A FEW INCONVENIENT TRUTHS ABOUT MICHAEL CRICHTON'S *STATE OF FEAR*: LAWYERS, CAUSES AND SCIENCE

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"Art rediscovers, generation by generation, what is necessary to humanness."

John Gardner, On Moral Fiction[1]

"It ain't what you don't know that gets you into trouble. It's what you know for sure that just ain't so."

Mark Twain
Cited in
Al Gore, An Inconvenient Truth[2]

Although Crichton has lost the battle regarding global warming, his characterization of lawyers and law practice remains unchallenged. This article challenges his damning portrait of lawyers as know-nothing, self-aggrandizing manipulators of various social and environmental causes. A more nuanced examination of "cause lawyering" reveals that lawyers are not part of a vast conspiracy to grab power through the causes for which many work; in fact, the rules of professional responsibility as well as the structure of "cause lawyering" limit their power and influence. Regardless, lawyers are nonetheless vital, and generally principled, participants in the debates and causes that inform environmental (and other scientific) policy-making in a

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1. JOHN GARDNER, ON MORAL FICTION, 6 (Basic Books 2000) (1978).
2. AL GORE, AN INCONVENIENT TRUTH, 21 (Rodale Books 2006).

democratic society.

INTRODUCTION

State of Fear,[3] Michael Crichton's controversial and very ponderous novel, is about global warming. More accurately, the novel is a foil for Crichton's argument that the assumption that global warming exists and has been caused by human behaviors is questionable, at best. This article, on the other hand, is about lawyers; global warming is secondary. How are they connected? In this techno-thriller, the plot is advanced through the actions of four characters, all lawyers. Each character illustrates different visions of legal practice that are the focus of this article.

A well-known writer of techno-thrillers that frequently become movies, and the creator of *ER*[4], Crichton was more than an author. Prior to beginning his writing career,

3. MICHAEL CRICHTON, STATE OF FEAR (Harper Collins 2004) [hereinafter CRICHTON, FEAR].

4. *ER* (NBC 1994-2009).

Crichton was educated as a doctor,[5] and was comfortable in the world of science. The general focus of his œuvre has been man's hubris in believing that he can control nature through the use of scientific knowledge. Until *State of Fear*, the focus of his numerous books and movies had largely been on scientists, and science gone amok.[6] But in this book, he turned his attention to how the combination of law, science and media influence public opinion and policy initiatives on global warming.[7] What he found there was not to his liking.

Crichton's influence on popular culture and related political debates is not a trivial matter. For over twenty years, Crichton's novels and commentary have shaped American public opinion on topics as diverse as genetic engineering, sexual harassment, and medical practice.[8] Everyone who saw or read *Jurassic Park*[9] imbibed the dangers of entrepreneurial science. Crichton was helpful to former President Bush in shaping his message that the danger of climate change was exaggerated.[10] For a writer of "thrillers," Crichton, who had also testified before Congress,[11]

5. *See* Crichton Biography, http://www.crichton-official.com/aboutmc/biography.html (last visited Jan. 31, 2006). Crichton posted this biography at his website: Born in Chicago, Illinois, October 23, 1942. Educated at Harvard University, Cambridge, Massachusetts, A.B. (summa cum laude) 1964 (Phi Beta Kappa). Henry Russell Shaw Traveling Fellow, 1964-65. Visiting Lecturer in Anthropology at Cambridge University, England, 1965. Graduated Harvard Medical School, M.D. 1969; post-doctoral fellow at the Salk Institute for Biological Sciences, La Jolla, California 1969-1970. Visiting Writer, Massachusetts Institute of Technology, 1988; *Cf.* Crichton Biography, http://www.crichton-official.com/aboutmichaelcrichton-inmemoriam.html (last visited Aug. 7, 2009) (Crichton died on Nov. 4, 2008); *Cf.* Crichton Biography, http://www.crichton-official.com/books.html (last visited Aug. 9, 2009). His website is being maintained posthumously, and two books will be published after this death. *State of Fear*, however, was his penultimate book during his lifetime.

6. *See e.g.* MICHAEL CRICHTON, PREY (Harper 2002); MICHAEL CRICHTON, JURASSIC PARK (Ballantine Books 1990) [herinafter CRICHTON, JURASSIC]; MICHAEL CRICHTON, THE ANDROMEDA STRAIN (Knopf 1969).

7. *See* CRICHTON, FEAR, *supra* note 3, at 572.

8. *See supra* note 6*; See also* MICHAEL CRICHTON, DISCLOSURE (Ballantine Books 1994) [herinafter CRICHTON, DISCLOSURE]; *ER* (NBC 1994-2009); MICHAEL CRICHTON, FIVE PATIENTS (Arrow Books Ltd 1970).

9. CRICHTON, JURASSIC, *supra* note 6; JURASSIC PARK (Universal Pictures 1993).

10. *Cf.* ELIZABETH KOLBERT, FIELD NOTES FROM A CATASTROPHE: MAN, NATURE, AND CLIMATE CHANGE 197 (Bloomsbury 2006) ("A few weeks later, it was revealed that the president had turned to Michael Crichton, whose thriller *State of Fear* portrays climate change as fiction invented by environmentalists, for advice on how to deal with the issue. Bush and Crichton reportedly 'talked for an hour and were in near-total agreement.'").

11. *See infra* note 19.

had amassed incredible influence as the voice of science and reason.

Although Crichton had written about lawyers,[12] *State of Fear* represents his longest exposition, through the characters of three lawyers, on the effect that lawyers have on science, science policy, and public opinion.[13] This article focuses on the claims Crichton makes about lawyers through these characters. The three lawyers through which he makes his claim are Peter Evans, an associate at a Los Angeles law firm; Nicholas Drake, a former litigator now head of National Environmental Research Fund (NERF); and Richard Kenner, a man of action who holds both a J.D. and a Ph.D.[14]

Through these characters, Crichton makes claims about lawyers, and lawyering. The characters express models of legal behavior as lawyers mediate the discussions a democratic society must hold regarding science, policy and law. First, he claims that lawyers know nothing about science or the scientific method, nor are they inclined to learn anything about it. The implication is that, given a lawyer's central role in policy-making and litigation about science, this is dangerous to society. In his view, truth is held hostage to dispute resolution because of the adversary tradition.[15] Second, some public interest organizations, here illustrated by NERF, have been captured by lawyers to be run as platforms for pursuing socially disruptive litigation. This use of lawyers in the novel suggests that matters are pursued, regardless of its merit, for the sheer enjoyment litigation, rather than to promote the cause itself.[16] Finally, lawyers, aided by politicians and the media, are complicit in creating the "state of fear" from which the book takes its title.[17] This has promoted a "near-hysterical preoccupation with safety,"

12. *See* CRICHTON, JURASSIC, *supra* note 6 (The lawyer here is portrayed as a risk averse character whose job it is to ensure the safe profitability of Jurassic Park. Although the scene does not appear in the book, most movie goers cheered when the lawyer was plucked off of a toilet and eaten by a tyrannosaurus rex); *See also* CRICHTON, DISCLOSURE, *supra* note 8 (Male executive retains a lawyer to fight allegations of sexual harassment).

