

BEWARE OF NUMBERS (AND UNSUPPORTED CLAIMS OF JUDICIAL BIAS)

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An accusation of unprincipled bias in appellate decision making involves a substantive assessment. Such an assessment cannot be made without first looking at what litigants have presented to the courts and then looking at what the courts have relied upon in rendering their decisions.

In a recent set of articles, Professor Kevin Clermont and Professor Theodore Eisenberg advance the claim that federal appellate judges harbor an unprincipled bias against plaintiff/appellants.¹ The line of reasoning that the authors follow to reach this conclusion is, in our view, quite extraordinary. They first point to data that they claim show that defendants are more likely than plaintiffs to secure reversals in appeals from judgments and verdicts in federal civil cases.² They next assert that appellate judges perceive trial courts, especially juries, to be biased in favor of plaintiffs.³ And, finally, they speculate that, in an effort to overcome the perceived pro-plaintiff bias in the trial courts, appellate judges routinely favor defendants on appeal.⁴ The authors dub their conclusion the “anti-plaintiff effect” in federal appellate civil litigation.⁵ This thesis is specious, because it is founded on flawed reasoning and deficient empirical research.

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1. Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. ECON. REV. 125 (2001) [hereinafter *Defendants' Advantage*]; Kevin M. Clermont & Theodore Eisenberg, *Anti-Plaintiff Bias in the Federal Appellate Courts*, 84 JUDICATURE 128 (2000) [hereinafter *Anti-Plaintiff Bias*].

2. *Defendants' Advantage*, *supra* note 1, at 125, 134-35, 137; *Anti-Plaintiff Bias*, *supra* note 1, at 129-31.

3. *See Defendants' Advantage*, *supra* note 1, at 125, 135-36, 138-45; *see Anti-Plaintiff Bias*, *supra* note 1, at 129, 131-34.

4. *See supra* note 3.

5. *Anti-Plaintiff Bias*, *supra* note 1, at 129.

As an initial matter, it is not the least bit surprising or disturbing to learn that defendants are generally more likely than plaintiffs to secure reversals in some types of civil cases, and most especially in appeals from jury verdicts. The fact-finding process of a trial judge almost always involves some documentation of his or her reasoning, either in a transcript, written opinion, or findings of fact. It is therefore less difficult for a party to assign error to a judge's decision than to a jury's verdict. In any event, if defendants generally fare better than plaintiffs in securing reversals, this may be because plaintiffs usually carry the burden of proof at trial, so they have more to overcome when seeking reversal on appeal. We would also hypothesize that any differential in reversal rates is the predictable result of (1) the differing nature of appeals brought by plaintiffs and defendants and (2) the structural constraints related to the unique functions of trial and appellate courts. In particular, we would hypothesize that appeals brought by defendants more often involve viable legal issues than appeals by plaintiffs. Legal, not factual, issues are the principal work of the appellate courts, so if one group of litigants presents more viable legal claims than another, they will win reversals at a higher rate. The authors do not consider or choose not to focus on these possibilities in their empirical analyses. This is hard to fathom, "because in empirical research, challenging a theory with the best possible opposing arguments is what makes the strongest case for a theory."⁶

The authors also fail to furnish any credible quantitative or qualitative data to support their conclusion that the higher percentage of wins by defendant/appellants is a result of appellate judge bias against plaintiffs. Instead, they apply their own speculative "attitudinal explanation[s]"⁷ to limited and conclusory data on case dispositions drawn from the public records of the Administrative Office of the U.S. Courts ("AO").⁸ The authors' so-called attitudinal explanations—which purport to explain why appellate judges make the choices they do—are not supported by citation to any sociological or psychological literature regarding the appellate process or the reasoning of appellate judges. Rather, the authors merely rest on sweeping generalizations that equate appellate judges with the populace as a whole.⁹

6. See Lee Epstein & Gary King, *The Rules of Inference*, 69 CHI. L. REV. 1, 10 (2002).

7. *Defendants' Advantage*, *supra* note 1, at 141-45; *Anti-Plaintiff Bias*, *supra* note 1, at 132-34.

8. *Defendants' Advantage*, *supra* note 1, at 127-28, 129; *Anti-Plaintiff Bias*, *supra* note 1, at 129-30.

