1. Weber seems to see a progression as to the types of law from formally irrational to substantively irrational to substantively rational to formally rational.
   a. He saw this rationality in law as part of the whole project of rationality in Western systems that allowed the rise of capitalism and material progress.
   b. The key point is that individuals are free from arbitrariness and can plan with some certainty that law will not undercut their ventures and will support them.
      1. The 2 kinds of irrational systems make planning difficult unless they are a sham and hidden behind revelation and magic are real predictable patterns—we who count can count on the high priests.
      2. Weber finds substantive rationality too uncertain for capitalism; there is a demand for real formal rules with answers. Thus, we get classic continental European law.

2. Does his theory play out empirically?
   a. He faced his "England" problem: Great Britain was a successful capitalism imperialist nation that exported its legal system. However, it had the common law which, at best, was a poor version of formal rationality mixed with a lot of substantive rationality.
      1. Sterling and Moore suggest that the English system produced predictable results because "the courts favored capitalists in their use of precedent and denied justice to the lower classes." n&q5, pp. 196-200
      2. To make capitalism work, how predictable must law be? Is a substantively rational system chaos? S & M suggest that standards can communicate rules of the game. We know the external values being pursued and we know the judges—then we make probabilistic judgments about how much risk we want to take.
   b. Look at the U.C.C. in the U.S. Are we lost in substantive rationality? Would the U.S. economy be different if we had formal rationality—a series of bright line rules? Note that the U.C.C. is a reform away from formal bright line rules.
      1. Back to Macaulay in the last Chpt. When does K law play what role?
      2. Key thing is getting the expected performance. That's what must be

At least in the United States, formally-rational law was developed from within a court-centered system which relied on analogies and precedents, rather than statutory rules as a basis for its "rationalization." In this configuration, codified law was
Soviet Union move toward capitalism, they lack a western legal system to support Ks and
to regulate transactions. USAID and Forbes call for the “rule of law.”
A. How do transactions take place?
   (1) Barter and swaps.
   (2) Long-term continuing relationships where I will need you tomorrow and so
5. Does a Western legal system affect cultures based on communal organization? See Matsuda on pp. 201-204. She sees the legal system wrecking traditional Hawaiian ways, but she sees the Hawaiians flocking to it. Why? Not everyone liked the old hierarchy and traditional duties or their place in the scheme of things.

6. Note Galanter on "modern legal systems." [pp. 204-206]
   A. Isn’t this saying that a modern system is one like Western Europe, the USA or Canada? But cf. Winn and the others who study the success of the 5 Dragons--Taiwan, Korea, Singapore, Hong Kong and ?
   B. If we read the statutes and constitution of Peru, wouldn’t it come close to the picture painted by Galanter?
      (1) Is it enough to have a modern legal system on the books? Cf. the paper at the Lima conference on the tort system when most people don’t have the money to pay judgments and few carry insurance.
      (2) Add the institutions of bribery and preferential treatment to those whose families count.
New technology \rightarrow New solution

Side effects

Who bargains? When?

Long term bargaining for a legal solution

Workers Compensation

Common law incrementalism

Recognition of a problem

Boundaries of possible perceptions and solutions
- Great people?
- Cultural lag?
- Cross cultural borrowing?
- Taught tradition of lawyers?
- Tides of opinion and the struggle for sense?
"Relative autonomy"

- Dominant class
  - faction #1
  - faction #2
  - faction #3

- The "rule of law" and the judiciary
- The State
- The political system
- The police
- Repression ("worker bashing")

Unstable alliance

Mystification

Dominated classes
- faction #1
- faction #2
- faction #3
On a typically harried morning, the 53-year-old lawyer juggles conference calls coordinating antitrust litigation against Microsoft Corp. and the vitamin industry, as well as a $5.2 billion settlement he helped negotiate on behalf of people enslaved 60 years ago by the Nazis and major German corporations. "It's a little crazy around here," he apologizes, cheerfully.

Some observers think his frenetic activities are crazy in another sense. "It's something new, the next stage," says Victor Schwartz, a veteran corporate defense attorney. Sophisticated plaintiffs' lawyers, he continues, "are playing off politics, anticipating the industries that will be vilified, then attacking en masse."

