The Legal Regulation of Self-Serving Bias

Ward Farnsworth[*]

TABLE OF CONTENTS

[*] Professor, Boston University School of Law. Thanks to Jack Beermann, Ronald Cass, Tamar Frankel, Tim Hennessy, Stephen Marks, Richard Posner, Dan Simon, and Avishalom Tor for helpful comments.

People tend to believe what they want to believe. This observation is a shorthand description of the phenomenon known to students of cognition as self-serving bias. It can be understood more precisely as the tendency to make various judgments in a manner skewed to favor one's own self-interest. Self-serving bias has received increasing attention from practitioners of law and economics in its "behavioral" guise, who are interested in features of human cognition that may not be captured well by the rational actor model on which economics traditionally relies.[1] It has been the particular focus of a number of students of the economics of negotiation and dispute, since disputes frequently require their participants to make predictive and other judgments that may be particularly vulnerable to bias. This Essay examines various roles that self-serving biases can play in legal disputes and considers the following questions: are such biases always and everywhere a bad thing? Might references to "self-serving bias" in fact cover various phenomena that differ in their normative standing and in their potential to cause inefficiencies? What strategies are available in the law to curtail such biases — or at least those instances of bias that we want to curtail?

The findings of this inquiry may be summarized as follows. First, not all self-serving biases are of equal concern. We should distinguish between self-serving predictions, which have the potential to create clear inefficiencies, and self-serving judgments of fairness, which have a more complicated normative standing and in some instances may not be problematic at all. Second, once a bias is found objectionable there are a number of possible strategies for dealing with it. This Essay proposes a distinction between *personal* and *structural* strategies. Personal strategies are attempts to take people likely to be in the throes of self-serving biases and "debias" them. Structural strategies are attempts to put distance between biased parties and decisions their biases might affect.

There are practical legal responses to self-serving bias that fit each of those descriptions and others that fall between them. I will argue that structural strategies tend to be more effective than personal strategies but also more expensive, and that the law may already be taking most steps that would be cost-justified to reduce disputants' self-serving biases and their impact. Indeed, the problem of self-serving bias is

---

[1] *See generally, e.g.*, Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (arguing that attention to insights about human behavior may improve law and economics analysis); Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (outlining replacement of rational choice theory with "law-and-behavioral-science approach").

recent as an academic concern but an old one to the law. In many places where we would expect the influence of self-serving bias to be most serious, we shall see that our legal institutions reflect an impressive sophistication about the problem and have worked out various mechanisms to help contain it, some of them explicit and others more subtle.

I. THE NORMATIVE EVALUATION OF SELF-SERVING BIASES

It has long been understood that when people are better off if something is true, they become more likely to perceive it as true. This is a capsule description of self-serving bias, a phenomenon that can manifest in several more specific ways that have been well documented by behavioral psychologists. First, the term can refer to a person's tendency to take credit for success and avoid blame for failure; things that go well are attributed by the actor to his own skill or hard work, while things that go badly are attributed to bad luck or to the shortfalls of others.[2] Second, it can refer to a tendency for people to see themselves as having a greater than average share of some desirable quality — e.g., most drivers consider themselves above average in their level of skill behind the wheel,[3] while almost nobody thinks they are below average in their ability to get along with others.[4] Third, self-serving bias can manifest in unconsciously altered perceptions of what is fair or right in a manner that serves the perceiver's interests: I convince myself that what is best for me must be best, period;[5] "Every way of a man is right in his own eyes."[6] Fourth, such bias can manifest in skewed predictions; that which is desired is thought more likely to occur than that which is undesired.[7] These four ways in which self-serving biases can manifest

---

[2] *See* Dale T. Miller & Michael Ross, *Self-Serving Biases in the Attribution of Causality: Fact or Fiction?*, 82 PSYCHOL. BULL. 213, 218 (1975).

[3] SHELLEY E. TAYLOR, POSITIVE ILLUSIONS 10-11 (1989); Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981).

[4] DAVID G. MYERS, SOCIAL PSYCHOLOGY 85 (1983).

[5] *See* MAX BAZERMAN, JUDGMENT IN MANAGERIAL DECISION MAKING 96, 99-101 (4th ed. 1998) (discussing research showing that assessments of fairness are often biased by self-interest); Linda Babcock et al., *Biased Judgments of Fairness in Bargaining*, 85 AM. ECON. REV. 1337, 1342 (1995) (finding that in settlement negotiations, each party's views of fairness tends to be biased by self-interest, reducing prospects for settlement); Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 119-21 (1997) (stating that parties' notions of fairness will tend to gravitate toward settlements that favor themselves).

[6] *Proverbs* 21:2 (King James).

[7] Babcock et al., *supra* note 5, at 1341 (finding predictions of size of hypothetical

do not always present themselves distinctly in human affairs, and they may operate through a variety of mechanisms. One can distinguish, for example, between overconfidence in one's own abilities and wishful thinking about the likelihood of events over which one has no control; such habits may arise from different cognitive sources. General references to "self-serving bias" are best considered just a convenient way to refer to any of several phenomena that can have similar consequences and might be understood as driven by a common human tendency to interpret the world to make it square more comfortably with one's own interests and beliefs.

This discussion will focus primarily on the last two forms of self-serving bias described above, though all four forms are potentially relevant to the activity of disputing. Self-serving assignments of credit and blame can motivate parties to dispute the distribution of gains that are attached to those assignments. Litigation also may be motivated by self-serving notions of fairness, which may or may not be related to those assignments of credit or blame. Estimates of ability or virtue that are exaggerated in self-serving ways can cause parties to overestimate their likelihood of success in court and thus press forward in a dispute that they otherwise might compromise. Or they may be motivated by self-serving predictions about the likely outcome of the dispute driven by mere wishful thinking rather than unrealistic estimates of their own capabilities. Any of these forms of self-serving bias can be viewed as "irrational" or not, depending on how the term is defined. In some cases, as we shall see, they may represent forms of bounded rationality that serve the interests of their holders. But in any event these biases are not generally included in the rational actor models of behavior that provide the basis for economic analysis of legal policy. It is, therefore, worth inquiring into how their existence might affect the analysis of legal disputes and their settlement.

A. Bias, Knowledge, and Preferences

Where self-serving biases of any sort are identified, they usually are treated as cause for concern, whether they color parties' predictions, assessments of fairness, or other judgments. Self-serving notions of fairness in particular have been identified as a significant source of protracted conflict and inefficiency, with calls for exploration into ways

---

judge's award to be influenced by self-serving bias).

that parties might be "debiased."[8] On closer inspection, however, the normative significance of such biases becomes more ambiguous and less readily subject to general condemnation. Before a bias can be condemned or even identified, one must identify a baseline: a goal that the bias is frustrating; a judgment that it may contaminate but should not. The selection of such a baseline becomes more controversial in some settings than in others. To illustrate the point, it will help to focus specifically on the difference between predictions and judgments of fairness infected by self-serving biases.

The plainest cases of bias arise when an actor claims to be making statements not of value (e.g., what amounts to "fair" compensation for a wrong) but of fact, because then we have relatively uncontroversial baselines against which bias can be assessed. The clearest instance of this danger in the litigation setting is the possibility that self-serving biases distort parties' predictions of what judges will say about their disputes if they are litigated to the end. Such predictions are matters of fact, and if they persistently are inaccurate in the same direction we can label them biased just by comparison to a baseline consisting of actual outcomes. We also can be comfortable considering them sources of potential inefficiencies. Think of a case where a party wastes everyone's time by litigating to final judgment an issue on which only he thinks he can win. He cannot see problems in his case that would be visible to him if the case belonged to someone else. If he ends up at exactly the same endpoint later that he would have reached earlier but for his bias, we can consider the result inefficient. The extra expenditures along the way were a deadweight loss.

But it is not clear that self-serving judgments of *fairness* can be condemned on efficiency grounds as readily as self-serving predictions of fact. The most straightforward ground for worry is that if parties are affected by self-serving biases with respect to fairness, this cannot help but drive apart their valuations of a dispute, and therefore cause it to take longer to resolve. That added length is a cost; it reduces the size of the pie the parties are attempting to carve up. To make the point less sterile, parties in the grip of self-serving notions of fairness may put a lot of energy into destroying each other, as we see in the international arena with ghastly regularity. Avoiding that destruction would seem at least *prima facie* to be a good thing. But there are several complications involved in deciding whether a self-serving notion of fairness should therefore be considered costly, and worth expenditures of social

---

[8] *See id.* at 1337; Jolls et al., *supra* note 1, at 1504.

resources to root out.

First, self-serving biases can be difficult to evaluate from a normative standpoint, and especially from the standpoint of efficiency, because they operate alongside other cognitive tendencies from which they can be hard to separate: ordinary self-interest, and the fact that an actor knows himself, his tastes, and the feel of his experience better than anyone else does. Before someone spills coffee on himself, he thinks it preposterous that someone else who does this might collect a large award of damages from the maker of the drink. Once he himself has been burned, his view of the brewer's responsibility and the compensation it ought to pay may change significantly. But there is no reason to infer from this change alone that in the latter instance the actor is subject to self-serving bias in any troublesome sense. We know only that the casual views he and others hold as onlookers are different from the views they hold once they experience the harm. It will not do to say that in the former case he was behind a veil of ignorance and that those judgments necessarily are better as a result. The knowledge that he lacked in the original position may have hindered his ability to accurately value the injury. It may be that he and everyone else are mistaken in cases where their own well being is not at issue ("easy for *you* to say"), as they then lack an immediate stake in the decision; if the cost of coffee is salient to them but the experience of injury is not, they might be biased *against* the victim. Perhaps opinions about fairness uninformed by experience and not motivated by any real stake in the decision should be regarded with skepticism in their own right. In any event, the general point is that distinguishing bias from the knowledge that comes with close first-hand experience can be difficult. There is bad, arbitrary self-serving bias as well as this more salutary sort of "experiential" bias, and I shall discuss later an empirical effort to show the importance of the former type; but in practice they often are likely to be too bound up to separate.

