpractice), and are invested in the profession. While still respectable, their career high average is substantially lower (mean of $8 million; median of $4 million). Finally, the bulk of personal injury attorneys identified through my random sample are "low-end" practitioners who handle small cases (in the $10–30,000 range). They tend to handle a high volume of routine auto cases. They have a career high average of about $500,000. Based on a number of factors, I estimated that the elite comprise approximately 1% of PI lawyers in Chicago; the remaining high-end about 19%, and the low-end 80%. . . . Yet, even the elite and the high-end firms must take in medium-smaller value cases to survive. There are simply not enough big cases to sustain a whole practice, and the competition for the biggest cases is pretty tough. So, while their big cases can get quite big, the bulk of their practice is in more moderate cases.

E-mail from Sara Parikh to Herbert M. Kritzer (Mar. 1, 2004) (on file with author).

identified lawyers to interview by sampling court cases and found that only half the lawyers she identified belonged to ITLA compared to all but one of the lawyers she identified as "elite."[48]

E. Comparative Returns of Contingency-Fee Work

Brickman asserts that I argue that "contingency fees in personal injury cases generate hourly rates of return that are substantially the same as hourly based rates."[49] Certainly I do argue that *typical* contingency-fee returns are not wildly out of line with hourly rates. However, that is not the same as saying that they are "substantially the same."

I go to some length to lay out the comparison. My analysis shows that a small segment of cases produces very high returns, and this pushes the average return well above the hourly rates most lawyers charge.[50] However, this represents a small segment of cases (perhaps 10% or less); omitting the 10% leaves contingency-fee lawyers with a modest "profit" margin over the typical hourly rate which is easily justified by the additional services provided by contingency-fee lawyers (e.g., advancing the costs of the case, deferring payment for services, and insurance against the uncertainties inherent in tort claims and other litigation).[51] It is also the case that a very significant proportion of cases yield returns well under the typical hourly rate, and this is true even omitting those cases for which no return is obtained.

IV. OTHER ISSUES AND ASSERTIONS

A. Representativeness of Wisconsin

A major theme in Brickman's critique is that Wisconsin is not representative of "national lawyers' fees" and hence the results of my Wisconsin survey should be dismissed.[52] I would be the first to admit that

---

48. Parikh, Professionalism and Its Discontents, *supra* note 22, at 48–49.
49. Brickman, *Effective Hourly Rates*, *supra* note 9, at 665.
50. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 771–72.
51. Brickman claims that I do this to "combat the apparently unexpectedly result of a high mean," and that I "offered no explanation for such an exclusion beyond that [my] estimates are otherwise 'greatly influenced by relatively small numbers of extremely profitable cases'". Brickman, *Effective Hourly Rates*, *supra* note 9, at 677 n.74. I explain very clearly that I do this to understand the importance of the skew inherent in the distribution. *See* THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS 536–39 (5th ed. 1990). Moreover, I *also present the results without trimming the top 10%* so that readers are able to draw their own conclusions about the patterns in the data.
52. Brickman, *Effective Hourly Rates*, *supra* note 9, at 679.

Wisconsin is not Texas, New York, or California. But then, who would argue that Texas, New York, or California is representative of the United States as a whole?

Brickman asserts that my Wisconsin data are unrepresentative, "[b]ecause contingency fees are generally higher in urban areas."[53] I am not sure how he knows that this is the case. In fact, some of the highest contingency fees have come from trials in nonurban areas such as Alabama and Mississippi.[54] It may well be that more cases arise in urban areas,[55] but it is not clear why that would affect the contingency-fee income of lawyers unless personal-injury specialists are located only in urban areas (although particularly in urban areas, many specialists handle small value, routine cases[56]). Stephen Daniels and Joanne Martin report mean and median jury verdicts for 80 different jurisdictions (in 16 states), some urban and some rural, in their book *Civil Juries and the Politics of Reform*. While there appears to be something of a tendency for the largest means to come from urban jurisdictions, the pattern is far from consistent; in some states, the largest mean comes from a nonurban district, and the largest median comes from nonurban districts in a larger number of states.[57] Drawing on a 1996 study of tort verdicts in 45 of the 75 largest counties in the United States, there does appear to be a tendency for the mean and median verdicts to increase as population increases, although the link to median verdicts is much weaker than the link to mean verdicts.[58]

---

53. Brickman, *Effective Hourly Rates*, *supra* note 9, at 670–71.

54. *See* George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825 (1996) (describing the very large punitive awards coming from several rural counties in Alabama). In the late 1980s, I contemplated a research project on the "propensity to sue" that would have included a county in east-central Alabama as one of the research sites. As part of my preliminary work for this project (which never came to fruition), I spoke with the trial judge in this county. He told me that the local juries were inclined to give very large awards in cases involving corporate defendants from outside the local area.

55. There is evidence that a larger portion of injury victims in large cities—who claim compensation—employ an attorney than is true for injury victims in medium or small cities, or rural areas. *See* INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 28 (1994) [hereinafter IRC, PAYING FOR AUTO INJURIES 1994]; INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 47 (1999) [hereinafter IRC, PAYING FOR AUTO INJURIES 1999]. However, this also might mean that attorneys in nonurban areas are more selective, and take only cases with higher returns.

56. See *supra*, note 47.

57. *See* STEPHEN DANIELS & JOANNE MARTIN, CIVIL JURIES AND THE POLITICS OF REFORM 84–86 (1995) [hereinafter DANIELS & MARTIN, CIVIL JURIES].

58. *See* MIRIKA F.X. LITRAS ET AL., U.S. DEP'T OF JUSTICE, NCJ 179769, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996, at 13–14 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf. From the tables in Appendix A and Appendix B I computed the Spearman rank order correlation between county population and mean and median final award amounts (including punitive damages); the respective correlations were .536 and .348

However, there is no way of determining whether this reflects (1) differences in jury behavior, (2) differences in the kinds of cases arising in urban areas, or (3) differences in which cases lawyers choose to bring to trial.

