

An Outsider Perspective on Intellectual Property Discourse

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I. INTRODUCTION

“In God We Trust, All Others Bring Data”¹

Outsiders who are invited to conferences on specialty areas have several significant comparative advantages. As “innocents abroad,” they are free to question the assumptions, rhetorical tactics, and doctrinal strategies that insiders simply accept as the rules of trade. Outsiders can also arbitrage applicable insights from their home discipline; it is usually more efficient to import applicable knowledge than to build it from scratch. When trade across disciplinary boundaries is unrestricted, the work goes faster, and cross-hybridization strengthens at least one (and potentially both) fields. Finally, outsiders are one-shot players with limited reputational assets at stake, so they are free to trample scholarly conventions, upset apple-carts, kick sacred cows, and generally make nuisances (albeit preferably attractive ones) of themselves. The result is that outsiders

¹ Charles M. Cutler, *Research Needs For Managed Care*, 15 HEALTH AFF. 93 (1996).

can sometimes teach insiders profound things about themselves and their fields—think Alexis de Tocqueville’s *Democracy in America*.

Other times, outsider efforts fall flat or are affirmatively misleading—think everything written by the French about America and Americans other than *Democracy in America*.² This problem arises because outsiders labor under significant comparative disadvantages. Specialties exist because there are gains from specialization—no sensible person picks a pathologist or convenience store clerk to perform neurosurgery. The complexities and subtleties that insiders spend years studying do not cease to exist merely because outsiders ignore them. Oliver Wendell Holmes concisely stated the danger of dismissing insider “knowledge”: “ignorance is the best of law reformers. People are glad to discuss a question on general principles, when they have forgotten the special knowledge necessary for technical reasoning.”³ This reality also complicates the benefits of arbitrating insights across disciplines. Not all analogies are analogous, and the process of cross-disciplinary arbitrage frequently flattens and distorts important details on both sides of the disciplinary divide.⁴

With the hope that my comments will end up closer to the former than the latter, I offer the following observations, largely drawn from work I have done on narrative and legislation by anecdote.⁵ The most striking thing about the conference papers is the mismatch between the presence of confident factual assertions about the state of the world, and the complete absence of empirical evidence supporting the same. Although this rhetorical tactic was pervasive, for the sake of simplicity, I focus on one issue that gave rise to much discussion at the conference.⁶ On numerous occasions, it was stated that research and clinical treatment are being hampered by the existence of property rights in genes and DNA sequences. Speakers pointed to the exorbitant costs of performing screening

² See Andrew Sullivan, *America Knows Who Its Friends Are*, <http://www.sunday-times.co.uk/article/0,981-287105,00.html> (“For most Americans, when the French call something simplistic, it’s usually a sign that it’s the right thing to do.”).

³ Oliver Wendell Holmes, *THE COMMON LAW* 64 (1963).

⁴ This is a standard risk with “law and a banana” scholarship. See Mark A. Graber, *Law and Sports Officiating: A Misunderstood and Justly Neglected Relationship*, 16 *CONST. COMMENTARY* 293, 295 (1999) (“Casual legal interlopers into other disciplines risk making bald assertions that serious scholars in the non-legal field recognize as flatly wrong, if not downright silly . . . Relying exclusively on categories derived from the study of legal phenomena, law professors may miss the most interesting features of their interdisciplinary subject, features which generate entirely different models of interpretation, evaluation, and decision making.”) See also Richard A. Posner, *Against Constitutional Theory*, 73 *N.Y.U. L. REV.* 1, 15 (1998) (“Analogies are typically, as here, inexact and often, as here, misleading.”).

⁵ See David A. Hyman, *Lies, Damned Lies & Narrative*, 73 *IND. L. J.* 797 (1998) [hereinafter *Narrative*]; David A. Hyman, *Do Good Stories Make For Good Policy?* 25 *J. HEALTH, POLITICS, POLY & L.* 1149 (2000) [hereinafter *Stories*].

⁶ Lest I be thought to be picking on anyone in particular, the conference papers are replete with numerous examples of this phenomenon.

tests for genes which had been patented, the inconvenience and delay associated with having to send samples to a centralized location to have such tests performed, the chilling effects on the speed and direction of basic research when one must pay licensing fees or surrender future rights to obtain access to patented materials, the deleterious impacts on the social norms of science, including the demise of free and open sharing of research results and materials, and the like.