Second, whether a complaint about self-serving bias has teeth will depend on the precise claim that a party is purporting to make. A claim that a judgment about fairness is self-serving typically is a counterfactual about a value judgment: Gertrude would not be arguing that outcome X is fair if it were not advantageous to her, or if she did not have a stake in the resolution of the dispute. But even if this claim is true it may not matter much, for claims she makes about what seems "fair enough" for her liking may be little more than a fancy way for her to distinguish those outcomes she would consider offensive from those that seem bearable. In that case a counterfactual claim that she would not have

seen things this way before her interests were in play may be neither here nor there. It is not quite right to say that she is biased because she is not really purporting to estimate anything that can serve as a benchmark for accuracy or inaccuracy. Her history and resulting tastes are different now; that is all. From an economic standpoint, perhaps a notion of fairness is better understood as a *preference* than as a claim about the world. On that view a self-serving notion of fairness is just a self-serving preference, which is nothing new or noteworthy.

People may of course have preferences about their preferences,[9] including a preference not to be biased. In that case self-serving biases might be rued as contrary to their holder's own wishes. A party's preferences about his own cognitive performance are easier to estimate, however, when the subject of the inquiry is a factual belief rather than a value. If Fred thinks the world is flat and so will not travel more than a hundred miles from his home, this can be regretted because presumably he would prefer to be well informed and not to labor under misconceptions that limit his freedom of movement. If he won't travel because he dislikes traveling, that's different. We cannot so easily assume that he wishes he did *not* dislike it. That *might* be his preference, of course; he might go in for hypnosis to cure his fear of flying. Or he might just find it distasteful to be on the road away from his family, and then there is little reason to assume he has any comparable metapreference contrary to the immediate values he holds. To restate the point in the context of disputing: Harold wants two-thirds of a pie because he baked it. Albert claims half of the pie because he supplied the recipe. If he had been asked a year ago, before any pies were in prospect, Harold would have said that an even division of a pie in these circumstances would be fairest. Now he says something different. His assessment of fair division may be called self-serving, but without more it does not follow that his new judgment is defective or that he wishes he were able to be more consistent.

A better ground for worry arises if the party accused of bias is *purporting* to offer the same judgment that she would give if her interests were not at stake, for then the claim of bias amounts to a charge that she is not doing what she says. The point might better be stated in terms of what the party wants, rather than what she says; the worry is not that bias turns a party's claims about fairness into mere bluster, which may or may not be a bad thing, but rather that bias prevents a party from seeing

---

[9] *See* ROBERT E. GOODIN, UTILITARIANISM AS A PUBLIC PHILOSOPHY 132-48 (1995); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 937-38 (1996).

considerations of fairness as clearly as *she* would like. Suppose she earnestly wants an outcome to her dispute that is fair, and that included in this wish is a desire to assess fairness "objectively," i.e., fair in a sense she would have recognized before the dispute arose and thus in a sense uncolored by self-serving biases. She will feel better if she knows she is not laboring under such biases, and would rather have the dispute settled in a way that is "objectively" fair than in a way that suits her interests now, if those two notions of fairness turn out to conflict. Her bias then is getting in the way of her own wishes, and she might like to be rid of it. Appeals to such preferences do occasionally work: someone tells you that you wouldn't hold your position in a dispute if the shoe were on the other foot; on reflection you decide there is some truth to this and back off from your prior view.

Third, self-serving notions of fairness and attempts to root them out may have dynamic effects. Before any reason for dispute arises, a person may want to prevent himself from changing his views of fairness later if he can do so in return for a similar constraint on his potential adversary. Thus parties can make contracts specifying the remedy that either of them will have available if some contingency arises, and in this way commit themselves to a view of fairness that they may not hold once the bad thing happens. Where making such a contract is infeasible, the law may provide the parties with rules giving them the same outcome they likely would have wanted if they had been able to negotiate in advance. That outcome may incorporate notions of fairness that would have been the most plausible candidates for the parties' consent in advance when no self-serving biases were in the picture. The law's promise to do this may in turn facilitate productive activity by both sides. If so, the legal rule may be understood as a favor to the parties — even if the notions of fair division embedded in the law are contrary to the self-serving views of the parties after the dispute has arisen.

B. Advantages of Bias

An additional source of normative complication arises from the *advantages* that a self-serving bias bestows upon its holder. This is a complication in assessing self-serving biases of all kinds, not just biased notions of fairness. At the most general level self-serving biases tend to make their holders feel better, whether by relieving cognitive dissonance or by buoying the personality more broadly; a shortage of self-serving

bias may be linked to depression.[10] Self-serving biases also may have more particular benefits. First, they may create behavior and results closer to what the actor wants than he would otherwise be able to manage. The soldier charging over a hill; the bride or groom stepping toward the altar; the leader of the bomb squad hoping for steady hands while undertaking to defuse an explosive; the artist trying to summon the will to finish a creation: all of them may be helped by an exaggerated view of their prospects for success in a way vaguely similar to how they might be helped by a stiff drink. This might be because the self-serving bias offsets cognitive distortions that run in the other direction — i.e., pessimism — or it may just be that too accurate a view of the stakes is likely to ruin the sense of confidence or conviction needed to make success most likely. Realism may incline one to invest too little of oneself in an enterprise because the costs and benefits do not seem favorable; yet they have the oddly self-fulfilling quality of becoming more favorable if one thinks they are. But notice the limits of the principle. The bias is helpful at the moment of performance, but may be less helpful at the earlier node when one is deciding to undertake the activity in the first place. At that point — in deciding *whether* to enlist or marry — one wants a clear view of the consequences. Only once the decision to go forward has been taken is one better off with an unrealistically optimistic view. And even then there is an optimal amount of bias. Too much of it causes rashness or overinvestment, whether in a hopeless mission or a bad marriage.

All this is from the perspective of the actor. But of course acts may create external benefits and costs as well. Self-serving bias and the myopic reckoning of costs and benefits that it causes may generate behavior with more real costs than benefits for the actor, but with more benefits than costs in the aggregate. It may be bad for the soldier himself to exaggerate his expected fortunes when he decides to enlist, but good socially; we need the soldiers. This is why we invest in mythologies — stories, films, advertisements — that glorify and sanitize the soldier's experience: we feed the bias that exaggerates one's chances for glory and downplays the prospects for misery in order to bolster self-serving biases and thus encourage acts that make everyone better off on net (though not necessarily the actor). State-sponsored advertisements for lotteries can be viewed the same way, as can celebrations of the success of entrepreneurs and other figures who have achieved success of whatever sort despite grim beginnings. The production of art, scholarship, and

---

[10] *See generally* MARTIN E.P. SELIGMAN, LEARNED OPTIMISM (1990).

inventions all can be viewed in similar terms. Most efforts in these enterprises end up failing, but those that succeed are quite valuable. Perhaps few people (or fewer, anyway) would spend themselves on such endeavors if they grasped the likely futility of their efforts. The fact that they don't grasp it — that they are spurred on by unrealistic fantasies that their newest ideas just might make a big difference — produces social benefits, even if it causes creators to engage in investments that in truth have negative expected benefits for them.[11]

The application of these points to disputing is complex because it depends on a balance of private and social considerations that vary across different kinds of disputes. Suppose Ethyl's decision about whether to press forward or compromise on a dispute will be based solely on her prediction of the pecuniary payoff she will get if the dispute goes forward. This is more than a prediction of what a judge will say about her case; it also is a prediction about how effectively she or her lawyer will perform, negotiate, and so forth, for these all will be inputs into the outcome. The disputant partly is predicting whether *she* will be compelling. This dimension of her prediction is important for two reasons. First, it creates a still stronger temptation toward self-serving bias because now she is judging not only whether an outcome will favor or disfavor her but also the extent of her own skill. Second, it is a sense in which self-serving biases may have at least some private utility. The private utility derives from the point made a moment ago — that there are times when a disputant has a larger expected payoff if she is full of righteousness or optimism. These traits may make the client or her lawyer a more convincing and formidable forensic opponent or rival in negotiations.[12] They may help to cow an opponent into wondering whether his case is weaker than he thought. They may generate a more generous settlement just because the other side must reconcile itself to his opponent's preferences; they may in particular cause an opponent to think more seriously about compromising because he sees that his adversary is committed to battling to the bitter end.[13] These possibilities might reasonably cause a party to pause before taking a debiasing pill (if

---

[11] *See* JON ELSTER, SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY 157-66 (1983) (discussing role of self-serving biases and wishful thinking in motivating creative enterprises). *See generally* ALBERT O. HIRSCHMAN, DEVELOPMENT PROJECTS OBSERVED (1967).