Brickman notes that fewer Wisconsin accident victims file lawsuits than do those in many other states;[59] effective hourly rates tend to be higher in cases settled without filing than in cases that are filed in court because lawyers do not have to do all the tasks associated with filing, and formal discovery never starts. Brickman also notes that fewer Wisconsin auto-injury claimants have lawyer representation, which could well indicate that Wisconsin lawyers are more conservative and take only larger cases—and hence have higher potential fee yields.[60] Brickman argues that jury verdicts in Wisconsin tend to be on the low side;[61] while I have doubts about Brickman's data source for this point,[62] data that I have more trust in would also tend to support this assertion.[63]

Still, does this mean that Wisconsin is unrepresentative in terms of effective hourly rates earned by contingency-fee lawyers? In my article in this law review, I went to some length to demonstrate that the Wisconsin results in this regard are not inconsistent with what we can learn from other studies.[64] Brickman takes note of the fact that I also report data from the RAND Civil Justice Reform Act ("CJRA") study,[65] but he fails to grasp the import of the comparison.[66] When I limit the Wisconsin cases to those that most resemble the cases in the RAND data, I find that the effective hourly rates obtained by lawyers in Wisconsin are *higher* than those reported in the *national* RAND data.[67]

---

59. Brickman, *Effective Hourly Rates*, *supra* note 9, at 683.
60. *Id*. at 682.
61. *Id*. at 684.
62. *See infra* notes 54–58 and accompanying text.
63. *See* DeFrances & Litras, Civil Trial Cases and Verdicts, *supra* note 41, at 22.
64. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 769–72.
65. *See* Brickman, *Effective Hourly Rates*, *supra* note 9, at 685 & n.105.
66. Brickman also claims that I "revised upward" my previous calculations. Brickman, *Effective Hourly Rates*, *supra* note 9, at 686. I do revise the previous calculations somewhat (compared to the results I reported in the *DePaul Law Review* article) by refining my weighting scheme. However, Brickman misses the key point which is that the kinds of cases in the RAND study differ from the overall Wisconsin study (i.e., only filed cases and only cases involving a certain level of damages); for purposes of comparison, I try to zero in on the subset of Wisconsin cases that are most comparable to the federal cases in the RAND data.
67. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 772 tbl.8. I do not make an argument in the text that Wisconsin fees are higher, but simply that they "are not significantly out of line with patterns that one would expect to find from national studies." *Id*. at 771.

While I have done everything I can to assess the representativeness of the data I have collected from Wisconsin, that does not mean that evidence from other states, or from a national sample, could not show different patterns. However, simply noting the possible unrepresentativeness of a carefully designed study does little to advance either scholarly inquiry or the policy debate. It is unproductive to dismiss what we do know based on the fact that it is not based on the whole universe of lawyers. One rarely learns everything one needs to know about a social problem (or disease or other medical condition) from one study. But if each solid study is dismissed as piecemeal or unrepresentative of the complete universe, we would never get anywhere. If Professor Brickman were truly concerned about getting good, broad-based data, he and the organizations that back him would support carefully designed, systematic data collection on a broad scale such as I have done in Wisconsin. I would challenge Professor Brickman to urge the Manhattan Institute to join with the Roscoe Pound Foundation or Public Citizen or similar groups to support a national replication of my study.

B. Texas Data

In addition, Brickman erroneously questions something he calls the "Texas data." In discussing a Texas case where there may well have been questionable fees charged, he states "[i]t is a mathematical certainty that the 1992 Texas data relied upon by Kritzer for substantiating his estimates of effective hourly rates of contingency-fee lawyers did not include those $1.8 million fees."[68] I believe he is referring to a table in the *DePaul Law Review* article which lists several state bar economic surveys that had some information on income broken down by specialization; I used those data as an alternate way to estimate the effective hourly rates lawyers generate.[69] One of the studies in the table was from Texas and was dated 1992. Brickman is correct that the 1992 Texas study did not include the fee in the case he refers to, which was from a case settled in 1992; this is for the simple reason that the Texas study covered income for 1991.[70] However, there is nothing inconsistent between the data in the Texas study and the kind of fee Brickman reported for that particular case. If the study had covered 1992, it could well have included lawyers who earned $1.8

68. Brickman, *Effective Hourly Rates*, *supra* note 9, at 695–96.
69. Kritzer, *Wages of Risk*, *supra* note 16, at 277–79.
70. STATE BAR OF TEX., 1992 ATTORNEY BILLING AND COMPENSATION SURVEY: ATTORNEY COMPENSATION REPORT 3 (1992).

million fees during that year. Either Brickman failed to understand how these summary statistics were created from the raw data, or he is so focused on his advocacy that he chose to ignore this detail in order to try to score points in the policy debate.

C. Pain and Suffering

Brickman asserts that "[p]ain and suffering damages are generally valued for settlement purposes as a two- to three-times multiple of medical costs."[71] Brickman bases this on a combination of a statement in Charles Wolfram's textbook on legal ethics,[72] and on data he misinterprets from a 1987 insurance industry study.[73] Specifically, Brickman states "[t]he operative ratios are $2.11 in pain and suffering recoveries for every dollar of medical and wage loss costs."[74] Brickman should reread the insurance industry report. The figure in the report is the ratio of *total* damages to economic loss, not the ratio of *general* damages (pain and suffering) to economic loss;[75] this means that for 1987 (the year covered by the study that Brickman cites) the ratio of pain and suffering to economic loss was 1.11 to 1. Moreover, Brickman either fails to realize or chooses not to reveal that the insurance industry organization has been doing these studies since the late 1970s, and the ratio has been falling since that time. A total of five studies have been completed (1977, 1987, 1992, 1997, and 2002)**,** and the ratios of *total* payment to economic loss (in bodily injury claims) over that time have been, in order, 2.29, 2.11, 1.87, 1.65, and 1.49.[76] That is, the data published by the IRC from its 2002 study shows an average Bodily Injury ("BI") payment of $8,245 and an average "economic loss" of $5,520, which works out to a multiplier of only 1.49.[77] Interestingly, the actual average payment (in unadjusted dollars) declined

---

71. Brickman, *Effective Hourly Rates*, *supra* note 9, at 674.

72. Brickman, *Effective Hourly Rates*, *supra* note 9, at 675 n.59 ("Pain and suffering and similar nonmonetary damages probably average three times the monetary damages in personal injury claims.") (quoting CHARLES WOLFRAM, MODERN LEGAL ETHICS 528 n.21 (1986)).

73. Brickman, *Effective Hourly Rates*, *supra* note 9, at 674 n.59 (construing ALL-INDUS. RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTO. INJURIES IN THE U.S. 65–66 & tbl. 5-5 (1989)). The payment and loss figures reported by AIRAC and its successor, the Insurance Research Council, omit cases involving permanent total disability and death.

74. *Id.*

75. *See* ALL-INDUS. RESEARCH ADVISORY COUNCIL, COMPENSATION FOR AUTO. INJURIES IN THE U.S. 66 (1989).