Boxes of bulging loose-leaf notebooks on Mr. Hausfeld's conference table underscore this impression. Expecting growing consumer resentment of HMOs, he began in the early 1990s to gather ammunition for
Corporate gadfly Jeremy Rifkin celebrates what he describes as the evolution of mass litigation into a full-fledged adjunct to lawmakers and regulators. Mr. Rifkin, who more than a year ago pushed Mr. Hausfeld to sue over genetically modified crops, speaks of the lawyer as an interest-group leader might speak of his Capitol Hill lobbyist. "Michael is a Jewish
that judges lack the expertise to superintend entire industries and that cases are settled without a close look at the fate of alleged victims.

Mr. Hausfeld embodies the litigation society. Heavily influenced by accounts of the Holocaust he heard growing up in a left-leaning Jewish family in Brooklyn, he has...
attorneys, he argues, makers of guns or cigarettes wouldn't come to the bargaining table.

Although he personally takes home more than $1 million in good years, Mr. Hausfeld is far from the nation's wealthiest or best-known plaintiff's lawyer. The class description to be counted as part of the class, unless they explicitly withdrew. That greatly multiplied the potential liability of corporate defendants. State courts soon followed the federal lead, and the enactment of new consumer rights statutes in
says Mr. Hausfeld. One example was industrial pollution.

The Hausfeld firm was one of dozens that assailed Exxon, now part of Exxon Mobil Corp., after the Exxon Valdez tanker ran aground in Alaska's Prince William Sound in 1989, spilling 11 million gallons of oil. "You had the usual entourage of ambulance chasers and a total mess," says David Oesting, a commercial litigator in Anchorage who usually defends companies. The Hausfeld firm landed as clients a group of 5,400 action against pressure on corporate defendants to settle before trial and pay healthy legal fees. Even among skeptics of large lawyer payouts, however, CMH&T's reputation is generally good," says Brian Wolfman, an attorney with Public Citizen Litigation Group, a pro-consumer firm that regularly intervenes in class actions to try to reduce legal fees.

Mr. Hausfeld blames greedy rivals for tarnishing the reputation of the plaintiffs' bar. He says he deplores the
million in fees -- more than $1.5 million of which went to CMH&T. Mr. Hausfeld says that many of the coupons were collected by companies that were plaintiffs and whose employees travel frequently, putting the discounts to good use. But he says his firm hasn't done another coupon settlement since.

A source of great pride -- but also internal strain -- at the Hausfeld firm is his work on behalf of Holocaust victims. For decades, the German government and major German companies, including some affiliated with U.S. American lawyers like Mr. Hausfeld.

In 1998, the case against the Swiss banks was settled for $1.25 billion. Last month, the separate forced-labor case was settled for another $5.2 billion. There has been intense and highly visible feuding among some of the American lawyers, largely over how much they should be paid. Mr. Hausfeld notes that even though his firm worked for three years on the Swiss banks case-hiring a dozen researchers to pore over archival documents—he made it clear from the outset that...
years, as little as $200,000, which is what senior associates receive at the premier corporate firms.

In 1998, CMS&H was borrowing heavily to finance the Holocaust litigation and other cases. After tense internal debate, Mr. Hausfeld agreed to represent the victims, despite the large sum of fees. Mr. Toll acknowledges regret. "We could have done a lot" with a slice of the tobacco money, Mr. Hausfeld says.

Missing the tobacco fight made Mr. Hausfeld all the more determined to get involved in
His collection of loose-leaf notebooks serves a dual purpose: holding course material for law-school teaching he has done and charting potential courtroom targets. As managed health care expanded in the early 1990s, the volume on HMOs swelled. Congress, in his view, has failed to protect patients’ rights. Late last year, he and a cadre of class-action lawyers launched mass suits against major HMOs. A CMH&T suit filed in federal court in Miami alleges that Humana Inc. has defrauded millions of people by concealing the financial criteria used in coverage decisions. (Humana spokesman Tom Noland calls the suit “groundless,” adding that the company makes numerous disclosures to regulatory bodies and members.)

Mr. Schwartz, the corporate defense attorney, says that mass lawsuits against entire industries, such as health care, make a mockery of legislators, who for years have been struggling over HMO regulation. Leave it to Congress, he says.

But deferring to Congress doesn't always work for corporate advocates. Mr. Schwartz, a partner with the Washington firm Crowell & Moring, has made a good living for many years, lobbying lawmakers on behalf of business interests who want to rein in the plaintiffs’ bar. Some restrictions on securities litigation were enacted in 1995, but beyond that, Congress has generally allowed plaintiffs' lawyers to roam free.

In the future, Mr. Hausfeld predicts, the plaintiffs' bar won't wait to attack until after Congress gets bogged down in controversies such as those over cigarettes, guns or HMOs. He offers his class-action suit against Monsanto as a model.