13. *See* CRICHTON, FEAR, *supra* note 3.

14. Jennifer Haynes, a lawyer who infiltrates the NERF litigation staff and is niece to Kenner, plays a minor role here. Crichton tends not to develop female characters in his novels, and the same is true here.

15. CRICHTON, FEAR, *supra* note 3, at 92-93.

16. *Id*. at 128.

17. *Id*. at 454-456.

and the state uses this "fear" to exert social control.[18]

Crichton does not advance these claims lightly. As a quick perusal of his website suggests, these claims were his personal cause.[19] Taking the claims seriously, this essay asks whether each claim is true; if it is not true, then what is the correct account, and finally, what should be done after analyzing these claims. Although made in the guise of a novel, these claims are taken, and should be taken, seriously.[20] As we have moved from a common-law tradition to a regulatory state, lawyers' involvement in both the design of policy and challenges to it has grown exponentially. Many of these policies are based on scientific findings. Questions about science and its impact are raised in courts, legislatures and administrative agencies.[21] The quality or soundness of the relationship between law and science profoundly affects the legitimacy of the legal enterprise in a knowledge-based democratic society. This novel raises important issues about the role of law and lawyers in debates about social policy and risk in a deliberative democracy.[22]

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18. *Id.*

19. Crichton had an official website: http://www.crichton-official.com/. He had given several speeches on this topic: *e.g.,* Michael Crichton, Speech at the Washington Center for Complexity and Public Policy: Complexity Theory and Environmental Management (Nov. 6, 2005) (available at http://www.crichton-official.com/speech-complexity.html); Michael Crichton, Testimony Before the United States Senate, Committee on Environment and Public Works (September 28, 2005) (transcript available at http://www.crichton-official.com/speech-senatetestimony.html); and Michael Crichton, Speech before the Joint Session AEI-Brookings Institution: Science Policy in the 21st Century (January 25, 2005) (available at http://www.crichton-official.com/speech-sciencepolicy.html).

20. *State of Fear* was widely reviewed, although largely in reference to its claims about global warming. *See, e.g.,* Michiko Kakutani, *Beware! Tree-Huggers Plot Evil to Save World*, N.Y. TIMES, Dec. 13, 2004, *available at* http://www.nytimes.com/2004/12/13/books/13kaku.html?ex=1159675200&en=6492b2e9b274af9c&ei=5070. On the other hand, at least one reviewer stated that the book should be taken seriously: "The whole scenario is outlandish even by Crichtonian standards, but, when you think about it, there really isn't much choice. What *State of Fear* demonstrates is how hard it is to construct a narrative that would actually justify current American policy. In this way, albeit unintentionally, Crichton has written a book that deserves to be taken seriously." Elizabeth Kolbert, *Getting Warmer*, NEW YORKER, Jan. 3, 2005, at 22.

21. *See e.g.*, ROGER A. PIELKE, THE HONEST BROKER: MAKING SENSE OF SCIENCE IN POLICY AND POLITICS (Cambridge Univ. Press 2007).

22. *See* Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 11 AM. B. FOUND. RES. J. 281 (1986) (After noting that lawyers are "America's preeminently *political* profession," Chase states: "[V]ery little has been written (by lawyers, law professors, or social scientists) on the images

After outlining the plot of the novel, this article will fully describe the three claims that Crichton makes about lawyers. Following each claim will be a response considering whether the claim accurately describes lawyers and legal practice. Each response will center on one or two voices in the scholarly community that have focused on the issues raised by each claim.[23] While there are obviously many other sources of criticism, my goal here is to expose counterpoints to each of Crichton's claims.[24]

I. THE NOVEL

The plot covers a six-month period of time, roughly from May through October 2004, during which NERF secretly masterminds a plot to manufacture planetary disasters that will be attributed to global warming and severe climate change, thus enhancing NERF's credibility as a cause-based organization.[25] This greater prominence will lead to increased donations to fund its environmental litigation efforts, specifically a lawsuit that has been initiated on behalf of Vanutu, a small Pacific Island that will be inundated as global warming causes ocean levels to rise.[26] A small group of people foil this plan when they uncover the truth about NERF's involvement in creating disasters to improve its image.[27] The author uses this plot to discredit current global warming theories and environmental groups, using footnotes and charts to supplement the narrative. [28]

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that Americans have constructed of law and lawyers as mediated through the institutions of mass culture.").

23. *See* Part II *infra*.

24. This essay does not attempt to refute Crichton's views on global warming. Alternate, and far more accurate, accounts of the problem are available in scientific and popular literature. *See, e.g.*, Elizabeth Kolbert, *The Climate of Man (parts I, II & III)*, NEW YORKER, Apr. 25, 2005, at 56, THE NEW YORKER, May 2, 2005, at 64, NEW YORKER, May 9, 2005, at 52) (These articles were collected into Kolbert's book length treatment in FIELD NOTES FROM A CATASTROPHE, *supra* note 10). A summary of the scientific theory and legal initiatives undertaken appears in Kristin Choo, *Feeling the Heat: The Growing Debate Over Climate Change Takes on Legal Overtones*, 92 A.B.A. J. 28 (2006); *See also* MARK LYNAS, SIX DEGREES: OUR FUTURE ON A HOTTER PLANET (National Geographic Society 2008) (This book graphically demonstrates the consequences of global warming at one degree centigrade intervals).