76. The ratios for all five years can be computed from data reported in INS. RESEARCH COUNCIL, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 72 (2003).

77. *Id.*

between 1992 and 1997 from $8,460 to $7,836 (a drop of 7.4%); by 2002, the average payment was back up to $8,245, which was still less than 10 years before.[78] Adjusting for inflation, which the published IRC figures do not do, shows that the average payment in bodily injury cases dropped by 24% between 1992 and 2002.[79]

I have also looked at jury verdict data from Wisconsin, where juries itemized damages, for the mid-1980s. These data show an average ratio of general damages to special damages of about 1 to 1 (equivalent to a total damages to special damages ratio of 2 to 1).[80] Brickman might respond that this is just unrepresentative Wisconsin again; however, at my request Stephen Daniels[81] looked at data from several jurisdictions in Texas where damages are routinely itemized and came up with comparable figures.[82] Moreover, in a recent article, W. Kip Viscusi notes that in a previous study of product liability cases that he had done, "[T]he elasticity of the responsiveness of pain and suffering damages to the compensatory amount to less than one";[83] that is, the ratio of pain and suffering to compensatory damages, to the extent there is such a ratio,[84] is something less than one.[85]

D. Variation in Contingency-Fee Percentages

Throughout his writing, and reasserted in his article in this law review, Brickman has maintained that contingency-fee percentages are

---

78. *Id.*

79. This figure is based on a CPI of 140.5 for July 1992 and 180.1 for July 2002. *U.S. Department of Labor, Bureau of Labor Statistics, Bureau of Labor Statistics Data*, *available at* http://www.bls.gov/data/home.htm (last visited Feb. 27, 2004). Deflating the 2002 payment to 1992 dollars yields $6,432 which is a decline of 24%.

80. Herbert M. Kritzer, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, 23 LAW & SOC. INQUIRY 795, 871 n.23 (1998).

81. Daniels answered my question by drawing on the data from the study he did with Joanne Martin, which assembled jury verdict data from 80 jurisdictions in 16 different states, including six jurisdictions in Texas. *See* DANIELS & MARTIN, CIVIL JURIES, *supra* note 57, at 84–86.

82. I discuss evidence regarding the ratio of general damages to special damages in an appendix to my article, *Contingent-Fee Lawyers and Their Clients: Settlement Expectations, Settlement Realities, and Issues of Control in the Lawyer-Client Relationship*, see Kritzer, *supra* note 80, at 817–18.

83. W. Kip Viscusi, *Tort Reform and Insurance Markets*, 7 RISK MGMT. & INS. MARKETS 9, 12 (2004).

84. Viscusi also comments that "jurors do not simply multiply the compensatory award by some factor such as 1.5." *Id*.

85. It is important to note here that the study Professor Viscusi refers to looked at settlements and verdicts in products liability cases. *See* W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?* 8 INT'L REV. L. & ECON. 203, 205 (1988).

"standardized" at 33% or more;[86] his argument is that this demonstrates that contingency fees are not governed by the market and hence are noncompetitive.[87] While I report no specific evidence that there is competition regarding contingency-fee percentages,[88] in my article I report several studies—in addition to mine—that show substantial variation in contingency-fee percentages and that a significant portion of contingency fees are less than 33%. Thus, Brickman's assertion that the tort bar has been effective "in administering a uniform price" is simply untrue.[89]

The only supposedly new evidence that Brickman advances that there is little variation in contingency-fee percentages is from a study by the IRC.[90] Brickman reports that this study shows a median contingency-fee of 33% and a mean of 31% and that "the fees did not vary at all on the basis of how quickly a settlement was achieved."[91] This does not address the question of whether there was variation in fees, only whether variation related specifically to the timing of settlement. The data reported in this study, as well as the 1994 and 1999 editions of the same study (using data collected in 1992 and 1998 respectively), are very informative on the issue of variation in fee percentages.

---

86.   Brickman, *Effective Hourly Rates*, *supra* note 9, at 701–03.

87.   *Id*.; *see also* Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?* 25 CARDOZO L. REV. 65 (2003) [hereinafter, Brickman, *The Market for Contingent Fee-Financed Tort Litigation*].

88.   In my interviews of contingency-fee practitioners in Wisconsin, I did ask some of the lawyers whether they would take a case for a lower percentage if the case was one they were very interested in getting and they sensed that the client was lawyer shopping. The response was mixed; perhaps half of the respondents who addressed this question said they would offer a fee lower than their usual fee and half said they would not. However, the number of respondents who addressed this issue was too small to draw strong conclusions other than that some lawyers will offer reduced fees in the face of competition and some will not. Outside Wisconsin, I have seen at least one indicator of competition over fees in routine contingency fee work. The back of the Phoenix, Arizona yellow pages does boast a full-page advertisement from a personal-injury law firm that calls itself "The Discount Accident Lawyers," a title that is trademarked. It indicates that the firm provides "full service & discounted fees. It's about time." The phrase "Discount Accident Lawyers" is prominently displayed on the firm's webpage, which also explains that they charge 29% rather than the supposedly usual one-third. *See* Hastings & Hastings, P.C., *Hastings & Hastings FAQ*, *at* http://www.hastingsandhastings.com/faq-hastings.htm#Q2 (last visited Mar. 6, 2004).

89.   Brickman, *Effective Hourly Rates*, *supra* note 9, at 702.

90.   INS. RESEARCH COUNCIL, PAYING FOR AUTO INJURIES: A CONSUMER PANEL SURVEY OF AUTO ACCIDENT VICTIMS 2004 EDITION 39, 76 (2004) [hereinafter IRC, PAYING FOR AUTO INJURIES 2004].

91.   Brickman, *Effective Hourly Rates*, *supra* note 9, at 658 n.11(6).

TABLE 1: Fee Percentages from IRC Data

Fee Percentage 1992 & 1998 1998 & 2003		1992	1998	1998	2003
10% or less		5%	5%		
11%-20%		4	5		
	19% or less			8%	5%
21%-25%		9	9		
26%-30%		18	20		
	20%-29%			13	15
	30%-34%			70%	67%
31%-35%		56	54		
	35%-75%			9	12
36-40%		7	5		
41% or more		2	2		
		101%[a]	100%	100%	99%[a]
(n)		1322	1212	1253	705

[a]Percentages do not add to 100 due to rounding.