[12] *See generally* James Boyd White, *The Ethics of Argument: Plato's* Gorgias *and the Modern Lawyer*, 50 U. CHI. L. REV. 849 (1983).

[13] *See* THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 21-22 (1960); Amy Farmer & Paul Pecorino, *Pretrial Bargaining with Self-Serving Bias and Asymmetric Information*, 48 J. ECON. BEHAV. & ORG. 163 (2002).

one were available) unless her adversary were to take one as well, for it may be a strategic disadvantage to see matters "objectively" in a heated conflict where everyone else is excessively convinced that they are right. Enlightenment can become a disadvantage if it produces a case where "The best lack all conviction, while the worst / Are full of passionate intensity."[14]

And now what of the external costs and benefits of disputing? One effect of self-serving bias is to prevent a party from caving in when an accurate view of his prospects would make it seem sensible to him to do so. Apart from whether this helps him in the long run, it might be a good thing in cases where the litigation creates benefits for others not captured in the parties' private result. Public law litigation provides possible examples. The primary beneficiaries of such cases often are not parties to them; think of suits to enforce environmental laws or get rid of statutes that burden the rights of many — rights of religious expression, speech, freedom from search and seizure, etc. An outcome either way may usefully clarify the law for others. Or consider fields of private law where litigation performs a particularly important regulatory function, as it does in the area of products liability. If Ethyl presses on in the face of odds that are unfavorable when viewed coldly, she may be doing a public service in facilitating the creation of a valuable precedent. Her fervor may in particular be a useful offset to tendencies on the defense side of a case that lead to excessive spending to prevent unhelpful precedents from being set.[15] At the same time, a *defendant's* exaggerated view of his chances to win might cause him to hold out in the face of socially undesirable litigation and thus discourage it — another good thing.

The point of this discussion is not to establish that self-serving biases in general or self-serving notions of fairness in particular are good or bad. It is to complicate the issue by putting it into a fuller context. From a private standpoint the utility of self-serving bias depends on when it exerts its influence and with what consequences. People are a mess, and full of strange preferences and notions that serve complicated purposes in shoring up their identities and making them feel better about themselves and their lives. We should not be in a hurry to meddle with their preferences and behaviors on the ground that they are self-serving,

---

[14] W.B. Yeats, *The Second Coming*, *in* THE COLLECTED POEMS OF W.B. YEATS 187 (Richard J. Finneran ed., 1996).

[15] *See* Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6-8 (2000) (discussing strategic precedent manipulation). *See generally* Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

as that may describe *most* of their preferences. If parties make bad predictions of litigation outcomes because they overestimate the strengths of their cases, and the bad predictions cause them to arrive at the same result later rather than sooner, these may be understood as cases of self-serving bias and condemned as a source of inefficiency without too much controversy. But the case for trying to extinguish them can become tricky in at least three ways: self-serving biases may amount to (or be hard to distinguish from) the unusually high value that parties place on their own welfare or preferences, including their own notions of fairness; self-serving biases may cause different rather than merely delayed outcomes, and some parties may prefer it this way; and self-serving biases may sometimes motivate socially useful disputing.

The extent of these complications is hard to state generally, and also hard to pin down precisely in any given case. Parties regularly make both predictive and normative claims to themselves and to others without discriminating carefully between them. This makes it hard to sort the clearly biased judgment from the judgment that may seem strange for other reasons, or to distinguish biased predictions from biased judgments of fairness, which as we have seen may have different normative implications. The experimental literature testing the judgments of subjects in litigation environments, for example, finds self-serving biases in their estimates both of what a judge will say about their cases and of what a fair resolution would be. The studies find consensus between the parties on what is *fair*, rather than consensus on what the judge most likely will say, the more important predictor of whether a settlement will be reached.[16] One way to explain this is by reference to the literature establishing peoples' tendency to impute their own views and understandings to others.[17] A party might think that the best guide to how a jury (or anyone) will perceive his case is how he himself perceives it; his own perceptions of what is best are "available," so he gives them a lot of weight in guessing what others will say. In any event, since people do not present their biases in ways that allow them to be neatly labeled and evaluated, it is hard to determine whether and when self-serving biases are doing such harm that the search for a remedy is worth the trouble.

---

[16] *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 109-14 (1994); George Loewenstein et al., *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. LEGAL STUD. 135, 154 (1993).

[17] *See generally* Raymond S. Nickerson, *How We Know — and Sometimes Misjudge — What Others Know: Imputing One's Own Knowledge to Others*, 125 PSYCHOL. BULL. 737 (1999) (discussing imputating one's knowledge to others).

C. Example: A Civil Action

In 1995 Jonathan Harr produced a valuable and well-known journalistic account of the progress of a complex tort suit.[18] The account provides a useful study in many of the considerations we have been discussing. The plaintiffs claimed to have been injured when they ingested groundwater that the defendant corporations had contaminated. The author spent a great deal of time with the attorneys while the case was being litigated, and the book depicts their behavior and thought processes in some detail. The judgments of the plaintiffs' lawyer, Schlictmann, appear to have been heavily affected by self-serving biases. He typically blames any misfortunes he suffers in the case on the judge, whom he becomes convinced is part of a conspiracy to ensure that the defendants win. He is thoroughly convinced of the righteousness of his cause, he is not much good at seeing the case as his opponents do, and his predictions about the outcome of the trial are unstable and sometimes wildly high; at one point he concludes that he should decline to settle the case for anything less than $100,000,000.

Schlictmann's perceptual biases cause consequences that make for difficult reading. He spends nine years of his life on the case. He finances the litigation recklessly, investing all of his property in it and ending up ruined; his car is repossessed, at the conclusion of the book he declares personal bankruptcy, and his partners nearly lose their houses. He turns down opportunities to settle with one defendant who goes on to win outright; the other defendant ends up settling for $8,000,000, a figure that might well have been higher if the plaintiffs had settled earlier. Schlictmann also ends up being attacked by some of his own clients, who become convinced that he overbilled them for expenses and lost sight of their interests more generally. (The lawyer for the defendant corporation featured most prominently in the book takes a more detached view of the case and makes out fine.)

The whole account can be viewed as a cautionary tale about the hazards of self-serving bias — but perhaps also about hasty condemnation of it. If Schlictmann had taken a more cold-eyed view of the case and seen his prospects for success accurately, it seems certain that he would have invested far less in the dispute in personal and material resources. He might have been better off as a result — or perhaps not, since the case and the journalism about it made him a minor legal celebrity, admired by many for his passionate commitments and

---

[18] JONATHAN HARR, A CIVIL ACTION (1995).

willingness to go to the ends of the earth to win. Some of those consequences might be considered fortuitous, since they depended partly on the accident that a journalist took a special interest in chronicling the matter. Less fortuitous, but also ambiguous, are the consequences for his clients. They would have been financially somewhat better off if they had settled earlier, but they did not want this. They wanted the moral satisfaction of victory, and Schlictmann's crusading mentality was something that they apparently valued. Their main source of sorrow concerning the litigation's end was that once they did settle, they did not obtain a full confession of wrongdoing by the defendants.

And then there is the question of the social value of the litigation. Schlictmann's self-serving biases could be regarded as motivators of a heroism that otherwise would have been unlikely. The plaintiffs' claims were risky, and Schlictmann was up against well-financed defendants who may have been inclined to spend heavily on the defense of his suit to deter others from bringing more of them. Had he seen his prospects clearly he probably would have settled much earlier, and probably for a good deal less than he ended up obtaining both in the way of money and in satisfaction for his clients.[19] A lawyer not in the grip of such self-serving biases might not have kept the case long enough to obtain even the settlement opportunities that Schlictmann *missed*; this could be a situation where the only available cognitive strategies involve high probabilities of either overshooting the mark or coming up short of it. Schlictmann committed the first type of error, which might have been better than the second kind. It also is possible that the litigation had some benefits in giving companies like the defendants' incentives to use more care in environmental matters, though this is hard to say. In the end the consequences of Schlictmann's self-serving biases seem largely baleful but perhaps not all bad. They generated a series of costs and benefits for all concerned, the net of which is difficult to estimate.

II. TOOLS FOR MANAGING BIAS

With these reservations in mind, let us consider what the law can do to diminish the effects of self-serving biases that are unfortunate in the most straightforward sense — just the biases, in other words, that frustrate a party's own efforts to make an accurate prediction of the

[19] *See* Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 76-77 (1985) (discussing difficulties of settlement when parties' negotiation positions widely diverge).

outcome of his case. There are several sorts of strategies available, and they can be arrayed on a spectrum. At one end are what I will call purely personal solutions: attempts to "debias" litigants, using various techniques to try to snap them out of their skewed perceptions. At the other end are purely structural solutions: efforts to put distance between parties subject to biases and decisions the biases might contaminate, or to create circumstances in which such biases are less likely to be provoked in the first place. Between these poles lie various methods for reducing the costs that self-serving biases can create by penalizing them (closer to a personal solution) or by interposing unbiased parties between the biased party and whatever decision he has to make (closer to a structural solution). Solutions tending toward the structural side seem more likely to be fruitful than solutions of the personal variety that aspire to get people to overcome their biases — though the more structural a solution is, the more expensive it is likely to be in various respects as well.