25. CRICHTON, FEAR, *supra* note 3.

26. *Id.*

27. *Id.*

28. *Id.* It is likely that Crichton was fictionalizing the plight of the Pacific Island

As noted previously, the plot is driven through the actions of three characters: Peter Evans, Nicolas Drake, and Richard Kenner. As one reviewer noted, "the characters in this novel practically come with Post-it notes on their foreheads indicating whether they are good guys or bad guys."[29] Briefly sketched, twenty-eight year old Peter Evans,[30] the every-lawyer, is a junior associate at the Los Angeles firm of Hassle and Black, where he apparently exclusively conducts pro bono litigation in this otherwise corporate firm. Ultimately, he must choose to align himself with either the "bad" lawyer or the "good" one. In contrast, Nicholas Drake, the "bad" lawyer, has been director of NERF for ten years, after retiring from a "highly successful" career as a litigator.[31] Drake is portrayed as a "drama queen" for whom everything is a crisis, important and urgent.[32] Richard Kenner, the "good" lawyer, is introduced as a man of action, almost spy-like in his ability to obtain information and thwart obstacles in his path.[33] He has a J.D. from Harvard, and a Ph.D. in civil engineering from M.I.T.[34] Although obviously the scientific issue driving the plot, global warming also becomes the stage on which the three characters make claims not only about the veracity of global warming, but also about the utility of lawyering.

people of the Carteret Islands, a chain of islands northeast of Papua New Guinea. "[S]ea levels have risen so much that during the annual king tide season, November to March, the roiling ocean blocks he view from one island to the next, and residents stash their possessions in fishing nets strung between the palm trees." Neil MacFarquahr, *Refugees Join List of Climate-Change Issues*, N.Y. TIMES, May 28, 2009, at A4, *available at* http://www.nytimes.com/2009/05/29/world/29refugees.html. Thus, Crichton's fictionalized dilemma is actually devastatingly real. Island people have sought a United Nations resolution linking climate change, mass population migration and national security issues. Typically most climate change debate has been focused on the science rather than international peace and security issues that arise from mass population migration and food shortages. The human rights aspect of climate change was addressed at a *The Law of Climate Change and Human Rights Conference: Three Degrees, the University of Washington School of Law*, *available at* http://www.threedegreesconference.org/ (last visited Aug. 10, 2009) (which is being maintained post-conference for further developments.).

29. Kakutani, *supra* note 20.
30. CRICHTON, FEAR, *supra* note 3, at 40.
31. *Id*.
32. *Id*. at 161.
33. *Id*. at 31.
34. *Id*. at 56.

II. THE CLAIMS ANALYZED

A. Lawyers Willfully Lack knowledge of Science to the Detriment of Policy-making.

1. The Claim

One of Crichton's claims is that lawyers have no knowledge of science. In fact, he claims they are proud of being scientific "know-nothings" who at times, enabled by the adversary system, willfully distort it.[35] Given a lawyer's key role in shaping science policy, in Crichton's world this is a grievous sin. He makes this point through the characters of Peter Evans and Nicholas Drake, and in observations about the adversary system. This matters because "we're in the middle of a war – a global war of information versus disinformation" fought on various battlegrounds: "Newspaper op-eds. Television reports. Scientific journals. Websites, conferences, classrooms – and courtrooms, too, if it comes to that."[36]

From the beginning, lawyers are portrayed as people who, in contrast to scientists, use facts instrumentally. This is illustrated in an exchange between Drake and a scientist, witnessed by Evans, whose work has been sponsored by NERF.[37] The scientist's data shows that Iceland has become colder, and its glaciers have been advancing.[38] Drake tries to persuade the scientist to change the explanation of the data in a way that the scientist feels "twists truth."[39] Drake insists that the corporate disinformation campaigns will seize upon this fact to the implied detriment of environmental groups. The scientist replies, "[h]ow the information is used is not my concern. My concern is to report the truth as best I can."

35. *Id.* at 44, 94,187.

36. *Id.* at 48.

37. *Id.* at 23.

38. *Id.* at 43. A footnote at the bottom of the page accompanies the character dialogue: "*P. Chylek, et al. 2004, 'Global warming and the Greenland ice sheet,' *Climatic Change* 63, 201-21. 'Since 1940 . . . data have undergone predominantly a cooling trend. . . . The Greenland ice sheet and coastal regions are not following the current global warming trend.'" At the very beginning of the novel, Crichton has placed a note that states: "This is a work of fiction. . . .However, references to real people, institutions, and organizations that are documented in footnotes are accurate. Footnotes are real." *Id.* at vii.

39. *Id.*

"'Very noble,' Drake said. 'Perhaps not so practical.'"[40]

Peter Evans later confirms that lawyers have this view of truth and truth telling. When discussing the likelihood of opposing scientific evidence in the Vanutu case, Evans reflects that "[o]ne of the first things you learned in law school was that the law was not about truth. It was about dispute resolution. In the course of resolving a dispute, the truth might or might not emerge. Often it did not. . . . It happened all the time."[41] This likely leads to Crichton's conclusion, in his "Author's Note," that complex system management and policy-making should not be done through litigation, but rather through the political process.[42]

But even more appalling for Crichton is the typical lawyer's lack of, if not outright disdain for, scientific knowledge. Principally through Evans, and to a lesser extent Drake, the novel is a virtual acid rain of a lawyer's contempt for scientific knowledge. From the beginning, Evans is so scientifically inept that he does not understand why NERF is funding so many scientific experts for the Vanutu case until Jennifer Haynes, one of the NERF Vanutu litigators, points out that the focus on data is central to the litigation "because we're trying to win the case."[43] Evans needed to be reminded that in the adversary system, data can be used instrumentally to persuade the fact finder of the "truth" of the legal claim in order to win at trial.