Table 1 shows the responses reported by IRC to the survey question asking respondents about the fee they paid to their lawyers. The table shows that there is substantial variation in the percentages paid.[92] Importantly, the figures in the table are strikingly consistent with other data I have reported on contingency-fee percentages.[93] Specifically, the most common percentage fee is 33% (or, as shown here, in the 31-35% or

---

92. *See* IRC, PAYING FOR AUTO INJURIES 1994, *supra* note 55, at 57; IRC, PAYING FOR AUTO INJURIES 1999, *supra* note 55, at 87; IRC, PAYING FOR AUTO INJURIES 2004, *supra* note 90, at 75. The 1994 and 1999 reports provided relatively detailed breakdowns of the percentage fees (5% or less, 6–10%, 11–15%, 16–20%, 21–25%, 26–30%, 31–35%, 36–40%, etc.) while the 2004 report provides only the categories shown in Table 1, which accounts for part of the difference in the two sets of figures for 1998 (the second 1998 column was reported in the 2004 report). Given that the 2004 column is very similar to the 1998 column reported in the 2004 report, I infer that the detailed breakdown for 2002 is almost certainly very similar to that for 1998. The question asked did not change significantly between 1998 (which was the same as 1992) and 2004: "What payment arrangements were made for attorney services"; the answer alternative related to fee percentage did change very slightly, from "Contingency fee (percentage of award) (Specify percentage)" to "A percentage of the settlement or award (Specify Percentage)," but this is unlikely to greatly affect the responses. *See* IRC, PAYING FOR AUTO INJURIES 1999, *supra* note 55, at 106; IRC, PAYING FOR AUTO INJURIES 2004, *supra* note 90, at 84. There is no explanation for why the number of responses differ for the two sets of figures for 1998; one possibility is that the later report included multiple responses for some cases (for both 1998 and 2002 surveys, information could be provided by up to three people in the family who made claims in a given accident). One might speculate that the Insurance Research Council changed the level of detail to accord with Professor Brickman's argument; Professor Brickman did have access to the IRC analysis long before it was published (my request to have advance access to information that would appear in the report prepublication was denied).

93. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 755–61.

30-34% range), but there is significant variation around—and particularly below—that figure.

E. The Contingencies of Contingency-Fee Work

Throughout his writings on contingency fees, Brickman has taken the position that the only justification for any payment premium under a contingency-fee recovery is the risk of nonrecovery. In his first article he asserts, "for a contingent fee to be valid, there must be an actual contingency, which means a realistic risk of nonrecovery."[94] Now, Brickman has finally acknowledged that the risks involved in the contingency fee includes more than nonrecovery; however, he has largely continued to ignore the denominator for the effective hourly rate equation.[95] That is, he acknowledges that not only can there be no recovery (the numerator can be zero) but there can also be a low recovery (the numerator can be small).[96] What he continues to ignore is the uncertainty in the denominator: lawyers cannot know how much time a case will take because they do not know how the opposing side will respond to the settlement demand that they make.[97] In some types of cases, e.g., medical malpractice, lawyers, at least those I have talked to, assume that there will be significant resistance even when they believe that the negligence is clear; uncontested cases do occur, but that is not the expectation that lawyers have when they take on a medical malpractice case.

In his discussion of my writing about risk,[98] Brickman neglects to note that I have always focused heavily on the risk involved in the denominator. I have never asserted that contingency-fee lawyers fail to recover in a very large percentage of cases (although a relatively low recovery rate does occur in some areas such as medical malpractice). Hence, he is wrong when he states that my "statement that contingency fee

---

94. Brickman, *Contingent Fees*, *supra* note 10, at 30.
95. To be fair, Brickman does acknowledge in a footnote that I argue that uncertainty over the amount of time that will be required needs to be considered among the contingencies faced by lawyers. *See* Brickman, *Effective Hourly Rates*, *supra* note 9, at 696 n.149. Brickman asserts that he has also considered this issue. *Id.* at 656 n.8, 696 n.149 (citing Brickman, *Contingent Fees*, *supra* note 10, at 97–98). I invite readers to review what Professor Brickman said in his 1989 article to assess for themselves whether he has really taken into account the uncertainties I label "investment risk."
96. Brickman, *Effective Hourly Rates*, *supra* note 9, at 656 n.149.
97. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 748–49.
98. Brickman, *Effective Hourly Rates*, *supra* note 9, at 696–97.

lawyers 'face substantial risk' is belied by [my] own research"; nor do I "recede from [my] prior statements about risks of nonrecovery."[99]

V. ALTERNATIVE APPROACHES TO ESTIMATING EFFECTIVE HOURLY RATES, OR GROWTH IN EFFECTIVE-HOURLY RATES

Brickman asserts that my approach to measuring the return on contingency-fee work fails to produce valid data. He proposes three alternative ways of drawing inferences about these returns and attempts to apply two of them.[100] In fact, I apply a variant of one of the approaches he describes (the one he does not attempt to apply); my results using that approach are consistent with the other approaches I have applied.[101] The other two approaches that Brickman does attempt to apply are severely flawed for reasons I detail below. The flaws demonstrate Brickman's failure to understand and apply the principles of social science research and his unwillingness to acknowledge the issues involved in drawing inferences from one type of data to another type of data.

A. Estimating Effective Hourly Rates Through Aggregation

In Appendix A of his article, Brickman suggests that "[t]he most direct way of calculating the increase in the effective hourly rate of tort lawyers would be to assemble total contingent-fee income data realized by plaintiff lawyers in personal injury litigation in each of the years 1960–2001 and divide that number by the number of hours contingent-fee lawyers devoted

---

99. *Id*. at 696–97 & n.149. These supposed prior statements are cited to my unpublished paper, KRITZER, RHETORIC AND REALITY, *supra* note 6, at 37. I invite readers to read what is in that paper. The bulk of the discussion is on medical malpractice where the risk of nonrecovery is substantial. The balance focuses on the risk of nonrecovery in filed cases; there I report an overall risk of nonrecovery of about 17%. KRITZER, RHETORIC & REALITY, *supra* note 6, at 20. If one assumes that less than half of cases are filed and that virtually all unfiled cases lead to recovery then the overall risk of nonrecovery is less than 10%. However, at least one publicly available dataset suggests a higher risk of nonrecovery. The Texas Department of Insurance publishes an annual report on closed commercial liability claims. *See supra* notes 34–35. The 2001 report shows a total of 151,344 closed claims only 62,810 of which resulted in payments—for a recovery rate of 41.5%; the recovery rates ranged from a high of 57.5% in commercial auto-liability claims to a low of 16.7% in medical professional-liability claims. *See* TDI, 2001 CLOSED CLAIM ANN. REP., *supra* note 38, at 21, 28 (recovery rate percentages calculated from raw data provided in TDI Report). The figures above undoubtedly *overstate* the risk for contingency-fee lawyers because they include cases where the claimant had no lawyer; unfortunately, there is no way from the available data to separate out represented and unrepresented claimants because that information was collected only in regard to claims settling for more than $10,000 (i.e., there is no information on representation for claims where no payment was made).