9. The authors assert that appellate judges analyze cases before them in the same manner as the general populace. See *infra* notes 30 and 31 and accompanying text. This defies common sense. This

The authors are forced to use these frail and speculative “attitudinal explanations” because their study design is faulty. They attempt to apply multi-regression analyses to information gathered from the AO data base. The problem, however, is that while this data base includes a large number of cases decided by federal courts, it provides very little substantive information regarding what litigants have presented to the courts or what the courts have relied upon in rendering their decisions. In other words, the information is simply too thin to yield the broad conclusions the authors attribute to it.

The portion of the AO data base used by the authors consists of thirteen categories of federal tort and contract cases terminated in fiscal years 1988 to 1997—a period of time during which information was gathered by the AO from both district courts and courts of appeals.¹⁰ The limited substantive information contained in the AO data base includes:

[1] the names of the parties, [2] the subject matter category and the jurisdictional basis of the case, [3] the origin of the case in the district court as original or as removed or transferred, [4] the amount demanded, [5] the dates of filing and termination in the district court or the court of appeals, [6] the procedural stage of the case at termination, [7] the procedural method of disposition, and, [8] if the court entered judgment or reached decision, who prevailed.¹¹

To arrive at their conclusion on judicial bias, the authors first ascertained the appeal rate by looking to terminated district court cases that reached the appellate docket.¹² They narrowed that set of cases to those that involved “district court judgments formally for one side that the other side put[] on the appellate court docket.”¹³ They defined the *reversal rate* as the percentage of

assertion is also at odds with “the considerable body of social psychological research that teaches us that human behavior is highly sensitive to context.” Deborah R. Hensler, *Beyond Prosletyzing: Some Thoughts on Empirical Research on the Law 5* (unpublished manuscript, on file with the Washington University Law Quarterly) [hereinafter *Prosletyzing*].

10. After eliminating duplicate case records and adjusting for cross, consolidated, and reopened appeals, the authors used the district court docket numbers and filing dates to match the district court data to the appellate data. *Defendants’ Advantage*, *supra* note 1, at 128-29; *Anti-Plaintiff Bias*, *supra* note 1, at 130.

11. *Defendants’ Advantage*, *supra* note 1, at 127-28. *See also Anti-Plaintiff Bias*, *supra* note 1, at 129-30.

12. *Defendants’ Advantage*, *supra* note 1, at 129.

13. *Id.*; *Anti-Plaintiff Bias*, *supra* note 1, at 130. Initially, the authors assumed that if the district court judgment was for the plaintiff, the defendant was the appellant. However, upon closer examination of the parties’ names on the ensuing appeals, they discovered that more than 25% of the appeals from judgments for plaintiffs were filed by plaintiffs. The authors subsequently dropped these cases from their data base. *Defendants’ Advantage*, *supra* note 1, at 129; *Anti-Plaintiff Bias*, *supra* note

that group of appeals that reached a “decisive outcome” and were categorized as “reversed,” “remanded,” or “affirmed in part and reversed in part.”¹⁴ *Affirmed cases* were defined as those categorized as “affirmed” or “dismissed on the merits.”¹⁵ Performing a series of regressions comparing whether the plaintiff or defendant won “with other independent variables of case category; jury trial; year; district; status as a reopened appeal or not; and origin status as original, removed, or transferred,” the authors concluded that the “plaintiff-win variable” was the only variable that had “an important effect on reversal rate.”¹⁶

This analysis, limited as it is by the nature of the data available in the AO data base, shows nothing more than *formal outcomes* in certain civil cases. The data show virtually nothing about the appellate courts’ decisions justifying the formal outcomes. The data likewise offer no information on appeals that were withdrawn (or the reasons for the withdrawals) or settled (or the reasons for the settlements). The authors also fail to look behind the formal labels of “reversal,” “remand,” or “affirm” to determine whether some of these cases were merely pyrrhic victories for the supposed winner. As any practicing attorney knows, the formal disposition of a case may be very deceiving if it is not considered in conjunction with the written opinion rendered by the court.

Finally, the data upon which the authors rely include absolutely nothing about the issues raised by the parties before the appellate courts (nor the issues that were raised in trial and then dropped or waived on appeal); the quality of advocacy on appeal; or the appellate courts’ bases for the decisions rendered in the cases that are included in the study. It seems clear to us that an empiricist cannot possibly assess the outcomes in appellate litigation to determine whether appellate judges are biased against certain parties without first gathering and then considering data of this sort. We will amplify this point in the discussion that follows.

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The first thing that we discovered upon careful review of the authors’ articles is that there are several caveats to their assertion that defendants in civil jury trials succeed “significantly”¹⁷ more often than plaintiffs in winning reversals on appeal.