Leave aside all the obvious theoretical responses to such claims, such as wondering about the implications of such an analysis for the propriety of pharmaceutical patents more generally,⁷ and the incentives for innovation in the face of an unduly casual attitude toward the scope and enforceability of intellectual property rights.⁸ Leave aside as well the churlish suggestion that the golden age of science wasn't all that golden.⁹ Focus instead on the evidentiary foundation (such as it is) for these claims. Those making these statements really didn't offer much in the way of supporting data, beyond an occasional highly salient example or first-person testimonial.¹⁰ A charitable commentator would describe such information as "anec-data," and emphasize the good faith and exemplary reputation of those advancing such claims, and the prestigious

⁷ The reasoning is exactly parallel and virtually syllogistic:

1. Being sick is a bad thing;
2. Drugs to treat illness are expensive because they are patented;
3. Patient access to drugs is restricted because of their cost;
4. Patents should not be granted on drugs or patent rights should be easily breakable, through mandatory licensing or expropriation if prices are unreasonable.
5. QED.

⁸ I must confess a substantial degree of agnosticism on this point, because I lack the specialized knowledge to assess the trade-offs. However, the lesson from condemnation cases is that property-holders are invariably under-compensated by any regulatory regime designed to make them whole for expropriation, because a wide variety of property-owners' costs are not counted as costs (e.g., relocation and demoralization costs), and regulatory takings are not typically counted as takings. Thus, even though the purpose of the takings clause is "to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," ex post compensatory regimes do not, in practice, prevent such conduct. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

⁹ See, e.g., F. Scott Kieff, *Facilitating Scientific Research: Intellectual Property Rights and the Norms of Science. A Response to Rai and Eisenberg*, 95 NW. U. L. REV. 691 (2001). See also Arti K. Rai, *Evolving Scientific Norms and Intellectual Property Rights: A Reply to Kieff*, 95 NW. U. L. REV. 707 (2001).

¹⁰ The designated "bogeyman" of the story seems to be Myriad Genetics Inc., which has patented the BRAC1 and BRAC2 gene sequences. For what it is worth, Myriad Genetics has apparently agreed to offer discount pricing for sequencing that is conducted exclusively for clinical research, and unflinchingly defends its rights to otherwise charge what the market will bear. See Kimberly Blanton, *Corporate Takeover Exploiting the Patent System*. BOST. GLOBE, Feb. 24, 2002, at 10. Not surprisingly, this has occasioned considerable complaint from governmental purchasers in other countries (e.g., France and Canada), who have gotten used to using price controls and monopsony purchasing power to obtain pharmaceuticals at below-market rates.

schools with which they are associated. A less charitable commentator might use words like “anecdote” and point out that good faith, exemplary reputation, and a prestigious professional address are all charming attributes, but they fall far short of demonstrating that the assertion in question is accurate and representative. An uncharitable commentator might use words like “urban legend” and suggest that such “evidence” is unhelpful both in diagnosing the problem and in specifying the appropriate solution.

Still more interesting is the evident lack of concern (let alone embarrassment) about the dearth of empirical evidence on the subject in question. With one exception, this issue was simply not mentioned at the conference.¹¹ To be sure, the problem is not unique to this conference or this subject, but results from the selection and socialization processes that produce lawyers and law professors, along with the incentives under which these professions operate.¹² Professor Rosenberg neatly stated the problem (along with its causes and consequences) at a conference on civil procedure almost 15 years ago:

The tendency of legally-trained minds to prefer thinking to counting is legendary. So is the lawyer’s preference for learning by watching for the vivid case rather than tabulating the mine-run cases. The problem is not that watching this case or that is useless. A dramatic case or anecdote may be more informative and more memorable than a tubful of printouts. But the rub is that good anecdotes do not care if they are not representative; they can be badly misleading if generalized. Nor does the problem end with the misleading anecdote. No matter how carefully the facts or data are gathered to respond to the pivotal

¹¹ See Justin Hughes, “Goat Boy Roams the Halls,” *supra* at 263.

¹² See Michael Heise, *The Importance of Being Empirical*, 26 PEPPERDINE L. REV. 807 (1999); Peter Schuck, *Why Don’t Law Professors Do More Empirical Research?* 39 J. LEG. ED. 323 (1989).