A. Personal Solutions: Reeducation

Professor Babcock and her colleagues ran experiments in which subjects arbitrarily were assigned roles as plaintiffs and defendants and told to try to settle a dispute.[20] In some rounds of these experiments the parties were given "debiasing" instructions. The instructions informed the parties that disputants do not always think carefully about the weaknesses in their own cases. They then said that "[f]or plaintiffs, this means that the judge's award is often less than their expectations. For defendants, this means that the judge's award is often greater than their expectations." The parties were then instructed to list the weaknesses in their own cases. The first striking result was that the parties assigned roles as plaintiffs and defendants without the instruction just described showed immediate signs of self-serving bias: the plaintiffs valued their claims more than the defendants did. The second striking result was that parties given the debiasing instruction tended to settle their cases more quickly than the parties left to their own devices. Their predictions of what a judge would say about their cases showed greater convergence. The authors therefore suggest that parties to litigation be made to go through a similar debiasing exercise as part of the legal system's other standard attempts to encourage settlement before trial — conferences with the judge, required mediation, and the like.

---

[20] Linda Babcock et al., *Creating Convergence: Debiasing Biased Litigants*, 22 LAW & SOC. INQUIRY 913, 915, 917 (1997).

The Babcock study is interesting and valuable. But while the spirit behind the debiasing proposal is admirable, I nevertheless have significant reservations about it. First, "debiasing" parties by telling them there is a good chance they are being too optimistic and making them dwell on the shortcomings of their cases does not necessarily make their estimates of the likely outcome more accurate. It may just cause them to converge, which is not the same thing and not necessarily a good thing. This point is an important corrective to the assumption that any measure that creates more settlements is an improvement, or that "creating convergence" (in the title of Babcock's article) is necessarily a good thing per se. If you tell two parties that they are twice as likely to lose as they think they are, you make settlement more likely — but this does not mean you have enabled them to more speedily reach the same outcome they would have obtained without the instruction. The outcome itself may be different, with distributive consequences that cannot be presumed good by virtue of the fact that they came sooner rather than later.

The reason the authors nevertheless find their results significant and encouraging is that the debiasing instruction appeared to reduce an arbitrary bias that otherwise was quite strong in those parties who were not so instructed. I call the bias shown by the uninstructed parties "arbitrary" because it does not seem attributable to any salutary source such as heightened *knowledge* in the parties about their cases, etc. It was triggered by nothing more than their assignment to one side of the case or the other. So if a debiasing instruction reduces this seemingly arbitrary bias that fastens itself to parties, perhaps it must be a good thing. Yet I still am not so sure. The effect of the debiasing instruction might have been to offset (rather than deflate) the self-serving biases that the subjects in the experiments experienced. Again, telling both sides that they probably are being too optimistic is likely to increase their probability of settlement regardless of whether both of them in fact are being too optimistic. If we are sure that undue optimism is a problem for them, then perhaps the instruction to be more pessimistic has some value. But the effect of the pessimism instruction does not depend on whether there is excessive optimism. It has its effect regardless. One must be careful in so advising parties.

Additional points about the study are striking as well. The first, to which I have alluded already, is the ease with which the bias was triggered, since the participants did not have any of the real interests or experiences we expect of plaintiffs or defendants. They were just pretending, yet this was enough to affect both their predictions and their

sense of fairness. The second point is how easily the bias was dissipated through the use of a simple exercise. Both results seem surprising, but then they may be related. The biases under which the parties to the experiment labored were unearned, so the attachment to them may have been weak, unusually fragile, and therefore eradicable with the nudge furnished by the instruction. Easy come, easy go. The self-serving biases that infect real parties with deep investments in their positions may well be more robust, making superficial exercises to root them out less likely to be effective.

Another difficulty is that the students involved in the studies were not experienced lawyers. In the initial studies establishing the existence of bias, a mixture of undergraduate and law students was used.[21] In the studies where debiasing techniques were used successfully, the subjects all were business school students.[22] They were not accustomed to making predictions about litigation outcomes or to testing such predictions with the self-skepticism that is supposed to be part of a lawyer's skill set. I do not know whether law students would have responded any differently from business students; it is the inexperience of the subjects more than the nature of their schooling that gives me pause, as it may help to explain both the easy emergence of the biases and their responsiveness to a simple intervention.

The authors anticipate the objection that the behavior of the students in the study may not be representative of the behavior of lawyers, but suggest that the objection is overcome by further studies showing that professionals of other types, and perhaps also lawyers,[23] are subject to biases in their judgments. It is not clear, however, that "professionals" is the appropriate category to use for analysis here. Lawyers are already trained to undertake the exercise the authors propose; it is a large part of the purpose of law school to teach students to see both sides of a case and to become acutely aware of the holes in whatever arguments they make. Perhaps this learned ability to resist wishful thinking can be considered some part of any professional education, so that supposing lawyers are any better at it than others may be self-serving bias on the part of this author. In all events, resisting such bias with respect to arguments made in litigation is the particular daily drill of law school, and it also is a lesson reinforced by experience. A professional gambler

---

[21] *See id.* at 918; Loewenstein et al., *supra* note 16, at 145.

[22] Babcock et al., *supra* note 20, at 918.

[23] *See* Theodore Eisenberg, *Differing Perceptions of Attorney Fees in Bankruptcy Cases*, 72 WASH. U. L.Q. 979, 982 (1994).

on his first day of work may be subject to bias when he estimates the likelihood that his alma mater will cover the point spread that day. As some time passes, however, he is likely either to learn to correct himself or to be forced into a line of work where such biases are not so ruinous to his chances for success. Lawyers are similar. Litigation is a gamble, and those who make inaccurate estimates of the outcome of a trial are likely to have trouble attracting or holding clients.[24] Of course this corrective mechanism is crude, since some clients are one-shot players and since a discrepancy between a lawyer's prediction and an outcome at trial does not necessarily prove that his prediction was wrong as a probabilistic matter. But beyond the market pressure to avoid bias there is just the cognitive residue left behind by a number of years of hard lessons. After handling dozens of cases and watching many more, a lawyer is likely to gain a more clear-eyed and perhaps weary sense of how a client's story is most likely to end in court. Self-serving bias in its most obvious and easily dissipated form thus can be understood as part of the naïve enthusiasm of the amateur. In the litigation documented by Harr and discussed earlier, Schlictmann — the lawyer in the grip of the self-serving biases — was a tyro; the corporate defense attorneys on the other side were highly experienced.

The point is not that lawyers are unlikely to suffer from self-serving biases. Probably everyone is vexed by them to some degree, and in some lawyers they may be profound. Lawyers do routinely believe that their arguments are better than the ones advanced by their opponents, and half the time they must be wrong about this.[25] The point, rather, is that in lawyers significantly addled by such biases, their myopia probably is a part of their personality not so easily eradicated through relatively superficial exercises in forced introspection. If the lawyer's education has been successful, both in school and in his profession, advising him to think twice and asking him to write down the weaknesses in his own case will be superfluous. If his education has not been successful in this way, asking him to undertake the exercise seems likely to be futile. It will be irritating as well, as a lawyer of any sort is likely to feel patronized by an instruction to copy down his understanding of the flaws in his case as an exercise in helping him overcome his cognitive shortcomings. Meanwhile the client with the good lawyer would be

---

[24] *See* Roberta Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, 59 S. CAL. L. REV. 313, 324 (1986).

[25] *See* Donald C. Langevoort, *Ego, Human Behavior, and Law*, 81 VA. L. REV. 853, 860-65 (1995) (discussing lawyers' overconfidence in their cases, and how lawyers' egos can disserve their clients in other ways).

forced to pay as much for the exercise — or more, since his lawyer probably is more expensive — than would the client of the bad one, creating more pressure on the abler side to cut its costs by settling. It would be a subsidy for the weak-minded.

I do not mean to suggest that the debiasing proposal could do *no* good. Biases robust enough to survive in a lawyer's mind may be unlikely in the average case to be deflated by the exercise the authors recommend, but the process might sometimes help the marginal lawyer or the lawyer in the marginal case see his prospects more clearly. Yet then there are practical problems as well. If the lawyer's statement of the defects in his case is to be filed with the court, it will have to be drafted cautiously and artfully to avoid exposing more of his view of the case to the judge or opposing lawyer than is best for his client; but this caution and artfulness seem likely to drain the exercise of much of its force. (Or he may understate the flaws in his own case in hopes that his adversary will be left with a misimpression that might be exploited.[26]) The proposal might be softened so that lawyers informally are advised to worry about the holes in their own cases without being *required* to do more. It would be a hortatory strategy, in other words — the legal equivalent of the automaker's reminder that objects in the sideview mirror are closer than they appear. Still, we should hesitate before imposing even small nuisances, which in the aggregate may become large after all, on the basis of experiments that can be distinguished from the real world in so many ways. There is an optimal amount of self-serving bias that we are better off tolerating than trying to eradicate, and this may be a case where the corrective measure would be more costly than the problem it is trying to remedy once the small expected benefits of it are discounted by its potential to annoy.