100. Brickman, *Effective Hourly Rates*, *supra* note 9, at 686–92.

101. This is what I refer to as the "mean hourly return," see Kritzer, *Seven Dogged Myths*, *supra* note 8, at 761–72.

to all representations in those years."[102] What Brickman is calling for is a complete census of the population of contingency-fee cases, their outcomes, the fees earned, and the hours worked. As anyone familiar with inferential statistics knows, a full census is not necessary because valid and quite precise estimates of population figures can be obtained using appropriate random samples.[103]

In fact, I do report some results that rely upon a methodology along the lines Brickman proposes. Specifically, I take all of the cases in my sample, add up all of the fees (adjusted for expenses that an hourly-fee lawyer would bill out separately), add up all the hours the lawyers reported devoting to the cases in the sample, and divide the first sum (fees) by the second sum (hours). I refer to this as the "mean hourly return." I do this for both Wisconsin and the RAND CJRA data, and report them both in my Table 8.[104] These figures range from $157 for 1992–93 federal cases to $274 for "high stakes" Wisconsin court cases; the figures are heavily influenced by the top 10% of cases and when I trim the top 10%, the range drops to $110-$181.

In my recent book, I report comparable data from the 1979 Civil Litigation Research Project where the mean hourly return worked out to $47 ($51 for federal and $40 for state cases).[105] Over the period from 1979 through 1995 the CPI rose about 120%; during this period, the median hourly rate charged by lawyers working on an hourly basis rose from $50[106] to about $125 (for a mean of $124).[107] Thus, depending on which of the mean hourly return figures one chooses to focus on, the increase in mean hourly return for contingency-fee work over the 16 years from 1979 to 1995 has either been just a bit greater than the CPI and the increase in hourly rates generally or about double that increase. While I cannot say which is the more accurate characterization, this is nothing like the 1000–

---

102. Brickman, *Effective Hourly Rates*, *supra* note 9, at 707.

103. The entire field of inferential statistics is built on this core foundation. Every elementary statistics book discusses how samples can be used to draw valid and relatively accurate inferences about populations; while the samples cannot give the exact population figures, they can provide estimates with known levels of likely errors.

104. Kritzer, *Seven Dogged Myths*, *supra* note 8, at 772.

105. KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 25, at 184–86. These same figures can be found in my unpublished paper, Kritzer, What Are Contingency Fees Really Like, *supra* note 26, at 13–14.

106. HERBERT M. KRITZER, THE JUSTICE BROKER: LAWYERS AND ORDINARY LITIGATION 138 (1990).

107. KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 25, at 186.

1400% increase that Brickman wants to suggest, unless most of that increase occurred between 1960 and 1980.[108]

B. *What Do Jury Verdicts Tell Us about Growth in Payouts and Hence, Contingency Fees?*

One of Brickman's arguments is that typical contingency fees must have risen radically over the last 40 years because there has been radical growth in average jury verdicts—even controlling for inflation.[109] There are several problems with using average jury verdicts as a surrogate measure for typical contingency fees.

First, throughout his discussion, Brickman relies mostly on arithmetic means to describe jury verdicts. From the viewpoint of those receiving or effectively paying these fees (insurance companies in tort cases), the mean is an important statistic because what payers (and payees) are most interested in is the total payout, and the total payout can be obtained by multiplying the arithmetic mean times the number of cases. However, from the viewpoint of policy analysis directed at how a system operates, medians are probably more important because one wants to focus on what typical juries are doing in typical cases.[110] In this area, means fail to describe typical cases because of the extreme skew caused by a small number of extreme outliers, which is why I report results with and without a 10% top trim.

A second problem is that Brickman relies largely on data collected by Jury Verdict Research ("JVR").[111] I know of no social scientist who has studied jury verdict patterns who will use data from JVR because of the unscientific way JVR assembles its information.[112] The three best studies of jury verdicts either rely upon jury verdict reporters that have systems in place to capture most verdicts within the jurisdictions they cover or involve systematic sampling of verdict reports directly from court files. These studies are the series done by the RAND Institute for Civil Justice focusing on California and Cook County, Illinois;[113] the study by Daniels

---

108. Brickman, *Effective Hourly Rates*, *supra* note 9, at 655, 714.

109. *Id*. at 707–14.

110. *See* DEBORAH HENSLER ET AL., TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS 12–13 (1987).

111. Brickman, *Effective Hourly Rates*, *supra* note 9, at 708–13.

112. One social scientist I spoke to about JVR commented, "I can wax poetic about that crap."

113. For the most recent publication from the long series of RAND reports on this research, see Seth Seabury et al., *Forty Years of Civil Jury Verdicts*, 1 J. OF EMPIRICAL LEGAL STUD. 1, 8 (2004) [hereinafter Seabury, *Forty Years of Civil Jury Verdicts*]. Earlier work includes: AUDREY CHIN & MARK PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS

and Martin which looks at 80 jurisdictions in 16 states around the country;[114] and the studies of 45 of the largest 75 counties in 1992, 1996, and 2001 conducted for the Bureau of Justice Statistics.[115] A number of scholars have criticized the JVR data. Stephen Daniels and Joanne Martin have stated:

> The JVR data . . . are alleged to be national figures and are widely cited as such. The reliability and validity of these data, however, are questionable. JVR's coverage is highly selective, reporting on what it determines to be precedent setting verdicts. The coverage is thus biased toward high awards, and is not reported in constant dollars. . . . [N]o context is provided within which to interpret these data. No information is given on the total number of verdicts, nor on the proportion of plaintiff verdicts. This lack of context is especially problematic with regard to trends in the number of $1 million-plus awards.[116]

Likewise, Michael J. Saks has stated in *The University of Pennsylvania Law Review*:

> Although practitioners sometimes turn for information about awards to reports from Jury Verdict Research (JVR), no serious students of the litigation system regard those data as reliable summaries of jury behavior. The JVR data are not the product of systematic and representative sampling. The resulting sample of awards is taken