On the other hand, asking law professors to do empirical research may be asking for trouble. See Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002). But see Frank Cross, Michael Heise & Gregory C. Sisk, *Above the Rules: A Response to Epstein and King*, 69 U. CHI. L. REV. 135 (2002); Jack Goldsmith & Adriane Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153 (2002); Richard L. Revesz, *A Defense of Empirical Legal Scholarship*, 69 U. CHI. L. REV. 169 (2002) (offering various defenses of empirical legal scholarship, and criticism of Professor Epstein & King’s analysis). There is also a demand-side element; legislators and lobbyists generally do not pay attention to the studies that do exist, preferring to legislate on the strength of anecdote. See David A. Hyman, *Drive-Through Deliveries: Is “Consumer Protection” Just What the Doctor Ordered?* 78 N. C. L. REV. 7 (1999) (detailing how prohibition on drive-through deliveries was enacted on the strength of anecdotal complaints, even though available empirical evidence indicated practice was safe and effective); Michael Heise, *The Future of Civil Justice Reform and Empirical Legal Scholarship: A Reply*, 51 CASE W. RES. L. REV. 251, 251–54 (2000) (same, for civil justice reform).

questions, there will be great trouble in penetrating made-up minds . . . [Lawyers, lawmakers, and judges] prefer anecdotes to tables.¹³

My criticism of prevailing practices in intellectual property discourse, and of legal academic discourse more generally, invites several obvious comebacks. What is the evidence that my complaints are anything more than anecdotal?¹⁴ What's wrong with relying on anecdotal evidence when analyzing issues and proposing reforms? Isn't the development of the common law based on anecdotal evidence (*i.e.*, the facts of each individual case)? Doesn't anecdotal evidence crystallize and mobilize public, legislative, and scholarly opinion on even the most dull and arcane subject?¹⁵ Don't good anecdotes simply speak for themselves? What is wrong with a form of proof that is both simple and transparent—particularly when math and statistics-phobic law professors are the ones dealing with the data?¹⁶

Despite these rhetorically appealing comebacks, there are, in fact, substantial risks associated with relying on anecdotal evidence (or “anec-data” for those determined to bootstrap their rhetorical position), which explain why it is shunned by scientists and medical researchers.¹⁷ The problems with “anec-data” are usefully analyzed in terms of truthfulness/completeness, and typicality.

¹³ Maurice Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197, 2211 (1989).

¹⁴ Admittedly, my sample of intellectual property discourse is limited to attending a single conference, and reading some of the literature. As such, I am effectively drawing conclusions about the forms and modes of discourse in a field that I have not studied systematically. This “pot calling the kettle black” critique of my observations would have more merit had other intellectual property scholars not made similar observations. See Hughes, *supra* note 11, at 263–265.

¹⁵ See Hyman, *Narrative*, *supra* note 5, at 800, note 14 (noting Senator Kennedy's use of consumer complaints about the abuse of pets shipped as cargo (“frozen dog” anecdotes) to bring issue of airline deregulation to life); *International Board of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (anecdotal evidence brings “the cold numbers convincingly to life.”).

¹⁶ See, e.g., Catharine MacKinnon, *Law's Stories as Reality and Politics*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 232, 237 (1996) (Professor MacKinnon admits that “she bursts into tears at columns of figures.”); Blake Fleetwood, *From the people who brought you the twinkie defense*, 19 WASH. MONTHLY 33 (1987) (“Many [judges] weren't that good at math or science or statistics [which is] why they went to law school.”).

¹⁷ See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147, 1159–61 (1992) (“[A]necdotal evidence is heavily discounted in most fields, and for a perfectly good reason: such evidence permits only the loosest and weakest inferences about matters a field is trying to understand. Anecdotes do not permit one to determine either the frequency of something or its causes and effects . . . and have the power to mislead us into thinking we know things that anecdotes simply cannot teach us.”). In particular, anecdotal evidence cannot distinguish causation from coincidence, reporting error, self-deception, observer bias or intentional fraud.