What this discussion does suggest is the importance in legal education of attending to self-serving bias as an occupational hazard. I described debiasing as an everyday exercise in a law school, and so it is; but it is done indirectly, by asking students to argue against their intuitions. It may be that more could be done to explicitly impress upon the student the prevalence of self-serving biases and the importance of vigilance in beating them back or avoiding the circumstances where they are likely to arise. Courses on legal ethics teach some of this; they offer rules meant to keep lawyers out of a number of situations where biases tend to arise. These include rules that distance lawyers from the temptations of self-

[26] *See* Samuel Issacharoff, *Can There Be a Behavioral Law and Economics?*, 51 VAND. L. REV. 1729, 1739 (1998).

dealing by forbidding them to represent clients when they would have personal interests of their own at stake (though not, in the United States, forbidding contingency fees, on which more in a moment). But there is no rule that can prevent a lawyer from just overestimating his and his client's prospects for victory. It is a question of skill and experience. Law schools would do their students a service by exposing them to what is known in the social sciences about the tendency to exaggerate the strength of one's own position in a dispute.[27] Merely informing people of the risks of self-serving bias does not necessarily make their own biases any weaker,[28] but it may motivate greater investment by the lawyer in training to avoid such hazards or in structural steps in his own practice to minimize them.[29]

B. Penalizing Bias

Another family of responses to self-serving biases involves penalties for indulging them. It might be supposed that such biases already penalize their holders by luring them farther down the path of litigation than they would go if clear-eyed; they will end up disappointed by the small awards they receive or the large awards they pay. Biased litigants may or may not conclude that they would have been better off settling, but in any event they experience financial losses. Is this not penalty enough? Why aren't self-serving biases their own punishment?

The first problem is that a litigant's bias also can create costs for other parties to the case and for the judicial system, and the litigant does not necessarily take these into account in deciding whether to press forward with a case. Many American courts therefore provide mechanisms to help bring those costs home to the parties to a suit. The best known is Rule 68 in the federal system:[30] a plaintiff who turns down a settlement offer but then collects less at trial than the offer would have provided is obliged — even if she wins the case — to pay the defendant's litigation costs incurred after the offer was made. The rule punishes plaintiffs whose estimates of their prospects are skewed high by self-serving bias (or for that matter by simple bad judgment). Notice that the federal rule

---

[27] *See* Paul Brest, *The Responsibility of Law Schools: Educating Lawyers as Counselors and Problem Solvers*, 58 LAW & CONTEMP. PROBS., Summer/Autumn 1995, at 5, 10.

[28] James Friedrich, *On Seeing Oneself as Less Self-Serving Than Others: The Ultimate Self-Serving Bias?*, 23 TEACHING PSYCHOL. 107, 107-09 (1996).

[29] *Cf.* Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227, 255-59 (2001).

[30] FED. R. CIV. P. 68.

does not likewise punish *defendants* whose estimates of their prospects are unrealistic. It is not clear why.[31] The reason may be that unrealistic defendants are considered less likely to create trouble than unrealistic plaintiffs; or it might be thought that defendants who underestimate their exposure to liability already suffer an out-of-pocket punishment when they have to pay a plaintiff a large judgment, so there is no need to add to the plaintiff's winnings. An overly optimistic *plaintiff* may just suffer by receiving a smaller judgment than he had expected, an outcome that he still may find satisfactory; an out-of-pocket payment to the defendant then is needed to make the plaintiff's blunder more salient to him.

In any event many state jurisdictions do have rules providing penalties in both directions for any party who rejects a settlement offer that hindsight shows would have made him better off than a trial.[32] In some places the rules permit the recovery of attorneys' fees, an item not counted as a "cost" in the federal system.[33] If the rules cover *all* types of costs incurred after offers are made, and if these mechanisms are available to penalize parties on both sides, the incentive becomes considerable for each to make an accurate settlement offer to the other; the consequences of being wrong in estimating the value of the case become quite substantial. This might not deter the party with the relentlessly self-serving bias, who may be as likely to bring the bias to bear in evaluating a Rule 68 offer as in other situations, but it causes such a party to internalize more costs of the bias and thus encourages cost-justified efforts to root it out. One can easily imagine further intriguing variations on these rules. One possibility would be for each side to certify a prediction of the outcome of a case that is headed to trial; whoever's estimate is farther from the actual result pays the attorney's fees for the other side.[34] Or there could be larger penalties for being wrong.

---

[31] *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 312 (7th Cir. 1995) (discussing Rule 68's favoritism of defendants).

[32] *See, e.g.*, ALASKA STAT. § 09.30.065 (Michie 2003); CAL. CIV. PROC. CODE § 998 (Deering 2003); COLO. REV. STAT. ANN. § 13-17-202 (West 2002); MONT. CODE ANN. § 25-7-105 (2002); WIS. STAT. § 807.01 (2002).

[33] *See generally* Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J. LEGAL STUD. 93 (1986).

[34] *See* Michael D. Young, *Bottom Line Negotiating*, 49 FED. LAW. 20, 20 (2002). For discussion and other suggestions with a different focus, see generally David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225 (1994); Miller, *supra* note 33.

A natural next question is why such stronger measures are not found more widely. The likely reasons are three. The first is that such a bias is hard to eradicate once it takes hold, so a practice of piling on additional sanctions against parties who succumb to bias will not cause comparable marginal reductions in the amount of it. Self-serving bias is insidious in that it denies its own existence,[35] and it is hard to deter someone from being influenced by a bias to which he doubts he is subject in the first place.

A second reason is our lack of confidence in the system about which the parties and their lawyers are making their predictions. If every legal result were sure to be "correct," perhaps a party's failure to accurately forecast it could be considered an unambiguous error. But there is some variation in the outcome of legal cases, so a prediction that turns out to be incorrect may nevertheless have been a good estimate of the outcome that was most likely.

A third reservation about heavy sanctions for mistaken predictions involves the difficulty of distinguishing self-serving bias from other reasons why parties might turn down settlement offers that later appear better than the outcomes they obtained by litigating. There is the danger that provisions like Rule 68 will treat as "biased" some predictions that instead reflect unusual personal knowledge — including knowledge of a party's private goals. If a plaintiff declines a settlement offer of X, and goes on to recover slightly less than X, he may consider his decision a success if he values a victory in court at some amount greater than his cash recovery. Yet he is treated by the law as having made a mistake. In effect Rule 68 penalizes litigants who pursue litigation to vindicate non-pecuniary values.[36]

C. Separating Biased Parties From Decisions

Large parts of the legal system can be understood as efforts to curb the influence of self-serving bias on decisions, whether by public officials or by disputants. Once we know there is a risk that an actor's perceptions are influenced by untoward considerations it is hard to ferret them out — hard for onlookers and hard for the actor as well, since self-serving and other biases often do their work outside the view of consciousness.[37]

---

[35] *See generally* Friedrich, *supra* note 28.

[36] *See* Cross, *supra* note 15, at 29.

[37] *See* Richard E. Nisbett & Timothy De Camp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 231-32 (1977); Richard E. Nisbett & Timothy De Camp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*,

As discussed a moment ago, the reaction of people told about the dangers of self-serving bias typically is to conclude that they are better than average at avoiding its effects. So the most usual legal strategy for combating the influence of biases is to avoid the circumstances that bring them about — to forbid conflicts of interest, rather than to urge those who labor under them not to succumb to temptation. Hence the aversion in the legal system to letting parties great or small serve as judges in their own causes: one branch of government checks the other; judges recuse themselves when they may have a personal stake in a case; prosecutors, not victims of crime, decide whether and how to bring criminal charges against one citizen who allegedly has wronged another.

Alas, in many departments of law and the rest of life recusal is infeasible. When managing their affairs and especially when disputing, people frequently are called upon to serve as judges in their own causes with no plausible way to step aside. Since the *source* of the bias cannot be eliminated, the problem becomes the difficult one of managing its effects. The most common technique consists not of direct efforts to improve the behavior of disputants but of more structural efforts to distance them from their decisions. If a party cannot be excused from his position on account of his biases, perhaps he can be required or expected to listen to someone not so addled in his perceptions — a lawyer, whose job description includes helping clients avoid making decisions based on cognitive illusions.[38] Thus the norm against self-representation in court is very strong even when the client is himself a lawyer who thoroughly understands the legal rules at issue. We count on disputants to hire agents and advisers who will be less biased or not biased at all. Part of the modern trial judge's job description likewise is to find ways to talk sense into parties and lawyers who are kidding themselves about their likelihood of success.[39]

On the civil side of the law there are other institutional measures available that sometimes can be used to separate aggrieved parties from their claims. Insurance companies routinely require that an insured hand over control of litigation to collect for an injury — suffered or

---

35 J. PERSONALITY & SOC. PSYCHOL. 250, 250-52 (1977).

[38] *See* Jennifer Arlen, Comment, *The Future of Behavioral Economic Analysis of Law*, 51 VAND. L. REV. 1765, 1787 (1998); Korobkin & Guthrie, *supra* note 16, at 160-61; Romano, *supra* note 24, at 324. For a good discussion of lawyers' own difficulties in avoiding self-serving biases, see Langevoort, *supra* note 25, at 860-65.

[39] For a discussion of ways that other cognitive illusions can affect decisions by judges, see Farnsworth, *supra* note 29; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001); Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571 (1998).

inflicted — that is covered by his policy.[40] There are many reasons for this, but one of them no doubt is that the insurer is less likely than the insured to be afflicted by self-serving biases. Whatever normative judgments attach to the conduct at issue in the case do not reflect on the insurer and so do not trigger biases, and the insurer plays the game often enough to wear down this or other sources of perceptual distortion.