(1985); AUBREY CHIN & MARK A. PETERSON, FAIRNESS IN CIVIL JURY TRIALS: WHO WINS, WHO LOSES IN COOK COUNTY (1983); ERIK MOLLER, EXPLAINING VARIATION IN PERSONAL INJURY JURY AWARDS (1997); ERIK MOLLER, TRENDS IN CIVIL JURY VERDICTS SINCE 1985 (1996); MARK A. PETERSON, CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY, ILLINOIS (1987); MARK A. PETERSON, COMPENSATION OF INJURIES: CIVIL VERDICTS IN COOK COUNTY (1983); MARK A. PETERSON ET AL., PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987); MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960–1979 (1982); MICHAEL SHANLEY & MARK A. PETERSON, COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959–1980 (1983); MICHAEL SHANLEY & MARK A. PETERSON, POSTTRIAL ADJUSTMENTS TO JURY AWARDS (1987); Erik Moller et al., *Punitive Damages in Financial Injury Jury Verdicts*, 28 J. OF LEGAL STUDIES 283 (1999).
    114. DANIELS & MARTIN, CIVIL JURIES, *supra* note 57, at 84–86 (selected jurisdictions were included from Arizona, California, Colorado, Georgia, Illinois, Kansas, Michigan, Missouri, New York, Ohio, Oregon, Texas, and Washington, plus all of Alaska, Idaho, and Montana).
    115. COHEN & SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES 2001, *supra* note 41 (the 2001 study was expanded to 46 counties); DEFRANCES & LITRAS, CIVIL TRIAL CASES AND VERDICTS, *supra* note 41; DEFRANCES ET AL., CIVIL JURY CASES AND VERDICTS IN LARGE COUNTIES (1995) [hereinafter DEFRANCES ET AL., CIVIL JURY CASES].
    116. Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 JUST. SYS. J. 321, 327 (1986).

disproportionately from the high end of the distribution, and the resulting summary statistics therefore overstate the size of awards. In addition, reporting practices may vary with geography, case type, and over time, such as when public controversy over awards rises. As a result, apparent changes in award patterns [according to the JVR data] may reflect little more than changes in reporting patterns and changes in the nature of the sampling bias.[117]

Finally, Rachel Zimmerman and Christopher Oster stated in a June 2004 *Wall Street Journal* article:

Jury Verdict Research says its 2,951-case malpractice database has large gaps. It collects award information unsystematically, and it can't say how many cases it misses. It says it can't calculate the percentage change in the median for childbirth-negligence cases. More important, the database excludes trial victories by doctors and hospitals—verdicts that are worth zero dollars. That's a lot to ignore. Doctors and hospitals win about 62% of the time, Jury Verdict Research says. A separate database on settlements is less comprehensive. A spokesman for Jury Verdict Research, Gary Bagin, confirms these and other holes in its statistics.[118]

As indicated by the above quotes, JVR has been a passive receiver of jury verdict information; while JVR's data are national in scope, JVR does not conduct sampling in anything that looks like a scientific way. JVR relies in significant part on lawyers and other informants to tell it about cases. The result is that JVR overestimates both plaintiff wins and verdict amounts. It also fails to account for the large number of bench trials. For example, Brickman refers to an average verdict of $1,365,110 for 2001.[119] The Bureau of Justice Statistics study of 45 of the 75 largest counties found that in 1996 the average tort award was $430,359, up from $407,875 for 1992.[120] Interestingly, this study shows a sharp drop in the median

---

117. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Liability System–and Why Not?* 140 U. PA. L. REV. 1147, 1245–46 (1992) [hereinafter Saks, *Do We Really Know Anything*].

118. Rachel Zimmerman & Christopher Oster, *Assigning Liability: Insurers' Missteps Helped Provoke Malpractice "Crisis"*, WALL ST. J., June 24, 2002, at A1. The article goes on to report that Bagin said, "[T]he numbers nevertheless accurately reflect trends. The company, which sells its data to all comers, has reported jury information this way since 1961. 'If we changed now, people looking back historically couldn't compare apples to apples,' Mr. Bagin says." *Id.*

119. Brickman, *Effective Hourly Rates, supra* note 9, at 708.

120. DEFRANCES & LITRAS, CIVIL TRIAL CASES AND VERDICTS, *supra* note 41, at 8; DEFRANCES ET AL., CIVIL JURY CASES, *supra* note 115, at 5. The 2001 Bureau of Justice Statistics ("BJS") study does not provide sufficient information to calculate separate means for jury and bench trials; the

award and slight drops in the means for auto injuries and medical malpractice cases from 1992 to 1996.[121] Importantly, as noted previously,[122] Brickman argues that urban areas should produce higher average verdicts than nonurban areas; if this is true, one would expect a study focusing on the large urban counties to produce a higher mean verdict than a true national sample.

This is not to say that there has not been substantial growth in *mean* verdicts. The best long term data—that collected by RAND for Cook and San Francisco counties—shows growth on the order of 400–500% from 1960 to 2000 after controlling for inflation. At the same time, those studies show at best modest growth in median verdicts (50–100%) over the same time period.[123]

Even granting that there has been growth, it is not at all clear what this growth tells us about changes in cases that do not go to verdict. There is strong evidence that the mix of cases being tried has changed substantially over the last forty years.[124] In many jurisdictions the number of civil trials has declined not just relative to the number of cases being filed but in absolute numbers.[125] The RAND research has shown that the number of tort trials in San Francisco has fallen by about two-thirds over the 40 year period covered by the research. Statistical analysis of jury verdicts in the RAND study indicates that once one controls case characteristics and

---

overall average tort award in 2001 was $565,238 (in unadjusted dollars)—less than half the figure reported by JVR for that same year (computed from COHEN & SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, *supra* note 41, at 5). I obtained the raw BJS data from the Inter-university Consortium for Political and Social Research and computed the mean tort verdict for jury trials; the result was $597,000. *See Inter-University Consortium for Political and Social Research, Civil Justice Survey of State Courts*, *2001*, U.S. Dep't of Justice, Bureau of Justice Statistics, *available at* http://www.icpsr.umich.edu/access/index.html (last visited Sept. 2004). The 2001 BJS report does show median jury award amounts in tort cases *adjusted for inflation* declining from $64,000 in 1992 to $28,000 in 2001 and a decline is evident even using unadjusted dollars (from $51,000 in 1992 to $30,000 in 1996 to $28,000 in 2001). *See* COHEN & SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, *supra* note 41, at 9. Comparing the overall (combining bench and jury trials) means for 1996 to those for 2001 (using unadjusted dollars) does show an increase in *average* tort awards over the period.