On numerous occasions, Evans is depicted as willfully ignorant of science. Although responsible for assessing the Vanutu litigation for his client, George Morton, Evans does not understand the sea level measurement formula crucial to the litigation.[44] Later, Evans, an environmental lawyer, admits that he is "clueless" about science and that the complexity of it gives him a headache.[45] As he falls under the influence of Kenner, Kenner must take pains to explain simple science ideas to Evans such as the notion of a standing

40. *Id*. at 44.
41. *Id*. at 92-93.
42. *See Id*. at 572.
43. *Id*. at 79.
44. *Id*. at 95.
45. *Id*. at 187-188. This is in contrast to most environmental lawyers in my acquaintance, many of whom have become knowledgeable about the scientific basis of global warming and other environmental problems.

wave, or the significance of error terms in scientific research.[46] As Crichton concludes, when Evans narrowly saves himself from a lightning strike, "[h]e didn't know any science, but assumed it must be something metallic or electronic."[47] Evans is similarly unable to distinguish between good science and bad science, and therefore is not troubled by the anomalies between different data sets and their implications for litigation or other legal pursuits.[48] Ultimately, however, under the careful and patient tutelage of Kenner, Evans is redeemed and comes to appreciate science.[49]

Drake, one of the founding heads of NERF, is equally bereft of scientific knowledge: "[H]e had no science background at all."[50] Crichton's message is that this lack of background, combined with the norms of the adversary tradition, means that lawyers have absolutely no scruples about distorting scientific truth.

2. Another View

On this claim, Crichton does have a valid point. Many lawyers are woefully ignorant of science, statistics and the methods of each discipline. This can be especially

46. *Id*. at 210, 247; *See also id*. at 248, 313, 406. There is also a subtextual argument that lawyers' indifference to science and their commitment to orderly dispute resolution make them wimps. Kenner chides Evans on several occasions for being afraid to use physical force. He chides Evans for being reluctant about fighting back, and Evans replies, "[m]aybe so, but I'm a lawyer." *Id*. at 261. Later, Evans thinks, "[j]ust because I don't shoot guns . . . I'm a lawyer, for Christ's sake." *Id*. at 323. Under the tutelage of Kenner on both science and manliness, Evans overcomes his reluctance to resort to violence, and is then seen as more confident, older, and more mature, particularly by the women around him. *Id*. at 357-359. This also underscores a message that Crichton is trying to make about civilization versus the state of nature. Nature is not something admirable in Crichton's view; rather, civilization saves us from nature be it cannibals or rampaging dinosaurs or tiny microbes. *Id*. at 527. "You think civilization is some horrible, polluting human invention that separates us from the state of nature. But civilization doesn't separate us from nature, Ted. Civilization *protects* us from nature. Because what you see right now, all around you [cannibals]—this *is* nature." *Id*.

47. *Id*. at 336.

48. *See id*. at 84-90, 247-248.

49. For example, Kenner patiently provides Evans with references on global warming in a successful effort to "turn" him to the anti-global warming side. *Id*. at 193 (It is through this device that Crichton is able to introduce a number of charts, studies and footnotes into the plotline).

50. *Id*. at 127.

troublesome because "[s]cience provides many of the assumptions that underlie most environmental laws and is frequently used by policy-makers to justify decision-making. Often, science is used support various claims, counter-claims and assumptions about the environment."[51]

This is paradoxical because, since the time of Christopher Columbus Langdell, the father of the modern law school curriculum, and the formalists, law has attempted to ground itself in science and to imitate it:

> [A]ll the available materials of that science [that is, law] are contained in printed books. . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, ...[52]

For these early legal theorists, hitching law's star to the scientific wagon was a way to argue for the logic and endurance of law. For law, a discipline that meddles so much in human affairs, it was a way to suggest some certainty and objectivity in its pronouncements. The law school became the center of legal research, which went hand-in-hand with the development of legal elites.[53] Although the focus of law has shifted to the social sciences, this attraction to scientific method has been a way in which law tries to assure its critics of its rationality and objectivity. It is also a way of assuring that the predictions law must make, and the control that it has over human behavior, has some basis in reality.

In his implicit critique, Crichton raises two objections. The first is that lawyers know little about science; the second is that, because the adversary system focuses more on dispute resolution than on truth, it does not partner well with science. Many lawyers do have a limited grounding in science, although there have been no empirical studies to confirm this. Professor Faigman, in his book *Legal Alchemy: The Use and Misuse of Science in the Law*,[54] depicts lawyers and scientists as speaking two different languages. He is an especially harsh critic of lawyers, noting that "[m]any students who

51. John McEldowney, *The Environment, Science, and Law, in* 1 LAW AND SCIENCE: CURRENT LEGAL ISSUES 109 (Helen Reece, ed., 1998).

52. GRANT GILMORE, THE AGES OF AMERICAN LAW 42 (Yale Univ. Press 1977).

53. *See, e.g.,* JEROLD S. AUERBACH, UNEQUAL JUSTICE, ch. 3 (Oxford University Press 1976); GILMORE, *supra* note 52, at ch. 3.

54. DAVID FAIGMAN, LEGAL ALCHEMY: THE USE AND MISUSE OF SCIENCE IN LAW (W.H. Freeman and Company 2000) [hereinafter LEGAL ALCHEMY].

have spent much of their educational life avoiding math and science become lawyers. . . . The average lawyer is not merely ignorant of science, he or she has an affirmative aversion to it."[55]

As Faigman chronicles, while law and science (and religion), began as intellectual partners, with a concomitant admixture of the natural and the moral, their ways departed. In the course of his book, he makes two basic points about law and science, both of which are germane to Crichton's exposition. First, Faigman pointedly paints lawyers as woefully ignorant of science and develops the ways in which this ignorance affects the three venues where law and science intersect: the courtroom, the legislature, and administrative agencies.[56] For example, he points out that the Supreme Court's "insecurity" in grappling with science has "real costs" that cause the justices to avoid "need analysis" because of its lack of comfort with science.[57] Although the Court finally erected legal rules for the use of expert and scientific testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[58] Faigman noted that many continue to doubt the ability of jurists as scientific gatekeepers. However, he believes that most judges have the intellectual capacity to master the science that is presented in court proceedings.[59] His goal is not to turn lawyers into scientists, but into "good consumers of science," noting that lawyers should have the ability "to read research reports written by scientists."[60]

55. *Id.* at xi.

56. *Id.* at 49.

57. *Id.* at 26.

58. 509 U.S. 579 (1993). In that case, the underlying substantive issue involved whether the maternal ingestion of the anti-nausea drug, Bendictin, caused birth defects. The Court announced that the trial court judge must assure that admitted scientific "evidence is not only relevant, but reliable." Thus, judges are now tasked with the task of determining "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand of determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. We are confident that federal judges possess the capacity to under this review." *Id.* at 592-93. In their eyes, then, "good" or legally relevant science will be testable, ordinarily peer reviewed, have an ascertainable error rate, and find general acceptance in the scientific community. *Id.* at 593-95.