1, at 130 n.4.

14. *Defendants’ Advantage*, *supra* note 1, at 129; *Anti-Plaintiff Bias*, *supra* note 1, at 130.

15. *Defendants’ Advantage*, *supra* note 1, at 129; *Anti-Plaintiff Bias*, *supra* note 1, at 130.

16. *Defendants’ Advantage*, *supra* note 1, at 135 n.18.

17. *Anti-Plaintiff Bias*, *supra* note 1, at 128.

First, it turns out that not all federal circuits fit the authors' claim of appellate bias. A footnote in *Appeal from Jury or Judge Trial: Defendants' Advantage* [hereinafter *Defendants' Advantage*] admits that the authors did not find a higher reversal rate for defendants in the D.C. Circuit.¹⁸ In that same footnote, the authors also acknowledge that, while "almost all circuits . . . show the defendants' higher reversal rate, *some show it insignificantly and others show it substantially.*"¹⁹ The authors dismiss this finding in a single sentence: "These variations in local culture are consistent with an attitudinal explanation."²⁰ In short, the authors assert that variations in the degree of alleged anti-plaintiff bias among circuits can be explained by cultural differences. Yet, the authors offer no definition of "local culture," let alone one that might correlate with circuit boundaries. And, more fundamentally, they never explain where this assertion comes from or on what it is based.

The authors' data also admit of several caveats relating to the size of the differential across case categories.²¹ Given the principal purpose of this essay, however, no good point will be served by cataloguing each of these limitations.

The second thing that struck us upon a close read of the articles was that the authors' own numbers do not support their conclusion that appellate judges decide cases pursuant to a "fear of pro-plaintiff bias at the trial court level."²² The authors reason that if appellate courts are "leaning toward undoing trial court and jury trial favoring of plaintiffs,"²³ there should be "a perceptible difference between personal injury . . . and non-personal injury case categories, as the latter type rests less on the format of little victim against big defendant."²⁴ They further argue that, because appellate judges mistrust juries more than trial judges, the biggest difference in plaintiff and defendant reversal rates should show up in personal injury jury trials and the smallest in non-personal injury judge trials.²⁵ This is what the authors find in the numbers highlighted in the table reproduced in pertinent part in Table 1. Based on these limited data, the authors conclude that whenever trial courts, and especially juries, are suspected of acting on a pro-plaintiff bias, "the

18. *Defendants' Advantage*, *supra* note 1, at 142 n.32.

19. *Id.* (emphasis added).

20. *Id.* See also *Anti-Plaintiff Bias*, *supra* note 1, at 133 (parenthetically admitting to the same caveat with respect to variations among the circuits).

21. See *Defendants' Advantage*, *supra* note 1, at 136-38.

22. *Defendants' Advantage*, *supra* note 1, at 136.

23. *Id.* at 138.

24. *Id.* at 138-39.

25. *Id.* at 139.

appellate courts step in to favor the defendant.”²⁶

The authors’ empirical study simply does not support their conclusion. There are three reasons for this: First, even assuming the authors’ table provides a useful starting point, it cannot support their claim because they fail to consider alternative explanations for their numbers. Second, the authors have not done the work necessary to unearth the quantitative empirical data that they need to actually test their thesis. In other words, their empirical methodology is flawed. So no matter how the numbers are analyzed, they cannot prove the point that the authors hope to make. And, third, the authors’ crucial premise—that federal appellate judges *perceive* trial courts, especially juries, to be biased in favor of plaintiffs—is not based on any credible quantitative or qualitative empirical evidence. We address each of these points in turn.

* * *

First, upon review of the authors’ table, it is immediately apparent that there are a number of viable explanations for the data. For one thing, it is not really surprising that there is a significant defendant/plaintiff differential in three of the four categories of cases shown in the table. (These figures are highlighted in the second version of the table shown in Table 2.) In our experience, defendant/appellants rarely challenge findings of fact. In contrast, our sense is that plaintiff/appellants, who almost always carry the burden of proof at trial, are more often forced to rely on what are essentially factual claims, although they may, at times, be artfully clothed as “legal error.” If we are right, defendants are likely to have a predictable advantage on appeal. Why? Because trial courts are owed great deference in their findings of fact, whereas viable legal arguments mandate *de novo* review and so are much more likely to capture the attention of appellate judges.