A related tool for stripping bias out of the negotiation over a claim is assignment: the sale of the claim to a disinterested party. What is striking is how infrequently such assignment occurs. It generally can be done in contract but not tort cases; in Texas, a rare jurisdiction that permits the sale of tort claims, it still is not done often.[41] A practical reason is that the plaintiff's cooperation as a witness normally will be needed to successfully prosecute a lawsuit, and once the plaintiff has sold his claim his incentive to cooperate is greatly reduced. Still, the general advantages of assignment are clear. It puts a claim into the hands of a party who, like an insurance company, has no personal attachment to one view of the merits or another, and who engages in the sorts of repeated dealings that help inoculate against bias. But perhaps the limits of the usefulness of assignment are tied in with the very bias it promises to extinguish: people *want* to litigate their own disputes. They are not just seeking compensation, but want to participate in the ritual of vindication, and no assignee is going to pay them for that.

A variation on the theme, and perhaps one reason for the perception that assignment of tort claims is not needed,[42] is the contingency fee, a practice permitted in the United States but forbidden in many other jurisdictions.[43] A plaintiff's lawyer typically takes a case on the condition that he will be entitled to some percentage of the recovery — perhaps one-third. The contingency fee is an ambiguous arrangement from the standpoint of self-serving bias. It might seem a poor idea because it gives the lawyer an untoward interest in winning the case. Now predictions of a big victory serve his self-interest in a way that they did not when he was working for an hourly fee. But if we assume lawyers are good at resisting self-serving bias, the contingency fee might seem a

---

[40] For discussion of the rule, exceptions to it, and consequences, see Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 361, 371-72 (1991).

[41] *See* Samuel R. Gross, *We Could Pass A Law... What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 328 (1998).

[42] *Id.* at 328-30.

[43] *See* Virginia G. Maurer et al., *Attorney Fee Arrangements: The U.S. and Western European Perspectives*, 19 NW. J. INT'L L. & BUS. 272, 320 & n.177 (1999).

helpful antidote to such bias in the client, for it makes a professional with at least *more* detached judgment a part owner of the claim and a fuller partner in the perception of its prospects. On this view one might expect the contingency fee to function like a partial assignment and so to entitle the lawyer to a say of his own in deciding whether to settle the case. In fact, however, contracts for contingency fees are understood to have no such consequence, and indeed the client must remain the sole decisionmaker as a matter of ethical rule.[44] Evidently the purpose of the fee is more to provide a way for a client to finance litigation without having funds on hand, not a way for him to make a partner out of his attorney. And as an informal matter the lawyer usually does have a large say anyway in what the client decides to do, whether or not he is on a contingency fee.[45]

All the strategies just discussed represent the law's most favored type of mechanism for coping with self-serving bias. They should be considered partly personal but primarily structural. Mostly the idea is to put distance of various kinds between biased parties and their decisions. Sometimes the greatest distance that can be achieved is small: in the end people have to make their own decisions about whether to settle cases or move on. But adding another party to the mix whose judgment becomes important, if not required, helps balance the pressure of self-serving bias on the decision and reduce the costs it creates for others as well as for the party making the final decision. We will see additional examples in a moment.

D. Structural Solutions: Reducing the Occasions for Bias

1. Substantive Law

Suppose one wanted to design substantive legal rules *most* likely to provoke self-serving bias in disputants' estimates of their claims. How best to proceed? The most important elements would be a legal standard that calls for subjective judgment or evaluation,[46] rather than for a determination of facts that readily can be verified or falsified; and criteria

---

[44] *See* Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 283-84 (1996).

[45] *See id.*; Korobkin & Guthrie, *supra* note 16, at 160-64; Herman 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, 812-15 (1998).

[46] *See* Richard J. Reifenberg, *The Self-Serving Bias and the Use of Objective and Subjective Methods for Measuring Success and Failure*, 126 J. SOC. PSYCHOL. 627, 629-30 (1986).

that call for normative decisions — or decisions with normative overtones — about either side's behavior. A general illustration of such a rule would be one imposing liability on A if he has acted with disreputable intentions toward B — in their contractual relations, their employment relations, or wherever else. First, there usually would be no objective way to measure whether the standard has been satisfied. It is a question about state of mind that will have to be resolved with a measure of guesswork by a trier of fact. It may be particularly hard for the parties to separate their own views of the question from what the trier of fact will think about it, since there is no objective check on the correctness of those views (unless it takes the form of similar cases already decided). Second, the determination that a party has acted with disreputable intentions is likely to provoke self-serving bias because it has normative stakes. Most people do not want to believe that their intentions are disreputable. They tell themselves stories in which most or all of their intentions seem reasonable enough. But B may be eager to believe that A — his adversary — did have such intentions if A's conduct has caused him losses. Conditions are fertile for the emergence of self-serving biases.

Notice that if either of these features were absent — subjectivity or normativity — the problem might be less severe. If the *acts* that give rise to liability were clearly enumerated, consultation of the list might be enough to prevent self-serving biases from exerting much force against the parties' perceptions. Of course they might still disagree about whether the enumerated acts were committed, but the scope of operation for the bias would be narrowed by their ability to point at evidence in the world. Thus the measures of damages that best curb self-serving biases are those tethered to markets, since either party can consult objective evidence of the market value of his lost goods. Since there is no comparably objective way to measure pain and suffering, we would expect parties' estimates of that heading of damages not only to be more variable but also to be more self-serving.

Likewise, if a legal rule calls for a judgment that seems largely rudderless but has no normative overtones, it becomes easier for the parties to agree about it. Again they might continue to experience bias just by virtue of their different positions as plaintiff and defendant; no one likes to admit they did anything that creates liability for themselves. But at least here a predicted finding of liability would not mean an expectation by a party that he will be found to have breached norms that he may have internalized and believe he is not the sort to violate. The idea in reducing self-serving bias is to reduce the extent to which the *self*

is served by the bias.

This discussion thus suggests fresh advantages in legal standards that can be applied by reference to objectively verifiable indicators,[47] and also advantages in standards that minimize the role of normative judgment in assessing either side's conduct. The question is not whether legal rules *express* normative judgments; most do. The question is whether the application of the rule calls for a normative judgment that is likely to trigger self-serving biases in the parties as they attempt to figure out whether the rule has been violated. But of course there are disadvantages as well as advantages in legal standards employing these strategies. Let us consider some examples and applications.

a. Employment Discrimination

Statutes prohibiting discrimination in employment on various grounds — race, sex, age, disability, pregnancy, etc. — are plentiful in the United States.[48] The assessments at stake in discrimination cases are the sort we should expect to trigger self-serving biases. First, the defendant is accused of basing a decision on criteria condemned by norm as well as by statute; especially in a case of alleged racial discrimination, the stigma attaching to a guilty party is considerable. Meanwhile the employee has every reason to want to believe he has a good claim, as it provides an explanation for his misfortunes unconnected with the quality of his own credentials and performance. Given a choice between believing that he was fired because he was incompetent and because the employer disliked him for impermissible reasons, the latter explanation preserves the plaintiff's sense of self-esteem as well as creating a claim for monetary relief. To be sure, self-serving interpretations of such situations are likely to thrive regardless of whether there is a law against discrimination. The question about the law is whether it creates a ready way for those interpretations to be translated into legal costs for the parties and for others.

Second, the biases provoked by the law frequently are not disciplined by any verifiable criteria against which the judgments involved can be tested. The decision in a discrimination case hangs on the employer's motive for taking an adverse employment action. There often is no way

---

[47] *See* Russell Korobkin, *Behavioral Analysis and Legal Form: Rules and Standards Revisited*, 79 OR. L. REV. 23, 25-30 (2000).

[48] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (2000); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2000); Tit. VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (2000).

to determine this objectively — no document where the motives for a decision to hire or fire are spelled out in conclusive fashion. It is a question of whose protestations to believe, how to interpret evaluations of the plaintiff's work, what inferences to draw from remarks the defendant may have made, and so forth. The strength of these signals is liable to be too weak to withstand the press of wishful thinking by either party. Granted, it finally will fall not to the parties but to the trier of fact to assess what the defendant's motives must have been; but as noted before, at the stage where the parties bargain over such a claim they are likely to have trouble distinguishing their predictions about what a court will think from their own opinions.

What we know about self-serving biases thus suggests that laws forbidding employment discrimination are likely to generate unusually high numbers of spurious claims and defenses, and that it will be relatively difficult to find a view of the matter on which the parties can agree. Now of course it need not follow from this that laws forbidding employment discrimination on various grounds are undesirable. They may well have benefits — in the eradication of biases of other sorts, or at least of some of their consequences — that offset their costs. Turned around, the point is that the cost of reducing bias by rewriting anti-discrimination laws may well be greater than the costs the biases now create. Attention to the likely effects of self-serving biases merely provides a fuller picture of the latter costs — costs not just of anti-discrimination statutes but of any laws that create fertile ground for disputes driven by self-serving biases. A model of such a law epitomized by discrimination statutes is (a) X becomes liable to Y if Z occurs, where (b) it is in Y's interest to believe Z has occurred, and in X's interest to disbelieve it, for extralegal reasons, and where (c) it is hard to verify whether Z occurred in a sufficiently objective way to counterbalance the pressures created by those interests.