In the winter of 1998, long before popular anxiety over genetically modified crops migrated from Europe to the U.S., a mutual acquaintance arranged for Mr. Hausfeld to have lunch with Mr. Rifkin, the anti-bioengineering activist. Their discussion blossomed 18 months later into the lawsuit filed against the St. Louis-based food and pharmaceuticals giant in December. In the suit, a group of farmers accuse the company of failing to adequately test the safety of genetically modified corn and soybean plants and of trying to monopolize how staple crops are grown. Nine other plaintiffs' firms are backing CMH&T in the case, which Mr. Rifkin predicts will become a centerpiece in a campaign to
roll back the widespread U.S. planting of genetically modified crops.

Monsanto denies wrongdoing and predicts the suit will be thrown out. The Wall Street Journal's editorial page used the case as an occasion to brand Mr. Hausfeld a "corporate shakedown artist."

The epithet irritated him a little, he says. But then, he says, he decided that the notice signals that he has truly arrived.
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Wednesday, January 5, 2000

Letters to the Editor: Strong
Feelings About Lawsuits

Who says you have to suffer
an injury in order to collect
damages in a lawsuit? Beaumont
attorney Wayne Reaud avoided
that obstacle in his
successful $2.1 billion
settlement against laptop
giant Toshiba. ("Beaumont's
Wayne Reaud Takes New Tack on
Torts," Dec. 15.)

While the charge of
producing a flawed floppy-disk
controller sounds serious,
here is the oddity: No
consumer has ever claimed any
actual harm.

It takes such an extreme
situation for the flaw to show
itself that one wonders if any
users ever experienced data
loss. Besides, laptop owners
rarely use their floppy drives
to store data, preferring
instead the more-reliable
modern transmission of files.

And, unlike the
more-traditional class-action
lawsuits, not even the two
named plaintiffs, or "national
representatives" as they are
called, had to experience the
problem in question.

It reminds me of the lawyer
spoof from "Saturday Night
Live": "Let us help you
collect the money that you
didn't even know you were
entitled to."

No reported customer
complaints, no proof of harm,
yet five million Toshiba
laptop owners will soon be
lining up for their cash
rebates, coupons and software
fix. The two named plaintiffs
receive $25,000 each. For
their part, the trial team
from Beaumont pockets a
handsome $147 million.

Toshiba, meanwhile takes a
$1 billion charge-off, an
immediate downgrading of its
credit rating and a slippage
in its share price.

Requiring a public notice or
a product recall would have
made more sense for consumers;
but then again, it wouldn't
have produced hundreds of
millions for lawyers.

Cora Sue Mach
Executive Vice President
Mach Industrial Group
Texas Civil Justice League lobbyist George S. Christian was probably being disingenuous when he professed ignorance about the "social benefit" of suing unruly corporations.

Still, the corporate lobby does need schooling. Mr. Christian’s quote appeared in an article discussing lawsuits filed against:

-- Oil companies (the League’s founders) that exposed workers to asbestos;

-- Companies that lied about the addictiveness of tobacco and marketed it to kids;

-- A nursing home responsible for the death of an Alzheimer’s patient;

and

-- A company that knowingly sold a computer that corrupted data.

The social benefits of these lawsuits are elementary: Companies that harmed workers or consumers got punished; victims got compensated; and society sent a deterring message to other would-be wrongdoers.

Craig L. McDonald
Director
Texans for Public Justice
Austin
The Wall Street Journal
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Tuesday, January 4, 2000

Technology & Health

Toshiba Explains Accord as Other PC Firms Study Suits

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Questions on Chip Flaw Affect H-P, Packard Bell, Compaq and eMachines

By David P. Hamilton and Robert A. Guth

Staff Reporters of The Wall Street Journal

When Toshiba Corp. settled a personal-computer-related lawsuit for $2.1 billion in October, it left a lasting mystery: Why did the Japanese giant surrender without a court fight and on such relatively generous terms? class-action lawsuits. If the Toshiba case is any indication, the potential cost of these cases could be considerable. Only Compaq has announced its intention to fight; the others have for the most part declined to comment.

The threat of increased legal scrutiny is unnerving to the fast-moving, $189 billion-a-year PC industry, which tolerates a far higher degree of imperfection than many other consumer industries. PC officials, in fact, often argue that because the hardware and software components of PCs evolve so quickly, and are produced by such a large array of suppliers, it is almost inevitable that PCs are prone to unexplained lockups, mystifying bugs and unexpected crashes.