Another plausible explanation that the authors have not seriously considered is the effect of skillful lawyering.²⁷ Looking to the highlighted

26. *Id.* at 139, 141. See also *Anti-Plaintiffs’ Bias*, *supra* note 1, at 131 (setting forth the same analysis). As corroboration of their conclusion, the authors point to defendant/plaintiff reversal rates categorized according to whether the litigants were governmental or non-governmental entities, corporations or individuals, foreigners or domestic parties, and in-staters or out-of-staters. *Defendants’ Advantage*, *supra* note 1, at 139; *Anti-Plaintiffs’ Bias*, *supra* note 1, at 131. None of this “evidence” overcomes the basic flaw in Professor Clermont’s and Professor Eisenberg’s analysis. That is, none of the data takes account of the records presented to, arguments made before, and written decisions of the appellate courts.

27. See, for example, *Defendants’ Advantage*, *supra* note 1, at 138 & n.24 and 148 n.49, where the authors make passing reference to, but dismiss without serious analysis, the potential effect of skillful lawyering on appellate outcomes.

figures in Table 3, it is apparent that the reversal rates for plaintiffs appealing in non-personal injury cases decided by both judges and juries are higher than plaintiffs' respective reversal rates in personal injury cases. The disparity may reflect a difference in quality of counsel. Plaintiffs' counsel in non-personal injury appeals may appear more frequently before appellate courts and may be better at finding and framing arguments in terms of the legal issues that provide judges with the greatest leeway in ordering reversals or remands.

The effect of better appellate counsel may also be in play elsewhere. The circled figures in Table 4 show that, in trials before a judge, plaintiffs in non-personal injury cases fare much better in securing reversals than do plaintiffs in personal injury cases. The boxed numbers in Table 4 show that plaintiffs in personal injury cases fare about the same whether appealing from jury or judge trials.

As indicated above, because appellate judges invariably have before them written explanations from trial judges supporting their judgments, we would hypothesize that all parties generally have a better chance of securing reversals in appeals from judge trials than in appeals from jury verdicts. It is simply easier when appealing from a judge-tried case for a party to assign error. However, if plaintiffs' counsel in personal injury cases are less experienced in appellate advocacy than plaintiffs' counsel in non-personal injury cases, they may not be able to capture this potential judge-trial advantage. This would explain the nearly identical reversal rates for plaintiffs appealing from both judge- and jury-tried personal injury cases. Conversely, if plaintiffs' counsel in non-personal injury cases are generally more experienced in appellate advocacy, then they would be expected to be able to capture the advantage of judge-tried cases. The substantially higher rate of reversals for plaintiffs appealing from judge-tried non-personal injury cases bears out this prediction.

In short, the authors' study is suspect, because they did not address some obvious alternative explanations for their data. Judicial bias arguably could explain their data results, but they cannot rest on this possibility to support the conclusion if there are other plausible explanations that they have not seriously considered.

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The authors' failure to test their theory against viable opposing arguments is a serious flaw in their methodology, but it is not their worst mistake. The principal problem with the authors' "anti-plaintiff effect" thesis is that it is based on a flawed empirical study. Simply stated, the authors have not done the work necessary to find the data needed to test their thesis. Their data base

is too sparse. As a result, no matter how they analyze their data, they cannot prove the point that they hope to make. This is why their claim of judicial bias is not credible.

A careful empiricist will test his or her chosen explanation of an identifiable data trend, first, by investigating additional variables and considering alternative explanations based upon those variables, and, second, by applying a validity screen to any surviving explanations.²⁸ Had the authors followed this methodology here, they would have acknowledged that the only way to fairly assess whether appellate courts are biased in their decision-making is to look at what is presented to the judges by the parties. Appellate review is limited to the record that comes from the trial court, and appellate judges may only consider arguments that are presented to them. If an attorney fails to present an argument, it is normally waived. So an empiricist cannot possibly assess whether the judgments of an appellate court are biased without knowing what the appellate judges were asked to decide.

The data that the authors use—conclusory numbers from the Administrative Office of the U.S. Courts—allow for neither of the prescribed tests. They merely show whether a case was affirmed, reversed, remanded, or dismissed.²⁹ Without more, these data demonstrate virtually nothing about the quality of decision-making by appellate judges. An empiricist would also have to look at the parties' briefs and the courts' decisions to know whether there is systematic bias against plaintiffs in appellate judgments.