II. TRUTHFULNESS/COMPLETENESS

People lie. When they aren't affirmatively lying, they often shade the truth, downplaying some facts and emphasizing others, to enhance the persuasiveness of the story they are telling. As such, "uncomfortable" facts, the context necessary to appreciate the reasons for existing institutional arrangements and the adverse consequences associated with proffered reforms, are likely to be omitted entirely from the anecdotes that are offered.¹⁸ As my colleague, Bob Condlin has written, "such inclusion and exclusion of data is the story-teller's prerogative, presumably because it is not relevant to the message she wants to convey (in other words, to the story she wants to tell). But that is the problem with stories. They are always an advocacy move, used as much to make a point as to discover one, even if the storyteller does not think so."¹⁹ This ability to "load the evidentiary dice" suggests that anecdotes should be approached with considerable skepticism—and the more egregious the described conduct, the greater the degree of skepticism required.

Heightened skepticism is also required because these anecdotes do not emerge into public view at random or by accident. Instead, they are sought out, packaged and "spun" by policy entrepreneurs and advocacy groups, who use them to further their agenda. If the "spin" sometimes overtakes the facts, most advocates can doubtless convince themselves that they have committed no great sin, since they *know* they are on the side of the angels.²⁰ Indeed, with sufficiently diligent effort, advocacy groups can even offer simultaneous anecdotes which support diametrically opposed positions.²¹

¹⁸ See Martha Minow, *Stories in Law*, in *LAW'S STORIES*, *supra* note 16, at 24, 31 (noting problem of selectivity in storytelling, and conscious refusal to include "additional stories which convey unattractive features of the community that I was trying to paint in a sympathetic light.").

¹⁹ Robert J. Condlin, *Learning From Colleagues: A Case Study in the Relationship Between "Academic" and "Ecological" Clinical Legal Education*, 3 *CLIN. L. REV.* 337, 339–40 n. 29 (1997) (commenting on narrative account of relationship with client which omits details of horrific crime for which client was convicted and sentenced to death.).

²⁰ See, e.g., Katharine Dunn, *Fibbers: The Lies Journalists Tell*, *THE NEW REPUBLIC*, June 21, 1993, at 18 ("Of all the lies that are swallowed and regurgitated by the media, the ones that hurt the most come from the Good Guys, the grass-roots do-gooders, the social work heroes, the non-profit advocacy groups battling for peace, justice and equality . . . a lot of reporters don't check facts provided by non-profit organizations because they assume non-profits don't have anything to gain by lying . . . The well-meaning grow desperate for results and stoop to the tactics of their enemies. It happens all the time"); Daniel Koshland, *Scare of the Week*, 244 *SCIENCE* 9 (1989) ("Each group convinces itself that its worthy goals justify oversimplification to an 'ignorant' public.")

²¹ See Hyman, *supra* note 5, at 804–6 (presenting competing anecdotes on tort reform and property rights/environmentalism). See also Gina Kolata, *Ethicists Struggle Against the Tyranny of the Anecdote*, *N.Y. TIMES*, June 24, 1997, at C4 (competing anecdotes struggle to define global appropriateness (or lack thereof) of physician-assisted suicide).

When the only source of information we have is someone complaining about the conduct in question, it is fair to wonder whether we are getting the truth, let alone “the whole truth and nothing but the truth.”²² The result is that anecdotes frequently mis-frame, if not completely misrepresent the costs and benefits of the status quo and its alternatives. It is no accident that the legal system generally declines to take action on the say-so of one party²³ and looks with considerable disfavor on limitations on the right to confrontation and cross-examination.²⁴ These questions about truthfulness and completeness obviously call into question the utility of anecdotal evidence.

III. TYPICALITY

Scrupulously accurate and complete narratives can still be unrepresentative. Atypical narratives can lead to the adoption of policies which make the

²² As Professor Tushnet noted in criticizing news accounts of political correctness, “[t]he victim’s account of the incident is the only source of evidence. The reports never note that victims have a perfectly understandable desire to present what happened to them in a way that makes them appear best. When the reports are offered by people with a political ax to grind, one can fairly wonder exactly what happened.” Mark Tushnet, *Political Correctness, the Law, and the Legal Academy*, 4 YALE J. L. & HUMAN. 127, 131 (1992).

²³ See *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972) (“Because of the understandable, self-interested fallibility of litigants, a court does not decide a dispute until it has had an opportunity to hear both sides - and does not generally take even tentative action until it has itself examined the support for the plaintiff’s position.”).