121. DEFRANCES & LITRAS, CIVIL TRIAL CASES AND VERDICTS, *supra* note 41, at 8. I computed the means for auto injuries and medical malpractice from the 2001 study. The mean for auto injury cases was up slightly from 1996, but still below the mean for 1992. For medical malpractice cases, the mean in 2001 went up sharply to $2,040,000 from $1,319,000 in 1996 and $1,484,000 in 1992. *See* COHEN & SMITH, CIVIL TRIAL CASES AND VERDICTS IN LARGE COUNTIES, 2001, *supra* note 41, at 9.

122. *See supra* notes 53–58 and accompanying text.

123. *See* Seabury, *Forty Years of Civil Jury Verdicts*, *supra* note 113, at 9.

124. *See* Neil Vidmar, *Making Inferences about Jury Behavior from Jury Verdict Statistics: Cautions about the Lorelei's Lied*. 18 LAW & HUM. BEHAV. 599 (1994); Saks, *Do We Really Know Anything*, *supra* note 117, at 1262–67.

125. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

inflation, the average jury verdict has actually *declined* over the last 40 years.[126] Looking separately at auto torts and other torts, one finds a decrease in verdicts for auto cases and an increase for nonauto torts; the cumulative increase over the 40 years for the latter is about 90%.[127] It is probably the case that much of this increase in nonauto torts comes from business torts, which hardly existed 40 years ago.

The conclusion one must draw from the preceding discussion is that one cannot make inferences from raw jury patterns to the full range of cases handled on a contingency (or any) fee basis. Furthermore, even if one acknowledges growth in the mean verdict, the absence of significant growth in the median verdict undercuts the argument that *typical* effective hourly rates have grown radically over the past 40 years.

C. Estimating Effective Hourly Rates by Comparing to Defense Costs

Brickman attempts to provide his own estimate of effective hourly rates by drawing comparisons between plaintiff and defense costs and fees.[128] His method of estimating the average effective hourly rate is to take the ratio of total plaintiff fees to total defense fees from a Joint Economic Committee study of auto accident compensation[129] and then multiply by the average hourly rate he estimates is paid to defense lawyers ($140–$150). The central problem in the analysis is that Brickman has incorrectly assumed that in every case where there is a plaintiffs' lawyer there is also a defense lawyer; he neglects the fact that insurers do not bring in a defense lawyer in most cases until a suit is filed.[130] A second problem is that the total amount paid to plaintiffs' lawyers is derived by assuming an average contingency fee of 30%, which, while described as "conservative",[131] may well be too high. Finally, Brickman assumes that the amount of effort put in by defense lawyers is equal to that put in by plaintiffs' lawyers; for cases that settle relatively soon after filing, this is unlikely to be the case. The extrapolation method Brickman uses to arrive

---

126. Seabury, *Forty Years of Civil Jury Verdicts*, *supra* note 113, at 19.

127. *Id*. at 21.

128. Brickman, *Effective Hourly Rates*, *supra* note 9, at 686–92.

129. DAN MILLER, JOINT ECONOMIC COMM., 108TH CONG., CHOICE IN AUTO INSURANCE: UPDATED SAVINGS ESTIMATES FOR AUTO CHOICE (2003), *available at* http://www.house.gov/jec/tort/07-24-03.pdf.

130. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT (1980); KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 25, at 131–34.

131. MILLER, JOINT ECONOMIC COMM., 108TH CONG., *supra* note 129, at 15.

at an estimate of effective hourly rates earned by the plaintiffs' bar simply does not work.

VI. CONCLUSION

Professor Lester Brickman simply does not get it. He does not understand the data I present. He does not abide by the norms of scholarship. And, most decidedly, he does not like what my research shows about the reality of contingency fee legal practice in the United States. Ironically, there are results that I present that could be used to support an argument that contingency fees have increased over time; however, rather than understand those results, Professor Brickman prefers to attack and at times he seems to attack blindly.[132]

Professor Brickman wants to argue that contingency fees are not adequately governed by market mechanisms and hence need to be regulated.[133] The support for this argument is that fees do not vary significantly (which I have shown to be untrue, even using data that Professor Brickman tries to cite in support of this argument) and that lawyers routinely obtain windfall fees (again, not consistent with any of the data I have been able to locate). Still, it might be the case that contingency fees are not competitive, and in fact I have suggested that the solution—if fees are noncompetitive—is to improve the market. This can be done in two ways: increasing the amount of information available to consumers about variations in the fees that lawyers charge and introducing competition from licensed, nonlawyer claims negotiators who would, if the fees are noncompetitive, be able to offer their services below the allegedly noncompetitive fees charged by lawyers.[134]

---

132. The last direct contact I had with Professor Brickman was a brief email exchange in June of 2003. In commenting on a series of petitions filed by an organization called Common Good calling on state supreme courts to impose limits on contingency fees, Professor Brickman is reported as having told the reporter that "about 20 states have rules limiting attorney fees in contingency cases to one-third of the recovery." Daniel Wise, *Attorney Fees in Personal Injury Cases Are Targeted: A Move for Contingency Fee Caps in Quick Settlements*, NAT'L L.J., May 12, 2003, at 6. Via email, I asked Professor Brickman if he could provide me with a list of those states and citations to the rules or statutes imposing the limitations. I was very interested in seeing this list because a law student had just completed a search for me of state statutes, cases, and ethics rules for every state trying to identify all limitation and regulations on contingency fees. The student had found virtually no limitations of the type Professor Brickman had claimed existed. If the student had botched the assignment, I wanted to know. Professor Brickman replied to my inquiry, "Sorry. I do not have a current list." Email from Lester Brickman to Herbert M. Kritzer (June 30, 2003) (on file with author). Is there such a list, current or otherwise? On what basis did Professor Brickman make the claim? Or, did the reporter misquote Professor Brickman? If so, why did he not say so in his reply?

133. *See* Brickman, *The Market for Contingent Fee-Financed Tort Litigation*, *supra* note 87.