At the heart of the Toshiba matter is a technical flaw in a PC chip known as a floppy-disk controller, one that under certain circumstances could damage or destroy data stored on floppy disks.
What may have made Toshiba particularly vulnerable to the suit, however, is the fact that in addition to making notebook computers that exhibited the data-corruption problem, it also produced the defective floppy-disk controllers as well -- chips it has supplied to other PC makers for years. What is more, some Toshiba engineers had been aware of the problem in its chips for more than a decade, an individual close to the company says, but declined to fix it because they considered the likelihood of data-damaging errors remote. A Toshiba spokesman declined to comment.

The floppy-disk bug was first uncovered in late 1986 by Phillip Adams, then an engineer at International Business Machines Corp., who noted that under certain circumstances floppy-controller chips made by NEC Corp. of Japan could damage data stored on floppy disks. Intel Corp., which had licensed the floppy-disk controller chip design from NEC, also produced a chip that exhibited the problem.

Even then, the companies say, the problem was difficult to detect, since it didn't result in data loss except in unusual situations, such as when two programs attempted to use the floppy disk drive at the same time. Such conditions could prompt a common data-writing error known as an overrun. The defective chips, however, failed to detect the error and prevent the accidental destruction of existing data.

Both NEC and Intel fixed the problem in subsequent generations of chips released within a few years, and in 1990 and 1991 NEC even ran eye-catching ads warning of the problem and urging PC makers to switch to its newer chips. Neither NEC nor Intel ever received any complaints about data loss related to the controller problem, the companies say.

But the problem wasn't restricted to NEC and Intel chips. A few years earlier, Toshiba semiconductor engineers had reverse-engineered the NEC chip. When NEC found out, the two companies huddled in negotiations that eventually led to a "nonassertion agreement" in 1986. Under its terms, Toshiba agreed to make royalty payments to NEC but acknowledged no wrongdoing. Toshiba continued to produce its controller chip.

NEC Chairman Hajime Sasaki, who previously ran the company's semiconductor division, says NEC informed
Toshiba of the floppy-disk controller bug once it learned of it. Toshiba, however, took no action, and the bug was apparently forgotten. A Toshiba spokesman declined to comment.

From the moment the suit was filed last February, however, Toshiba officials in Tokyo monitored it closely. Their first step was to commission internal studies at Toshiba's PC factory in Tokyo in an attempt to re-create the data problems, efforts that were initially unsuccessful.

But matters soon took a turn for the worse. The first shock came when Toshiba officials realized one of the plaintiffs' attorneys was Wayne Reaud, a key figure in successful class-action lawsuits involving asbestos and tobacco. Heightening Toshiba's concerns was the fact that the suit had been filed in federal court in the Eastern District of Texas, an area renowned for jurors hostile to large corporations and even less friendly to foreign concerns.

"If you study class-action cases in the past, especially in Beaumont, we were in a terrible position," one Toshiba official says.

Toshiba's management had taken heart from the fact that the company would defend the suit alongside its crosstown rival NEC, which had also been named as a defendant. But in August, NEC was dropped from the suit after it demonstrated it had fixed the problem years earlier. At roughly the same time, a consulting firm hired by Toshiba's U.S. lawyers finally succeeded in duplicating the data error on Toshiba notebook computers, although only under rare conditions. Still, it was anything but good news.

As expected court proceedings in November drew near, tension ran high within Toshiba. Officials feared that an adverse verdict might require Toshiba to refund the average value of five million notebook PCs, at least $9 billion. And with the judge pressing the sides to come to terms, Toshiba officials gritted their teeth and recommended that President Taizo Nishimuro settle the case.

"Initially, I wanted to go to trial," Mr. Nishimuro says. "Unfortunately, the lawyers said that there is close to a 100% chance that we would lose." In the end, Toshiba officials decided it was safer to swallow the settlement than risk a fight that might drag on for years, cost them billions of dollars and taint the Toshiba brand.
and Intel, but was fixed within a few years. Toshiba also used the original NEC design for its own chips, apparently allowing the flaw to persist until now. -- Where it is now: Lawyers for the class-action plaintiffs say the bug is present in PCs from Toshiba, Compaq, eMachines, Hewlett-Packard and Packard Bell NEC. -- How serious it is: The $2.1 billion question. Plaintiffs' lawyers insist the bug is extremely hazardous, given that it could corrupt sensitive data, but so far haven't offered any public proof of actual harm.