²⁴ See *Coy v. Iowa*, 487 U.S. 1011, 1016, 1019–1020 (1994) (“[T]he Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact. . . . It is always more difficult to tell a lie about a person ‘to his face’ than ‘behind his back.’”); Christopher B. Mueller & Laird C. Kirkpatrick, EVIDENCE 6.29 (1995) (“If the calling party’s opponents cannot subject the witness to cross-examination for reasons that are not his fault, some remedy is necessary. . . . If cross-examination is permanently blocked, the direct testimony usually should be stricken in both civil and criminal cases, or a mistrial declared if the direct testimony is critical and striking it would not be effective.”).

It is these attributes that differentiate the common law approach from pure regulation by anecdote, since common law courts have at least some tools with which to attempt to get at the truth of the matter. It is far less clear that common law courts do a good job formulating efficient rules of decision when their raw materials are atypical/unrepresentative fact situations. See Andrew Morriss, *Bad Data, Bad Economics, and Bad Policy: Time To Fire Wrongful Discharge Law*, 74 TEX. L. REV. 1901, 1914 (1996) (“Courts created wrongful discharge law on a foundation of anecdotes drawn from the peculiar sample of cases that reach state courts. In general, anecdotes are a poor basis for public policy. Anecdotes gathered by surveying people in lawsuits are even worse. The grim picture of the workplace those anecdotes paint is contradicted by the evidence that does exist about the extent of the problems employees face in the workplace.”) *But see* George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 862 (1982); Paul Rubin, *Why is the Common Law Efficient?* 6 J. LEGAL STUD. 51 (1977) (arguing that the common law is efficient).

underlying problem worse, or cause other unintended consequences. The problem was nicely framed by Professor Saks:

the trouble with legislation by anecdote is not just that some of them are false or misleading. Even if true and accurate, anecdotes contribute little to developing a meaningful picture of the situation about which we are concerned. It makes a difference if for every ten anecdotes in which an undeserving plaintiff bankrupts an innocent defendant, one, ten, one hundred, or one thousand equal and opposite injustices are done to innocent plaintiffs. The proportion of cases that results in one or the other error, and the ratio of one kind of error to the other, ought to be of greater interest to serious policy-makers than a handful of anecdotes on either side of the issue. Reforms are intended to change that ratio and the tens of thousands of anecdotes the ratio summarizes.²⁵

Absent proof of representativeness/typicality, a single narrative in support of or opposition to a particular policy could be just that: singular. Even if a single anecdote is representative of a larger reality, one must know how frequent that larger reality actually is before deciding what, if anything, to do about it.²⁶ More generally, context (*i.e.*, how the mine run of cases are handled) matters a great deal more than the facts—however good or bad they may be—of any given case in assessing the overall merits of the system.²⁷ Unfortunately, disregarding this point can result in “reforms” which are intended to address the small percentage of transactions that go poorly, but end up disrupting the majority of the market, which works tolerably well.²⁸

²⁵ See Saks, *supra* note 18, at 1161. See also Richard A. Epstein, *Legal Education and the Politics of Exclusion*, 45 STAN. L. REV. 1607, 1619–620 (1993) (issues of truthfulness, frequency, and typicality preclude generalization).

²⁶ See Richard Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742–44 (“The significance of a story of oppressiveness depends on its representativeness. In a nation of more than a quarter of a billion people all blanketed by the electronic media, every ugly thing that can happen will happen and will eventually become known; to evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social sciences rather than of narrative. . . . The risk of narratology to which MacKinnon herself succumbs in her writings on pornography is that of atypicality. MacKinnon is a magnet for the unhappy stories of prostitutes, rape victims, and pornographic models and actresses. Even if all these stories are true (though how many are exaggerated? Does MacKinnon know?), their frequency is an essential issue in deciding what if anything the law should try to do about the suffering that the stories narrate.”)

²⁷ See Richard A. Epstein, *Discussion*, 45 STAN. L. REV. 1671, 1678 (1993) (“[If] you are trying to understand the way in which social reality works then the important thing to remember is that the prosaic and the boring is often far more important in the way in which the world organizes itself than is the exotic and profane.”).