One question that the authors would have to answer in order to fairly test the credibility of their thesis is the following: "Do defendant/appellants more often rely on viable legal claims than plaintiff/appellants when seeking appellate review?" In other words, is it true, as we suspect, that defendants are more likely than plaintiffs to seek reversal on the basis of viable claims of "legal" error and, therefore, are more likely to obtain favorable decisions from appellate courts?

The authors' failure to consider this possibility is particularly puzzling given the ease with which it can be empirically tested. Briefs and opinions (both "published" and "unpublished") furnish a readily available bank of information that can be coded and analyzed to determine the degree to which defendants rely on legal claims and plaintiffs rely on factual arguments, as well as the degree to which each controlled in the rendering of particular decisions. A review of this information would also reveal something about the quality of advocacy.

28. See, e.g., Epstein & King, *supra* note 6, at 9, 38, 76-80, 87-97.

29. See *supra* the text accompanying notes 12-16.

This is the kind of quantitative empirical data that an empiricist must consider before endorsing a claim of the sort propounded by the authors. And it is no answer to say that it is easier to use raw data from the Administrative Office of the U.S. Courts. An empiricist cannot justify using weak data on the grounds that it would be inconvenient, time-consuming, or boring to collect reliable data.

When we turn to the authors' crucial premise—that federal appellate judges perceive trial courts to be biased in favor of plaintiffs—the problem gets worse. The authors cite no credible evidence to support their premise. Rather, they intuit that, because appellate judges are human, one cannot expect them to be immune to the “misperceptions of the liability crisis [that] pervade the populace and the profession.”³⁰ Not only is this sheer conjecture, it also ignores the fact that the essence of appellate judging is the principled application of legal rules. The authors' views are not surprising, because they appear to be quite cynical about appellate judges. In *Defendants' Advantage*, for example, the authors say that, while “[a]ttorneys' misperceptions [of the trial system] are subject to the correction of actual adjudication, . . . appellate judges are free to exercise their biases without any check.”³¹ This self-serving description of appellate judges aims to advance the authors' claim of judicial bias, but it is not based on any concrete data. In fact, the authors point to nothing to show that appellate judges routinely “exercise their biases without any check.” Judges with whom we are familiar work very hard to apply the law, not personal biases, and they are “checked” by the law, their oath of office, judicial codes of conduct, and one another.

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Not only did the authors fail to do the work necessary to unearth the quantitative empirical data needed to test their thesis, they also failed to undertake a qualitative analysis of their “anti-plaintiff effect” theory.³² Through interviews and surveys of appellate judges, the authors could have gathered information on the accumulated experience and knowledge of judges against which to test their hypothesis. Although there can be reporting issues with such surveys, it is hard to imagine that there would not be

30. *Defendants' Advantage*, *supra* note 1, at 142. See also *Anti-Plaintiff Bias*, *supra* note 1, at 133.

31. *Defendants' Advantage*, *supra* note 1, at 142. See also *Anti-Plaintiff Bias*, *supra* note 1, at 134 (“Most professional people hold anti-jury views, and the appellate judges are in a position to put these views into action.”).

32. See Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335, 1364-70 (1988) (discussing qualitative analysis and the interpretation of data).

something to be gained by attempting to ascertain whether appellate judges actually hold the view that trial courts inappropriately favor plaintiffs.³³

Professor Deborah R. Hensler, the former Research Director at the Rand Institute for Civil Justice and now a widely respected scholar at Stanford Law School, argues that, because of the inherent limitations of certain statistical analyses, empiricists often must employ qualitative research techniques if they are to achieve credible results:

Multiple regression and its variations . . . are enormously powerful tools. But in the absence of theory on which to ground the specification of multivariate models, regression acts more like a clumsy robot than an intelligent agent [W]ithout any theories of litigation behavior beyond crumbed rational choice models that ignore virtually all of the realities of modern civil legal practice, it's difficult to know how to specify testable explanatory models of lawyer [or judge] behavior. And without such theories it is difficult to weave together the empirical findings that we do have. Theory, of course, is hard to come by, particularly theories that explain complex social phenomena. . . . Teasing out persistent patterns from a morass of social and psychological factors that are correlated with legal behavior is a daunting task. The best we can hope for are probably "little theories" – propositions about how lawyers (and others) are likely to behave in a particular set of circumstances. We're more likely to derive these theories from close analyses of behavior in context, using qualitative research techniques, than from statistical analyses of administrative databases. This is not to say that such databases are useless, but rather that we may glean more from them *after* we have formulated theoretical propositions based on other methods of analysis.³⁴

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If the authors had merely reported that defendant/appellants appear to have greater success than plaintiff/appellants in securing reversals on appeal in civil cases, their finding would have been interesting but not surprising.³⁵

33. "[T]his task is more of an art than a science, but it is important for researchers to recognize the continuing importance of qualitative data in civil justice research." Deborah R. Hensler, *Researching Civil Justice: Problems and Pitfalls*, 51 LAW & CONTEMP. PROBS. 55, 63 (1988) [hereinafter *Problems and Pitfalls*].