59. LEGAL ALCHEMY, *supra* note 54, at 64.

60. *Id.* at 199. In fact, he ultimately suggests that this may be a constitutionally imposed duty: "The Constitution imparts an affirmative obligation on lawmakers to act

That said, Faigman is also very clear that scientific outcomes should not determine the underlying value, legal or policy decisions; in fact the opposite is true. He is clear that law, for principled reasons, might choose to ignore scientific principles in setting policy,[61] but that would be, presumably, only after understanding the science and its applicability to the issue at hand. This is because the disciplines of law and science have two different tasks: science studies what is; law, what ought to be [62] (although this is not to say that the tasks are unrelated).[63]

B. Cause-Lawyering is Dangerous to the Policy-making and Political Process.

1. The Claim

It is bad enough in Crichton's view that lawyers are cheerfully ignorant of science, but when this ignorance is married to public interest group litigation and pro bono lawyering, it becomes dangerous. Through the characters of Drake and Evans, Crichton claims that public interest lawyering[64] is, for all intents and purposes, not in the public interest. He views environmental organizations as shells or covers for litigators to play out policy dramas that would be better resolved by scientists and Congress.

Most of Crichton's ire is aimed at litigation-driven public interest organizations, and the epitome of the form is captured in the character of Nicolas Drake, an ill-informed and self-aggrandizing character. Drake, formerly a successful litigator, left active practice to become the director of NERF, a position that he held for ten years.[65] The organization Drake directs represents the island of Vanutu in the global warming

rationally in carrying out their public duties. This means necessarily that they should have some facility with science and the scientific method." *Id.* at 202.

61. *Id.* at 11.

62. *Id.* at 6.

63. He describes law as operating in the world of policy, but it needs to know facts, established by science, in order to operate in that world of policy. *Id.* at 26.

64. Crichton does not attach a particular conceptual label to the environmental lawyers he depicts in his book. In this paper, the term "cause lawyering," rather than public interest advocacy/lawyering, will be used to describe this form of legal practice and advocacy.

65. CRICHTON, FEAR, *supra* note 3, at 40.

litigation that is a centerpiece of the plot.[66] While the lawsuit itself is ostensibly important to Drake, he is also concerned that it generate publicity. In fact, the publicity surrounding the lawsuit becomes more important than the suit itself.[67]

Crichton's condemnation of this model of cause lawyering comes to a head when a disenchanted supporter condemns the organization and the litigation, concluding that the money would be better spent on research:

> I said before that we don't know enough. But I fear that today, the watchword of NERF has become, we don't sue enough. . . . NERF is a law firm. I don't know if you realize that. It was started by lawyers and it is run by lawyers. But I now believe money is better spent on research than litigation. And that is why I'm withdrawing [my funding of the Vanutu lawsuit].[68]

Drake is outraged by this loss of support, noting that industry, NERF's opponent, is incredibly strong and "will stop at nothing" to see that the lawsuit is foiled.[69] In fact, it seems that the only thing that drives Drake is funding. Causes are nothing more to the character than a means of obtaining funds.[70]

In this portrayal of cause lawyering, everything is subordinate to funding and publicity. The lawyer appears to direct the setting of priorities, the choice of strategy, and is the "brains" behind the operation. That Drake is the originator of the highly illegal idea of causing severe climate change incidents to generate publicity and funding is consistent with the portrait of the character: a selfish, flighty person who has put litigation and publicity before any deep scientific understanding of the complexities of the underlying issue.

The portrait of Peter Evans as a cause-lawyer is only

66. As Crichton notes, this litigation "was never filed." *Id.* at xi. The story is thus framed as an explanation of this failed piece of environmental litigation, somewhat in the form of an exposé.

67. *Id.* at 52, 392 ("You know as well as I do that the whole purpose of this case was to generate publicity They've got their press conference There's no need to pursue it further."). Crichton also suggests that environmental groups funnel funds to ecoterrorists. *Id.* at 182, 560 (that claim, however, is beyond the scope of this paper).

68. *Id.* at 129.

69. *Id.* at 159.

70. Drake argues that global warming does not scare people enough to generate donations the way that cancer-causing pollution can. He needs a cause "that *works*!" where works is measured by the amount of funds generated. *Id.* at 295-96.

slightly more sympathetic. Perhaps this is because Evans eventually "sees the light" and backs away from NERF and the Vanutu lawsuit while helping Kenner to foil Drake's plan of intentionally causing severe climate incidents. Here, the sketch is less developed but Evans is drawn as someone who pursues cause lawyering at a major Los Angeles law firm described as "forward-looking, socially aware."[71] While his firm represents celebrities with environmental concerns, it also represents the three biggest land developers in Orange County.[72] Evans's sole responsibility, however, is to represent George Morton and his environmental interests.[73] As noted above, Evans is a cause-lawyer with absolutely no background knowledge in the science that forms the basis of the environmental and global warming concerns of his client base. Kenner berates Evans for his firm's client arrangements, accusing Evans of being a flunky for the environmental movement because environmental clients pay his salary and thus control his personal opinions. When Evans objects to this characterization, Crichton, through the character of Kenner, replies, "[n]ow you know how legitimate scientists feel when their integrity is impugned by slimy characterizations such as the one you just made" (where Evans suggested studies were biased by the industry paying for them).[74]

In summary, cause-lawyering in this portrait is manipulative as well as instrumental. In addition to self-aggrandizement, the lawyers are driven by a pre-occupation with money and the publicity it can buy. Lawsuits are filed only because they can generate publicity, not because they may actually address and remedy real social problems. Because of these barely hidden ulterior motives, cause lawyering and the resultant lawsuits, even if not pursued, are dangerous for making sound social and scientific policy. This is especially the case because lawyers are part of the "PLM," or political-legal-media complex, that intentionally creates fear in the subject population.[75] Crichton, in his final author's

71. *Id.* at 71.

72. *Id.*. This configuration of clients seems unlikely given professional conflict of interest rules.

73. *Id.*.

74. *Id.* at 195-96.