²⁸ Legal academics are particularly prone to this tendency. Any deviation from absolute perfection in the performance of a system is typically taken as a license to tinker, if not up-end the

As if matters were not already complicated enough, anecdotes are most persuasive when they appeal to our passions and prejudices—and the better they are at doing so, the more likely they are to be credited as representative, whether they are or not.²⁹ Even if a story is highly representative, other considerations may dictate a policy diametrically opposed to the one suggested by the story.³⁰ Finally, by its very nature, anecdotal evidence worsens the tendency in policy debates to privilege identifiable lives over statistical lives—hardly a recipe for sensible and cost-effective policies.³¹

IV. FROM THEORY TO PRACTICE

Let me recast my analysis from the meta-theoretical to the concrete and offer a highly representative anecdote about the risks of using anecdotal evidence. During 1997, Congressional hearings were held on the performance of the Internal Revenue Service (IRS). A handful of taxpayers offered testimony about their mistreatment at the hands of the IRS. The cases included a taxpayer who committed suicide because of a long-running bitter dispute with the IRS, and

entire system. Such attitudes empower legal academics to second-guess those who must actually live with the system, but it is a classic example of “nirvana fallacy” reasoning in action. See Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969) (“The view that now pervades much public policy economics implicitly presents the relevant choice as between an ideal norm and an existing ‘imperfect’ institutional arrangement. This nirvana approach differs considerably from a comparative institution approach in which the relevant choice is between alternative real institutional arrangements.”).

Worse still, when things are working tolerably well, they are, almost by definition, not reducible to salient anecdotes, and so the tolerable performance of the system never registers in the (exclusively anecdotal) scheme of things. A comparative institutional analysis helps moderate these academic tendencies, because it makes it clear that “bad is often best, because it is better than the available alternatives.” Neil K. Komisar, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 204 (1994).

²⁹ See David A. Hyman, *Regulating Managed Care: What’s Wrong With A Patient Bill of Rights*, 73 S. CAL. L. REV. 221, 241 (2000) (“the more compelling the anecdote, the less likely we are to consider issues of typicality and frequency—meaning the risk of being led astray is a direct function of the persuasiveness of the anecdote.”)

³⁰ See Hyman, *Stories*, *supra* note 5, at 1153 (2000).

³¹ See Clark C. Havighurst, James F. Blumstein, and Randall Bovbjerg, *Strategies in Underwriting the Cost of Catastrophic Disease*, 40 LAW & CONTEMP. PROBS. 122, 140–41 (1976) (contrasting willingness of society to sacrifice identifiable lives v. statistical lives; “it is difficult to improve significantly on the commonplace observations that human beings cannot empathize with faceless abstractions and that ‘squeaking wheels’—the complaints of known victims, such as the very vigorous lobbying of kidney-disease patients—not the silence of statistical unknowns will get the government grease. Spending ‘millions to save a fool who has chosen to row across the Atlantic has external benefits’ lacking from highway safety spending.”).

another taxpayer who alleged that IRS agents invaded his home, knocked his colleague's 12-year old son to the ground and held him there at gunpoint, and forced his 14-year old daughter to get dressed in front of them.³² The picture that was painted was of an agency that was, at best, inflexible, and, at worst, out of control.³³ The Clinton Administration attempted to finesse the issue by having the IRS Acting Commissioner apologize for his agency's conduct in any given case, while the President simultaneously defended the IRS' behavior as a general proposition.³⁴ However, Congress was sufficiently outraged that they passed a law which placed new strictures on the IRS, including ten offenses (the "ten deadly sins") for which the sanction was immediate termination.³⁵ Subsequent review demonstrated that there were serious concerns about the truthfulness and completeness of some of the proffered testimony,³⁶ and no evidence to indicate the conduct in question was representative.³⁷ As one commentator noted, "horror stories happen but they are relatively rare. Mistakes are inevitable at an agency with more than 100,000 employees who process more than 200 million returns every year."³⁸ The legislation has also had unintended consequences; the IRS Commissioner has admitted that "trying to balance customer service and compliance created an 'excruciating dilemma,'" ³⁹ and enforcement actions have declined precipitously as taxpayers threaten to report agents for violation of one of the ten deadly sins.⁴⁰ Thus, the perils outlined previously are quite real and cannot be dismissed on theoretical grounds.

³² See Leandra Lederman, *Of Taxpayer Rights, Wrongs, and A Proposed Remedy*, 87 TAX NOTES 1133 (2000).