Are there ways to advance the goals of such laws without the high risks of bias? One semi-structural possibility we saw earlier is to interpose a measure of independent judgment between the plaintiff and the courts. Here we find that approach already taken. A plaintiff seeking to sue an employer for unlawful discrimination must first tender the claim to a federal agency, the Equal Employment Opportunity Commission.[49] The EEOC cannot stop the plaintiff from eventually suing, but can delay the process several months while administrators

[49] *See* 42 U.S.C. §§ 2000e-5(e)(1), (f)(1). Similar requirements apply to claims made under the ADA. *See* 42 U.S.C. § 12117(a).

from the agency make attempts at "conciliation" — i.e., convincing either or both parties that their position is not as strong as they may think, and that they should compromise or give in.[50] We find the same approach, but tougher still, taken in another area of employment litigation: certain claims under the Fair Labor Standards Act, such as those alleging that an employee was fired because of union activity. Here the employee's only right is to complain to the National Labor Relations Board; he has no right of his own to sue.[51] The reasons for this policy again are many, but one function it serves is to take away from the employee the power to decide whether his own perception that he was fired for bad reasons should be turned into legal costs for the employer.

b. Defamation

Another area of law that might seem designed to provoke self-serving bias is defamation. The usual premise of a defamation suit is that the defendant has said something embarrassing about the plaintiff that is false. One can imagine many reasons for a party to bring such a claim. Perhaps the defendant's statement about him clearly *was* untrue; or perhaps by suing the plaintiff wants to signal his confidence that it was not true;[52] or perhaps the truth or falsity of the statement is a close question, and the plaintiff has a strong interest in believing it to be false — a self-serving bias in his estimate of its inaccuracy. This last possibility is stronger in the libel setting than it is with respect to many other torts. If a defendant is sued for negligence, little or no opprobrium attaches to a finding made against him. But most types of statements that provoke defamation suits are by definition the sort that injure the plaintiff's reputation by accusing him of infamous conduct — in other words, of a breach of norms. Attaching legal significance to the truth or falsity of such an accusation can be expected to have the same sort of consequence discussed in the employment discrimination setting. The plaintiff is likely to be happier if he believes the claim the defendant has made about him is not true. This will tend to cause him to take an exaggerated view of his prospects for success in a suit, both because he is overly inclined to believe he is right and because he is overly inclined to

---

[50] *See* Marjorie A. Silver, *The Uses and Abuses of Informal Procedures in Federal Civil Rights Enforcement*, 55 GEO. WASH. L. REV. 482, 518 (1987).

[51] *See, e.g.*, Jurado v. Eleven-Fifty Corp., 813 F.2d 1406, 1411-12 (9th Cir. 1987); Hudson v. Teamsters Local Union No. 957, 536 F. Supp. 1138, 1143 (S.D. Ohio 1982).

[52] Ronald A. Cass, *Principle and Interest in Libel Law After* New York Times*: An Incentive Analysis, in* THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 69, 70-71 (Everette E. Dennis & Eli M. Noam eds., 1989).

believe that others — a judge or jury — will come to the same conclusion that he has reached.

Turning to the defendant's perspective, American defamation law no longer imposes the strict liability that was characteristic of the common law.[53] The United States Supreme Court largely has constitutionalized the area, and as a result the defamation defendant is held liable only on a showing of culpability — and in some cases great culpability.[54] In a suit involving the alleged defamation of a public figure, the defendant must be shown to have acted with "actual malice," by which is meant knowledge that a statement was false or recklessness as to its truth or falsity.[55] To say that a journalist has acted in that way is very damning, so it again is to be expected that many journalists sued for defamation will convince themselves that they have not done so. The difficulty is not only that actual malice is bad conduct, but also that it is in part a conclusion about the defendant's state of mind. The defendant's beliefs and reconstructions of what he thought and when are likely to be plastic, and there may not be much to constrain his self-serving fantasies on the subject. Then again, he may have a better vantage point than anyone else in determining whether he knew his statements were false. We encounter again the Janus-faced problem of legal actors who serve as judges in their own causes: they may reach conclusions that favor themselves either because they know best or because those conclusions *serve* them best. In any event, we would expect the combination of an inquiry that is (a) hard to settle objectively and (b) normatively charged to drive the defendant's perception of the merit of his own case away from the plaintiff's perceptions, and to drive apart as well both sides' estimates of a court's likely resolution of the dispute.

These views of defamation cases would cause us to expect such suits to be unusually difficult to compromise, and so they are; they settle less frequently than most other types of civil suits.[56] Again, there may be reasons for this other than the self-serving biases of the parties, but such biases do fit the facts and seem plausible as part of the explanation. So

---

[53] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 15-16 (1990); *cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763-64 (1985) (holding that "[p]ermitting recovery of presumed and punitive damages in defamation cases absent showing of 'actual malice' does not violate the First Amendment when the defamatory statements do not involve matters of public concern").

[54] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

[55] *New York Times Co.*, 376 U.S. at 279-80.

[56] *See* Cass, *supra* note 52, at 71; David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 518 n.77 (2001).

what of the solution? One technique for coping with claims likely to be infected by self-serving bias is to raise or lower the bar for success in bringing them. This makes sense if the bias is thought to be more likely on one side of the case than the other. Whether the law's treatment of defamation can be understood in these terms is hard to say because the doctrines in the area are complex and helpful empirical data hard to come by. What plainly is true, in any event, is that defamation claims generally have become a good deal more difficult for many types of plaintiffs to win over the past forty years because of the aforementioned constitutional developments. One consequence of this raising of the bar is to offset self-serving biases held by plaintiffs who find it too easy to believe they have been wronged and would press their complaints in court too readily if the legal standard were not so tilted in the defendant's favor.

2. Procedures

There are possible structural antidotes to self-serving bias on the procedural side of the litigation process as well. One important potential source of self-serving bias involves what the parties and their lawyers are trying to predict during settlement negotiations. Of course in the end the parties are trying to forecast the likely outcome of full litigation, but that prediction may depend in part on who will be making the decision about the outcome, and particularly the distinction between ultimate decision by a judge or a jury. Different things will matter to those two audiences. Judges are former lawyers who typically have seen hundreds or thousands of other lawyers and cases work their way through their courtrooms, and thus are likely to have well-developed abilities to distinguish between the merits of a case and the quality of its presentation. Jurors tend to be highly inexperienced in the job of finding facts and applying law to them, and so are more likely to be influenced by perceived surrogates of merit in a case: the earnestness of the lawyer and the plausibility of his manner, or his capacity to entertain and endear himself to the jury. This creates a potentially powerful source of self-serving bias on the lawyer's part. He may overestimate the likely success of his claim if success depends on charming or otherwise impressing the jury, for he is likely to overestimate the extent of his charm and impressiveness. Those are characteristics that are hard to measure objectively, and especially hard to measure in oneself. The incentive to overestimate them is large, since most people are happier when they are convinced that others find them charming and impressive than they are when they think others find them unappealing. And it is

not just a question of appeal. Jury trials also depend on the ability of lawyers to make clever strategic decisions about which members of the venire to allow onto the jury and which to send home. Many trial lawyers take pride in their skill at making these judgments, but the extent of the skill is difficult to verify.[57] A lawyer's confidence in his practice of such a black art is another aspect of his ability difficult to anchor in objective evidence, and so is another fertile ground for self-serving bias.

The general point of this discussion is that entrants in beauty contests are likely to be hindered by self-serving biases in predicting the outcome. Jury trials bear a closer resemblance to beauty contests than do trials before a judge. We therefore would expect cases headed to a jury to be harder to settle[58] — not only because the jury is less predictable (a problem for which lawyers still ought to be able to account in their calculations), but because the prospect of a decision by a group of easily-buffaloed laymen is more likely to provoke exaggerated perceptions by the lawyers of their ability to win. The United States is unusual among advanced countries in providing jury trials to resolve most civil disputes, and here we can add another entry in the accounting of costs the practice creates.

3. The Costs of Structural Solutions

We have surveyed some structural solutions of both the substantive and procedural variety. What they tend to have in common, we find, is costliness. Agencies must be created to screen claims, and this is expensive in a conventional sense. Efforts to narrow legal rules to make them less likely to provoke bias create costs of other kinds; the clear rules favored by such an approach reduce the costs of bias but generate other error costs. Racial and other hiring quotas can, by creating objective criteria of success, reduce the danger of self-serving bias by either side in judging whether invidious attitudes played a role in an employment decision, but they may require the hiring of people who would not have been hired if no bias of any sort had been in the picture. This risk is costly in itself, and it can trigger another round of additional costs in the

---

[57] *See* STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 53-83 (1994) (relating skill used in choosing jury and difficulty in determining outcome).

[58] For some empirical evidence supporting this hypothesis, see Robert J. Aalberts & Lorne Seidman, *Seeking a "Safe Harbor": The Viability of Summary Judgment in Post-*Harris *Sexual Harassment Litigation*, 20 S. ILL. U. L.J. 223, 228 n.38 (1996); Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 816, 827-48 (2000).

creation of fresh occasions for bias: whoever was not hired becomes convinced it was because of the quota, and resents it; whoever was hired may worry that it was only because of the quota — possibly instances of pessimism, but that is a story for another day.