75. *Id.* at 456.

note, states: "We need more scientists and many fewer lawyers. We cannot hope to manage a complex system such as the environment through litigation."[76]

2. Another View

Austin Sarat and Stuart Scheingold shine light on a far more nuanced view of cause lawyering.[77] Although this type of practice has not received much scholarly attention,[78] their body of work has been important in defining and describing exactly what cause lawyering is, how it emerged historically, and the role it plays in practice and in deliberative democracies. As portrayed by these authors and their contributors to the edited volumes, cause lawyers attempt to eliminate the tension between personal values and beliefs, and the value systems of their clients. In short, they reject the "hired gun" stereotype of the lawyer.[79] As depicted in the scholarly literature, Crichton's portrait of environmental lawyers is deeply flawed. He has the analysis backwards: the lawyers do not drive the cause; rather, the cause drives the lawyers.

From the three works of Austin Sarat and Stuart Scheingold, a definition of the cause lawyer emerges that is both rich and complex. Carrie Menkel-Meadow, in her contribution, faces head-on the question that Crichton never raises: "Is the environmental defense lawyer in the U.S.

76. *Id.* at 572. Crichton believes that "resolution of conflicting claims" should be resolved through the political system. *Id.*

77. *See e.g.,* AUSTIN SARAT & STUART SCHEINGOLD, CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Oxford University Press 1998) [hereinafter CAUSE LAWYERING]; AUSTIN SARAT & STUART SCHEINGOLD, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (Stanford University Press 2004) [hereinafter SOMETHING TO BELIEVE IN]; AUSTIN SARAT & STUART SCHEINGOLD, THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Stanford University Press 2005) [hereinafter WORLDS]; A fourth and later book, THE CULTURAL LIVES OF CAUSE LAWYERS, focuses on depictions of various lawsuits and lawyers in the media. AUSTIN SARAT & STUART SCHEINGOLD, THE CULTURAL LIVES OF CAUSE LAWYERS (Cambridge Univ. Press 2008).

78. CAUSE LAWYERING, *supra* note 77, at 38, 41, 45. Similarly, in SOMETHING TO BELIEVE IN, the authors note that, because of the lack of scholarship, there is not a single valid definition. SOMETHING TO BELIEVE IN, *supra* note 77, at 3. They borrow, however, a definition proposed by David Luban, and state: "At its core, cause lawyering is about using legal skills to pursue ends and ideals that transcend client service—be those ideals social, cultural, political, economic or, indeed, legal." *Id.*

79. CAUSE LAWYERING, *supra* note 77, at 3.

Department of Justice politically and morally equivalent to the environmental prosecutor in the same agency, much less lawyers representing the Sierra Club?"[80] What exactly, then, *is* a "cause lawyer"?

For Menkel-Meadow, cause lawyering is "any activity that seeks to use law-related means or seeks to change laws or regulations to achieve greater social justice—both for particular individuals (drawing on individualistic 'helping' orientations) and for disadvantaged groups."[81] She concludes, "the goals and the purposes of the legal actor are to 'do good' – to seek a more just world – to do 'lawyering for the good.'"[82] Sarat and Scheingold, while not disagreeing with Menkel-Meadow, develop the definition further. They also see cause-lawyers as "political actors," albeit actors "whose work involves doing law."[83] While cause lawyering does not "preclude mixed motives," Sarat and Scheingold note that "political or moral commitment [is] an essential and distinguishing feature of cause lawyering."[84] Because cause-lawyers exist in a number of practice settings with varying levels of commitment, they are arrayed along a continuum that moves from something more than a conventional client-servicing lawyer to a political activist, who, while law-trained, may no longer actively practice law.[85] The authors note that the distinguishing factor of this type of practice may be the way in which law is reconnected to morality, and that the lawyer "shares and aims to share with her client responsibility for the ends she is promoting in her representation."[86]

80. Carrie Menkel-Meadow, *The Causes of Cause Lawyering: Toward an Understanding of the Motivation and Commitment of Social Justice Lawyers," in* CAUSE LAWYERING, *supra* note 77, at 33; *See also id.* at 55 fn. 20 (for the list of sources she compiles).

81. *Id.* at 37.

82. *Id.*

83. Austin Sarat & Stuart Scheingold, *Cause Lawyering and Conventional Lawyering: Professional and Political Perspectives, in* SOMETHING TO BELIEVE IN, *supra* note 77, at 3.

84. *Id.* at 4. On the next page, they note that cause lawyering is often called public interest lawyering but they reject this label because cause lawyering is "more inclusive" and does not implicitly distinguish between "worthy and unworthy causes" nor is it necessarily associated with a reform agenda in a liberal political sense. *Id*. at 5.

85. CAUSE LAWYERING, *supra* note 77, at 7.

86. *Id.* at 3. Continuing, they note that this raises problems for traditional notions of professional responsibility, and that the attention to altering some facet of the status

While attempting to change political relations, cause lawyering is in fact bounded by politics. In their earliest work, Sarat and Scheingold observe that cause lawyering is affected by the type of political regime as well as "by the prevailing legal tradition."[87] In a system where law is autonomous, the combination of law and politics threatens the relationship between the two disciplines. This combination suggests that, borrowing from E.P. Thompson, law is derivative of politics and is an "arena of struggle" in which law challenges the dominant politics and culture.[88] Menkel-Meadow echoes this observation, noting that the organization of the state "affects how cause lawyering is expressed" because legal rules define the permissible area and types of challenges to the system.[89] This operation within and on the edges of the political community may historically be a dominant feature of cause lawyering. As Menkel-Meadow states:

> The modern cause lawyer, then, is not unlike the lawyer of the 'mediating' class described by Tocqueville in the nineteenth century. In addition to translating between classes, the cause lawyer seeks to work within the system, to use the law, either to change it or to hold it to its promises, but retaining a more abstract commitment to its symbols, regimes, and rules beyond the relief of individual pain.[90]

In another study in *Cause Lawyering*, Professors McCann and Silverstein, after reviewing the classic portrait of the self-interested, hired-gun lawyer, state that their "research has not confirmed the standard critical view of legal activists" but rather has revealed that "although cause lawyers in our study certainly did encourage the use of tactics associated with the

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quo "transforms" the lawyer-client relationship so that "[s]erving the client is but one component of serving the cause," thus moving moral questions to the center of the relationship in contrast to the traditional model. *Id.* at 4. They reiterate this point in their article, *The Dynamics of Cause Lawyering: Constraints and Opportunities, in* WORLDS, *supra* note 77, at 1-3 (noting distinctiveness of this style of practice, encompassing lawyers who may work for a single cause or are "less closely identified with any cause. . .," this form of practice reconnects law and morality, and makes apparent that law is a "public profession.").