34. *Proselytizing*, *supra* note 9 (manuscript at 5-6).

35. Even this finding is far from clear, however. As noted earlier, the authors report that the size of plaintiff/defendant differentials vary depending upon case category and judicial circuit. *See supra*

Rather than stopping with that finding, however, the authors opted to spice their data with “attitudinal explanation[s]”³⁶ for which they have no support whatsoever. In other words, the authors resorted to a form of pop psychology to attribute “bias” to federal appellate judges. What is really distressing is the authors’ apparent attempt to place a mantle of authority on their claim of bias by suggesting that it is the unadulterated product of quantitative empirical research, when in fact their regression analyses indicate absolutely nothing about judicial bias.³⁷ Indeed, the authors’ claim of bias rests on nothing more than a specious syllogism: many people in society “imagine a biased and incompetent trial system handing vast sums over to undeserving plaintiffs. Why should appellate judges, who remain human after all, be immune?”³⁸ A conclusion based on this kind of reasoning betrays the glaring frailties of empirical analysis.

Professor Hensler has cautioned that “many of the civil justice phenomena that need study are not suited to current quantitative analytic techniques. . . . Researchers simply do not have available very good quantitative approaches to studying large social organizations or interaction processes.”³⁹

[T]he very factors that make the U.S. civil legal system so interesting to study—the wide range of situations that might stimulate legal claiming, the wide range of opportunities for strategic lawyering—when coupled with the lack of public information on correlates and outcomes of legal behavior . . . raise huge obstacles to drawing valid inferences about legal behavior The limitations on the data that supports most empirical analysis inevitably—and properly, in my view—leads to skepticism about the robustness of any conclusions drawn from these data. From a methodological standpoint, the soundest of analyses are those that carefully limit their conclusions to the data at hand and not only specify but underline the limitations of the findings.⁴⁰

Professor Hensler implies that good empiricists must guard against using sparse empirical data to support *behavioral* conclusions that find no support

the text accompanying notes 18-20.

36. *Defendants’ Advantage*, *supra* note 1, at 141-45; *Anti-Plaintiff Bias*, *supra* note 1, at 132-34.

37. This certainly lends support to the charge that “*the current state of empirical legal scholarship is deeply flawed.*” See Epstein & King, *supra* note 6, at 6 (emphasis in original).

38. *Defendants’ Advantage*, *supra* note 1, at 142. See also *Anti-Plaintiff Bias*, *supra* note 1, at 133.

39. *Problems and Pitfalls*, *supra* note 33, at 63.

40. *Prosletyzing*, *supra* note 9 (manuscript at 4).

in their quantitative data. Professor Clermont and Professor Eisenberg do not heed this principle. In advancing their claim of judicial bias, the authors make the fatal and unfortunate mistake of trying to extrapolate too much from limited data.

CONCLUDING NOTE BY JUDGE EDWARDS

Someone who is a participant in a corrupt enterprise may be seen to “protest too much” when exposed. Since I am one of the appellate judges who has been accused by the authors of unprincipled bias against plaintiffs, anyone reading this critique has every right to wonder whether I would admit to judicial wrongdoing if the authors had truly proven it. I can assure you that I would. As a society, we expect the appellate process to be governed by the principled application of legal rules. If there is indeed a bias against plaintiff/appellants in appellate decision-making, judges must be made aware of it so that we can check ourselves and protect against it.

Professor Clermont and Professor Eisenberg have dangerously oversimplified reality. Their charge of judicial bias is highly inflammatory. It suggests that appellate judging is largely a lawless enterprise rather than a reflection of the legal merits of particular claims. Such an assertion undermines public confidence in the judicial system and must not be made lightly or prematurely. An accusation of unprincipled bias in appellate decision-making involves a substantive assessment. Such an assessment cannot be made without first looking at what litigants have presented to the courts and then looking at what the courts have relied upon in rendering their decisions. The authors have yet to do this, so they have no good basis for accusing federal appellate judges of bias against plaintiffs.