E. Some Notes on Civil Liability

The focus of this Essay has been the management of self-serving bias within the litigation process, but the analysis also has implications for the use of liability rules to regulate primary conduct. Brief consideration of its application to problems of tort liability for negligence will be suggestive of the possibilities. Assume a world in which most people exaggerate their own skill and likely good fortune a bit, and thus tend to underestimate their chances of getting into accidents. They will not be as careful as they should be. To state the point in the terms suggested by Judge Hand,[59] self-serving bias will cause their estimates of the likelihood of an accident (P) to be inaccurately low; when that likelihood is multiplied by the cost of the accident (L — and while this could be underestimated as well, let us assume for the sake of simplicity that perceptions of this are accurate), the resulting expected accident cost will be inaccurately low as well. As a result they will underinvest in precautions (B).

One possible reply to such a problem would be to increase the size of tort damages. This is the response the law makes in other situations where actors reckon their likelihood of liability too low, usually because they are engaged in wrongdoing that is hard to detect; thus punitive damages are thought to be justified for intentional torts that are only detected from time to time, the better to ensure that the expected cost of committing the tort exceeds the benefits.[60] The same logic could be used to enhance damage awards routinely: it would help offset peoples' optimism. The appeal of such enhanced damages collapses, however, upon the introduction of various worldly complications.

The first difficulty is that we know too little about the extent and distribution of self-serving biases in various settings to be able to calibrate an offsetting penalty for them.[61] It is one thing to create

---

[59] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[60] *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 241 (5th ed. 1998).

[61] *See* Eric A. Posner, *Probability Errors: Some Positive and Normative Implications for Tort and Contract Law* 18 (U. Chi. L. & Econ., Olin Working Paper No. 161, 2002) *at* http://ssrn.com/abstract=332623 (stating that "when one tries to operationalize the insights of cognitive psychology, and make them usable for law and economics, one must

structural incentives for people to think more accurately about the likelihood that their behavior will create costs for themselves or for others, whether through excessive litigation or through the taking of insufficient precautions against accidents. It is quite another to assess a particular monetary penalty meant to offset the inaccuracies in their thinking. If such penalties are set too high they will induce too many precautions and thus generate waste of a different sort. In principle this also is a risk of the structural responses to self-serving biases we already have considered. Sometimes they may create more costs than they save; maybe for some parties Rule 68, or norms that require people to do their litigating through lawyers, do more harm than good. But many of those measures are mitigated by a certain self-regulating quality: they are the subject of contracts that can be jiggered to suit the occasion, or they just require a party to internalize certain risks that they otherwise might not take seriously enough. Enhanced damage awards would have to be fixed in advance on the basis of an abstract and rather wild guess about the extent of the bias it is meant to offset. It would be a blunderbuss response.

A related difficulty is that self-serving bias is unlikely to be distributed evenly among potential tortfeasors. Corporate and institutional defendants who repeatedly encounter the same risks have strong reason to invest in accurate estimates of their probability of causing accidents — unlike the individual who may cause significant accidental harm once or twice in his life, if ever.[62] The corporate defendant that accurately estimates its likelihood of causing accidents nevertheless is threatened with enhanced damages — damages, in other words, to offset a bias this particular defendant does not have. It will make extra expenditures on precautions to avoid these higher accident costs, and these expenditures will be a deadweight loss (as well as a windfall to the eventual plaintiff).

Speaking of eventual plaintiffs, the use of enhanced damages becomes even more problematic in "bilateral" settings calling for joint care — precautions by potential victims as well as potential tortfeasors. Both may labor under self-serving biases that cause them to use too little care. If so, however, the implication is that the tortfeasor's damages should be increased while the victim's should be *decreased*. Perhaps the result is a

---

make certain specific assumptions about the shape of probability functions, and terms like 'optimism' are too vague to be of help").

[62] *See* Jolls et al., *supra* note 1, at 1525 (arguing that "defendant overoptimism is likely to be a much smaller factor for firms than for individual defendants, since firms that make systematic errors in judgment will be at a competitive disadvantage. And for individuals, the role of overoptimism is likely to vary significantly with context.").

wash, amounting to offsetting penalties: unmodified damages should be awarded after all. Or maybe not; it could be that people are more likely to make mistakes in estimating their likelihood of doing harm than they are in estimating their likelihood of avoiding harm threatened by others. But this is another conjecture with no empirical foundation as yet.

Enhanced damages to offset optimism can be viewed as a type of personal antidote to self-serving bias. The threat of a larger damage award may not be meant to get actors to shake off their biases. Indeed, the enhancements would *assume* the existence of bias and would become harmful overkill if the bias were overcome. Instead, the threat of increased damages would be meant to force actors to think more accurately about the expected costs of their behavior. But here, as before, there also are structural solutions that hold more promise and that the legal system already has developed. They involve attempts to redistribute some of the influence over decisions about care from biased actors to others more likely to perceive the relevant risks clearly. The following three examples illustrate the range of solutions and some possible difficulties with them as well.

First, insurance companies assess risks more accurately than many of their clients do. We saw earlier one situation where this comparative advantage is exploited: the case where the insurer retains control over litigation involving the rights of the insured. But of course the same dynamic also arises before any cause for litigation has arisen. Insurers make actuarial judgments about a policyholder's likelihood of causing accidents. Those judgments are expressed in the price of the resulting premiums — and in adjustments of them when the insured takes various precautions or evidences an unusual propensity to cause accidents. Thus insurers offer discounts to homeowners who install alarm systems or fire extinguishers; to drivers with good accident records and who buy cars with low theft rates, automatic seat belts, and other safety equipment; and to buyers of life insurance who don't smoke or engage in other risky activities. Self-serving bias, as well as other limitations on knowledge or cognition, may prevent the insureds in any of these cases from fully appreciating the significance of those precautions. It doesn't matter. They need only appreciate the effect of the precautions on the cost of their policies.[63]

Second, the doctrine of respondeat superior generally causes employers to be held strictly liable for torts caused by the negligence of

---

[63] For discussion, see Howard Kunreuther, *Limited Knowledge and Insurance Protection*, 24 PUB. POL'Y 227, 235-44 (1976).

their employees.[64] The doctrine serves many purposes. It increases the likelihood that victims of an employee's torts will receive compensation and (as a result) provides employers with an incentive to select, train, and equip their employees carefully. These latter incentives force an employer to act in some of the same ways an insurance company would, making impersonal assessments of risks and precautions — and perhaps even hiring professional risk managers — rather than leaving those judgments to the front-line actors whose own behavior is in question and who are more likely to be afflicted by self-serving and other biases.

Third, the prospect of perceptual biases on the part of front-line actors has become a popular rationale for government regulation of their activities.[65] Also increasingly common is the rejoinder that the regulators may be subject to similar biases of their own.[66] To this literature I would only add that self-serving bias in particular seems likely to be a greater danger for government regulators than it would be for insurance executives. The latter have financial incentives to be accurate. Public regulators do not, and so have greater leeway to indulge the pleasing belief that they appreciate risks more accurately than the public does. Often they may, of course; but they suffer no competitive or other economic harm if they are mistaken or if they exaggerate the superiority of their perceptions — and such exaggerations may indeed redound to the benefit of their makers by leading to enlargements of their budgets and jurisdiction.

CONCLUSIONS

Legal scholars recently have been turning their attention to behavioral psychology and to the discrepancies it reveals between the cognition of *homo economicus* and real legal actors. It may seem natural to respond to those discrepancies with proposals to help the law better account for them and address any inefficiencies they may create. This is especially true in the case of the discrepancy known as self-serving bias; for "bias" has inevitable overtones of invidiousness, and nobody wants to think of their perceptions or behavior as self-serving. This paper nevertheless

---

[64] *See* DAN B. DOBBS, THE LAW OF TORTS §§ 333-36 (2000).

[65] *See, e.g.*, STEPHEN G. BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 55-81 (1993).

[66] *See* Jolls et al., *supra* note 1, at 1543-44 (stating that "there is no necessary reason to think that government officials are, by virtue of their offices, able to avoid overoptimism"); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1572 (1998).

has argued for caution in venturing such condemnation or spending resources to do anything new about it. Self-serving bias can indeed be a serious threat to good judgment and raise costs for all parties to a dispute. But it turns out to be an old and familiar problem to the law; indeed, it is possible to view many features of the American legal system precisely as responses to the threat of such biases and attempts to contain them — but with sensitivity at the same time to the fact that investment in such efforts can reach a point of diminishing returns. Getting rid of self-serving bias is expensive in several different senses, so there is an optimal amount of it that we are best off tolerating. For all we know, the current extent of the problem may be close to that optimal level.

A more general lesson of the inquiry is that we should pause before trying to reform the law to account for the new learning of psychologists and economists about human tendencies to depart from the rational actor model that dominates classical economic theories. I say we should pause, not desist; for there unquestionably are areas where the researches of behavioral psychologists and others have produced findings about cognition that do seem to provide clear support for legal reforms.[67] I mean only to offer a reminder that what theorists regard as new learning may be old learning to the law. Our legal institutions represent gradual responses to the practical challenges of managing conflicts. Of necessity they often evidence a keen appreciation of human nature and the costs and benefits of accounting for its vagaries. The law may in particular have evolved with greater sensitivity to irrationality than have our leading economic models, so when a shortcoming of that sort is discovered in economic theory it should not hastily be thought to imply a shortcoming in the law that requires an improved remedy.

---

[67] For good examples, though not ones that involve self-serving biases, see generally CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE (2002); William Meadow & Cass R. Sunstein, *Statistics, Not Experts*, 51 DUKE L.J. 629 (2001).

***