87. CAUSE LAWYERING, *supra* note 77, at 7.

88. *Id.* at 8-9. This is not surprising since they assert that in common law traditions, the boundaries between "law and politics tend to be readily permeable" with lawyers moving between different types of practice. *Id.* at 6.

89. *Id.* at 35.

90. *Id.* at 47.

judicial system, they tended to be highly circumspect, critical, and strategically sophisticated about the pitfalls of legal action, the 'liberal' biases of legal norms, and the imperatives of effective political struggle."[91] They concluded, "[a]ll in all, legal victories were hardly seen as ends in themselves by the lawyers we studied," and that all of the studied lawyers "noted the ethical code of conduct that must be adhered to in avoiding 'frivolous suits.'"[92]

Finally, Sarat and Scheingold have mapped the three practice settings inhabited by cause-lawyers. Chapter four of their study, *Something to Believe In*, finds that most cause-lawyers (a) work in the pro bono practice of a corporate law firm, (b) are salaried lawyers working for a public agency or privately-funded advocacy organization, or (c) work in a small firm setting devoted to cause lawyering.[93] The type of organization in which cause-lawyers practice can affect their level of commitment, resources, and the strategies they employ.

In the corporate setting, where Peter Evans practices, the major advantage for the cause-lawyer is the resources at the lawyer's disposal, such as billable hour requirements. However, these are limited by a firm's major function, servicing corporate clients, which entails adhering to professional responsibility rules regulating conflicts of interest. Positional conflicts (where a pro bono client has an interest at odds with the perceived interests of paying, corporate clients) particularly act to constrain firm advocacy because a firm's primary allegiance is to its corporate clients. Although this limits the ability of someone practicing in this venue to truly "upset the apple cart," the authors conclude corporate practice is a valid and widely employed vehicle for legal activism.[94]

Salaried staff lawyers and lawyers in firms devoted to

91. *Id.* at 266.

92. *Id.* at 269, 271. They add that most cause lawyers did not pursue litigation that had little chance of success because of the actual costs to the movements in which they were involved. *Id.* at 271.

93. SOMETHING TO BELIEVE IN, *supra* note 77, at 72-95. For a sustained example of cause lawyers operating in a case that involved science, *see* Margaret Talbot, *Darwin in the Dock: Intelligent Design has its Day in Court,* NEW YORKER, Dec. 5, 2005, at 66. This article is also interesting because it depicts "right-wing" cause lawyers, a breed of political/legal activist that has only recently emerged.

94. SOMETHING TO BELIEVE IN, *supra* note 77, at 74-80.

cause advocacy have many more avenues to pursue their agendas of change. Lawyers working on the staff of an organization typically must subsume their personal goals to the organizational mission, and the typically lower salaries are a trade off from the "commodified legal services" that are more typical in corporate practice.[95] Cause-oriented small firms represent a collegial option where a lawyer can practice with like-minded individuals and may have more freedom of choice in clients and methods to pursue their goals.[96] The pressure on this freedom, however, is the need to generate enough fee-based business to support the practice.[97]

Regardless of the practice setting, all of the Sarat and Scheingold research discussed above supports the finding that cause-lawyers do not engage in frivolous litigation, nor do they use litigation manipulatively for their own ends. Litigation is in the service of the cause; the cause is not in the service of litigation. Although some cause-lawyers engage politically, other lawyers do engage in "rule-of-law" cause-lawyering which means giving priority to using the courts and litigation to achieve their objectives. That is, for the legally engaged cause-lawyer, "legality is, in effect, the cause."[98] What differs in this setting is that the legal system is used more creatively and in more sophisticated ways than is conventionally assumed.[99] The McCann and Silverstein study of lawyers involved in pay equity and animal rights issues found that, in contrast to the traditional view, nearly all of the attorneys considered "law, litigation, and legal tactics in a skeptical, politically sophisticated manner."[100] Legal tactics may be used appropriately only in certain situations:

> For most of our subjects, these "right" uses involved careful coordination of litigation and legal advocacy with other tactics and resources. . . . In particular, most of our lawyers discussed the ways

95. *Id.* at 80-87.
96. *Id.* at 89.
97. *Id.* at 87-94.
98. *Id.* at 18-19.
99. Michael McCann & Helena Silverstein, *Rethinking Law's "Allurements": A Relational Analysis of Social Movement Lawyers in the United States*, in CAUSE LAWYERING, *supra* note 77, at 262. They state that the traditional critique of lawyers assumes that lawyers favor litigation as a preferred means of change and have an overly optimistic view of law's transformative power, and are seen as motivated by glory, status and prestige. *Id.* This claim is not borne out by their study. *Id.* at 261-86.
100. *Id.* at 266 (emphasis in original).

> in which litigation could be effectively used to bolster efforts for constituent education and mobilization, political lobbying, negotiation with management, and winning allied support.[101]

They conclude: "[L]egal victories were hardly seen as ends in themselves. . . ."[102] The lawyers were constantly aware of the ethical constraints on litigation, its many costs, and the advantages of other means of dispute resolution.[103] Most surprisingly, in contrast to Crichton's claim that cause-lawyers "take over" a movement, McCann and Silverstein found the opposite: "[C]ause lawyers did not tend to dominate movements or clients, nor did they ignore rank and file movement leaders."[104] In part, the clients' suspicions kept this in check and also, the lawyers themselves understood that they were part of a group, rather than acting independently, and needed to work toward connecting with clients.[105] McCann and Silverstein conclude, "[t]hus, the stereotype of the overly litigious lawyer may be just that: a stereotype."[106] Notably, although Crichton and much of popular culture malign lawyers, the social science literature paints a different portrait, particularly of cause-lawyers.[107]

C. Lawyers, Allied with Media and Politicians, Are Complicit in Creating a "State of Fear" Which Makes Intelligent Policy Planning in a Deliberative Democracy Impossible.