³³ Editorial, *Reforming the Tax Collector*, N.Y. TIMES, Sep. 26, 1997, at A26 ("for many in Congress the anecdotes reflect a hostile, corrupt agency that cannot correct itself"); John M. Broder, *Demonizing the I.R.S.*, N.Y. TIMES, Sep. 20, 1997, at D1 (recounting anecdote of taxpayer who committed suicide because of IRS harassment; "Committee staffers say that while the bleak conclusion of Mr. Kugler's tale is obviously more extreme than most, it is emblematic of the way the I.R.S. operates—inflexible, insensitive, intrusive and, ultimately, ineffective.").

³⁴ Peter Baker, *Clinton Defends IRS*, WASH. POST, Oct. 01, 1997, at A6.

³⁵ See IRS Restructuring & Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998).

³⁶ See General Accounting Office, *Tax Administration: Allegiations of IRS Employee Misconduct* GAO/GGD-99-82 (indicating that several taxpayer assertions at hearing of IRS misconduct could not be substantiated).

³⁷ See Michael Hirsh, *Behind the IRS Curtain*, NEWSWEEK, Oct. 6, 1997, at 29, 30 ("if the IRS hearings were high drama, they failed to shed much light on how widespread such abuses are, where they occur or who's really responsible.") To the extent there is a problem, Congress should not escape its share of blame, since they wrote the laws the IRS is trying to enforce. See Paul Glastris, *Lien on Congress*, U.S. NEWS & WORLD REP. Oct. 6, 1997, at 32.

³⁸ Paul Wiseman, *IRS May not be the Monster Critics Say It Is*, USA TODAY, Nov. 5, 1997, at 17A.

³⁹ See Cindy Zirkle, *IRS Decline in Enforcement Activity Draws Congressional Interest*, CCH Business Owners' Toolkit, <http://www.toolkit.cch.com/columns/taxes/00-289irsenforce.asp>

⁴⁰ See Brain Friel, *Treasury asks Congress to Make IRS' Ten Deadly Sins Less Deadly*, GOVERNMENT EXECUTIVE MAGAZINE, <http://www.govexec.com/dailyfed/0202/020702b1.htm> ("IRS

V. CONCLUSION

Unfortunately, empirical legal scholarship is the paradigmatic “dog that doesn’t bark in the night.”⁴¹ However, the absence of such scholarship is particularly problematic when the stakes are the regulation of intellectual property.

I recognize that many people will be inclined to dismiss the risks I have outlined in this piece, and proceed full-steam ahead with anecdote-driven legislation and regulation. Before doing so, they should have to first explain why anecdotal evidence will give a more accurate and complete picture of the world of intellectual property and its imperfections than it did with the alleged campaign to torch black churches; the supposed rampant child abuse in day-care centers; the purported rape crisis on college campuses; the alleged poisoning of the country by alar, saccharin, cyclamates, and electromagnetic forces emanating from high-voltage power lines; the supposed problem of domestic violence on Super Bowl Sunday; and, of course, the purportedly pervasive problem of IRS misconduct.⁴² In each of these instances, anecdotes gave a highly misleading impression of the existence and frequency of the “problem.” The sequence of events is as unmistakable as it is invariant: “call it the ‘whoops factor,’ a phenomenon that starts with shoddy research or the misinterpretation of solid research, moves on quickly to public outcry, segues swiftly into the enactment of new laws or regulations, and often ends with news organizations and some public policy mavens sounding like the late Gilda Radner’s character Emily Litella, as they sheepishly chirp, “Never mind!”⁴³

What then should be done? When dealing with anecdotes, one should be exceedingly skeptical and substantially discount the value of the information in light of its provenance and questionable generalizability. Indeed, in the absence of good data, “don’t just do something, sit there” turns out to be good advice—perhaps the best of all possible advice.⁴⁴ It is unlikely the regulation of intellectual property will turn out to be an exception to this general rule.

revenue agents have complained that some recalcitrant taxpayers have used the Ten Deadly Sins to stall IRS action against them. Agents have also said that the list has made them more hesitant to pursue tax violators. IRS enforcement activity has fallen in recent years.”)

⁴¹ David A. Hyman, *A Second Opinion on Second Opinions*, 84 VA. L. REV. 1439, 1462 (1998).

⁴² See Steven A. Holmes, *It’s Awful! It’s Terrible! It’s . . . Never Mind*, N.Y. TIMES, July 6, 1997, at E3.

⁴³ See *id.*

⁴⁴ David A. Hyman, *Medicine in the New Millenium: A Self-Help Guide for the Perplexed*, 26 AM. J. L. & MED. 143, 148–49 (2000).