134. *See* KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 25, at 263–64; Kritzer,

Brickman asserts that he has no problem with contingency fees, even extremely large contingency fees, when the risks that lawyers undertake are large. This is evident when he picks up on the fact that I acknowledge that some lawyers working on contingency fees do in fact earn very high hourly returns, e.g., the $300 (or perhaps $400) million contingency fee Texas lawyer Joe Jamail is reported to have earned in the *Pennzoil vs. Texaco*[135] case. Brickman goes on to defend Jamail's huge fee on the grounds of the high level of nonrecovery risk Jamail faced: "it [the fee] was ethically justified by the substantial risk he faced when he undertook the case and the amount of effort he reasonably anticipated at the time that he would have to expend."[136] Interesting—why then has Brickman, a vehement critic of the fees received by lawyers in tobacco cases, been unwilling to acknowledge that the very high fees received by the lawyers in the initial tobacco cases brought on behalf of states were not justified by "the substantial risk [they] faced when [they] undertook the case and the amount of effort [they] reasonably anticipated at the time that [they] would have to expend"?[137] Why does Joe Jamail deserve his huge fee while the lawyers representing states like Minnesota (which settled at the end of a trial but before the jury returned a verdict), Florida, or Mississippi (both of which settled before trial) do not? Besides Joe Jamail, is there any very large contingency fee, particularly one involving an injured person or an injured group of persons (as opposed to a business tort such as in the *Texaco* case) that Professor Brickman would deem justified?

I am sure that Professor Brickman would ask me in return whether I know of any contingency fees that I would deem excessive. The answer to that is yes. The *New York Times* reported a case in which a death claim had produced a settlement offer of $1.4 million to an unrepresented widow and her two children. A lawyer named Joseph Dowd approached the claimant after this settlement offer had been received and offered his

---

Wages of Risk, *supra* note 16, at 307–08.

135. Brickman, *Effective Hourly Rates*, *supra* note 9, at 692–93. *See also*, Andrew Blum, *The $400 Million Man?*, NAT'L L.J. at 2 (Sept. 26, 1988).

136. Brickman, *Effective Hourly Rates*, *supra* note 9, at 692–93.

137. *See also* Lester Brickman, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827 (1999); Lester Brickman, *Want to Be a Billionaire? Sue a Tobacco Company*, WALL ST. J., Dec. 30, 1998, at A11; Lester Brickman, *Will Legal Ethics Go Up in Smoke?*, WALL ST. J., June 16, 1998, at A18. In his June 16, 1998, *Wall Street Journal* piece, Brickman did state "When lawyers first brought suits against Big Tobacco, they were taking significant risks. For that they deserve to be richly compensated." *Id*. However, he goes on to argue, post hoc, that the risks really weren't all that big or that the contingency-fee contracts were sweetheart deals with corrupt politicians and hence were producing excessive fees. *Id.* Nowhere that I have been able to find does Brickman ever suggest that any of the fees actually received by lawyers in tobacco cases were warranted—not even the fee in the Minnesota case.

services; she retained him, and he referred the case to Corboy & Demetrio, one of the top plaintiffs' firms in Chicago. Two years later the widow's lawyer at Corboy & Demetrio advised her to settle the case for the $1.4 million offered before any lawyer was retained. Mr. Dowd, the lawyer with whom she signed the retainer and who referred the case to Corboy & Demetrio, demanded payment of the fee called for in the retainer even though the representation he arranged had provided nothing for the widow. I would deem Mr. Dowd's demand for his fee unethical even though Illinois courts have ruled that, given the terms of the contingency fee contract, it is legal. It is important to note that Corboy & Demetrio did waive any fee to which it was legally entitled.[138]

A more general example would be a case where there is clear fault and a relatively low policy limit producing an obvious limits claim (in Wisconsin, such a claim could involve a $100,000 insurance policy limit in a wrongful death claim arising from an accident caused by an intoxicated driver) and where all that the plaintiff's attorney must do to be successful is to present evidence of conviction for DUI and the death certificate of the deceased, a $33,333 contingency fee would clearly be excessive and unethical. One prominent lawyer I spoke with volunteered the hypothetical example of the clear limits case with relatively low limits of $100,000, and said that in those circumstances he would charge the client a fee of 5% or less (i.e., $5,000) rather than his usual 33%.[139] However, Professor Brickman might argue that even this fee, or virtually any fee, would be unethical because all that the family of the deceased should have to do is to present the same materials to collect the policy limits. In the course of my research, one of the lawyers I observed told me of precisely this kind of case, but the twist was that the insurance company refused to pay the full policy limits. The company argued to the claimant that by settling directly with him/her, she/he would not have to pay a lawyer. In fact, under Wisconsin law concerning loss of consortium resulting from wrongful death, the client should have received the policy

---

138. Adam Liptak, *Ethical Questions Raised on Legal Fee from Widow*, N.Y. TIMES, Aug. 28, 2004, at A4.

139. *See* KRITZER, RISKS, REPUTATIONS, AND REWARDS, *supra* note 25, at 41. An interesting question is whether alternative providers would be able to provide services at a lower cost than lawyers—particularly if those providers were subject to licensing and insurance rules. *See* HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 206–07 (1998). In a totally different arena, childbirth services, there is some evidence that alternative providers, midwife-staffed birthing centers, are failing in part because of increasing costs related to insurance. *See* Richard Pérex-Peña, *A Childbirth Phenomenon Fades: Use of Midwives Declines in New York as Insurance Costs Rise*, N.Y. TIMES, Mar. 15, 2004, at A21.

limits of $300,000;[140] the insurance company initially offered a settlement of $50,000 and eventually agreed to a settle with the claimant for $235,000 rather than paying the full $300,000 the claimant was legally entitled to. I would agree with Professor Brickman that in this case it would be unethical for a lawyer to charge fee of $100,000. What fee would be reasonable? One could argue that the client would be better off paying virtually any fee (including expenses) up to the difference in what the insurer would pay in the absence of representation.

Professor Brickman has been an advocate for limitations on the contingency fees that lawyers can charge. He has argued that such limitations are necessary because lawyers routinely obtain excessive fees and seldom face significant risk in taking on contingency-fee cases. He has maintained his position in the face of systematically-collected data that fail to support the core assumptions of his proposal. Rather than undertaking the hard work of designing and executing research that would produce better data—that does not suffer from the issues of unrepresentativeness that he argues, incorrectly, undercut the data I rely upon—he presents dubious analyses that misinterpret and misapply extant data. Moreover, he relies upon data sources that social scientists from many institutions have long known to fall short of meeting the norms of sampling and data collection required to achieve validity. The kind of research required to obtain valid and useful data is difficult and time consuming, but it is the only way to develop a picture of how something like the American contingency fee operates on a day-to-day basis.

---

140.   *See* WIS. STAT. ANN. § 895.04(4) (West 2000).