1. The Claim

Many techno-thrillers have at their heart some kind of conspiracy that creates an "us versus them" flavor, and *State of Fear* is no different. It is perhaps better, however, to let Crichton directly state his claim that "social control is best

101. *Id.*
102. *Id.* at 269.
103. *Id.* at 269-71.
104. *Id.* at 274
105. *Id.* at 274-76.
106. *Id.* at 277; *See also* WORLDS, *supra* note 77, at 10-13.
107. *See e.g.,* Chase, *supra* note 22, at 281 (observing that "very little has been written (by lawyers, law professors, or social scientists) on the images that Americans have constructed of law and lawyers as mediated through the institutions of mass culture."). His sketch reveals that there are two predominant images: the good, virtuous lawyer (think Atticus Finch), versus the negative, power and money hungry lawyer.

managed through fear[,]"[108] as he does through the character of Professor Norman Hoffman, who studies the ecology of thought in a dialogue with Peter Evans. Beginning with the premise that every sovereign needs to control the behavior of its citizens, Hoffman describes the state of fear induced by the environmental crises that now takes the place of the Cold War:

> But the military-industrial complex is no longer the primary driver of society. In reality, for the last fifteen years we have been under the control of an entirely new complex, far more powerful and far more pervasive. I call it the politico-legal-media complex. The PLM. And it is dedicated to promoting fear in the population—under the guise of promoting safety. [Although Evans acknowledges the role of safety, and Hoffman acknowledges Western nations are "fabulously safe" he continues.] Yet people do not feel they are, because of the PLM. And the PLM is powerful and stable, precisely because it unites so many institutions of society. Politicians need fears to control the population. Lawyers need dangers to litigate, and make money. The media need scare stories to capture an audience. Together, these three estates are so compelling that they can go about their business even if the scare is totally groundless. If it has no basis in fact at all. . . *this is the way modern society works*—by the constant creation of fear. And there is no countervailing force. There is no system of checks and balances, no restraint on the perpetual promotion of fear after fear after fear. . . .[109]

Even after Evans weakly asserts that the freedom of speech and of the press may act as limitations, Hoffman continues:

> We are talking about a situation that is *profoundly* immoral. It is *disgusting*, if truth be told. The PLM callously ignores the plight of the poorest and most desperate human beings on our planet in order to keep fat politicians in office, rich news anchors on the air, and conniving lawyers in Mercedes-Benz convertibles. Oh, and university professors in Volvos. Let's not forget *them*.[110]

Thus, it is not surprising a few pages later when the media display of a speech at a NERF climate conference is

108. CRICHTON, FEAR, *supra* note 3, at 454.

109. *Id.* at 456.

110. *Id.* at 454-57. Crichton states in his author's note: "The current near-hysterical preoccupation with safety is at best a waste of resources and a crimp on the human spirit, and at worst an invitation to totalitarianism. Public education is desperately needed." *Id.* at 571.

mysteriously changed in anticipation of NERF's evil plot to create artificial climate disasters.[111]

2. Another View

It is easy to dismiss Crichton's construction of the Politico-legal-media complex or PLM as little more than a plot device, but under closer scrutiny, it becomes apparent that it is actually an extended case of lawyer-bashing. While a social scientist might be quick to point out the outmoded views of politics and culture on which his PLM model rests, the focus here will be on whether Crichton correctly points the finger at lawyers as the agents creating litigiousness and a society in which people measure behavior in units of fear.

As explained by Professors Michael McCann and William Haltom, knowledge about the legal system can be socially constructed. As they note in their introduction, "We are interested in how legal knowledge, and hence law itself, is constructed and produced in mass-mediated culture." [112] Viewed through the perspective of their works, *State of Fear* reveals itself as little more than an extended "tort tale" which is part of an American narrative tradition that "convey[s] serious meaning and exercise[s] pervasive interpretive power in modern American society. . . . These narratives, we argue, are one important component in a powerful tradition of legal lore permeating contemporary mass culture."[113] Nor are these "tort tales" harmless anecdotes or amusing jokes: "[T]hese pervasive allegations about civil law are but one dimension of a larger assault on rights entitlements, legal challenges to hierarchy, and democratic appeals to courts that have fueled the culture wars in American society over the past several decades."[114]

111. *Id.* at 462-64.

112. WILLIAM HALTOM AND MICHAEL MCCANN, DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS ix (University of Chicago Press 2004) [hereinafter DISTORTING THE LAW].

113. *Id.* at 5-6. This is not necessarily a new or original portrait of lawyers. *See, e.g.,* Donald Baker, *The Lawyer in Popular Fiction*, 3 J. POPULAR CULTURE 493, 502 (1969) (noting that "[d]uring the depression era, novelists [depicted] the lawyer . . . as engaged in a conspiracy with business and property owners to exploit those less fortunate in American society. The heroes of these novels, certain that they are being cheated and robbed by this combination, condemn both the law and lawyers.").

114. *See e.g.,* DISTORTING THE LAW, *supra* note 112, at 6 n. 10 (defining "culture war" as "competing visions of the proper relationship between individual responsibility

"Tort tales," as they are later defined are "moralistic parables that refocus general dissatisfaction with civil justice into particular outrages or injustices" and have powerful ideological consequences in the values that they convey and shape.[115] The salient features of "tort tales" that make them successful in shaping legal knowledge are their elegance, stereotypic characterizations of legal actors and behaviors, and the "holler of the dollar." i.e. the price that immoral litigants can exact from society.[116] These stories derive their power from the fact that they are widely available, understandable, memorable, and ultimately uplifting. [117]

This account explains why Crichton's story, even while ponderous, nonetheless is calculated to appeal to American sensibilities. The stereotypic visions he paints of lawyers, embroiling them in a conspiracy to defraud the American people, is one that resonates with much of the prevailing anecdotal and political discourse. Yet, Part B of this article demonstrates that the opposite is true. As sketched in that section, cause lawyers are servants of causes rather than drivers of agendas. An extensive body of social science research, reviewed by Haltom and McCann, points out that in "the disputing framework," and "[d]espite complaints about the role of lawyers in Modern American society, lawyers act as gatekeepers who restrict the flow of cases and discourage

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and the collective 'moral community,'" and locate "education, television, movies, newspapers, advertising, etc. as the primary sites of this contest for influence" which has permeated our official political discourse.).

115. *Id.* at 61.

116. *Id.* at 62. By this characterization, Drake is the classic immoral litigator.

117. *Id.* at 68-70. Ironically, Haltom and McCann point out the failure of scholarly accounts or rebuttals (such as this one) to rebut tort tales because they are not published in accessible journals, generally require specialized knowledge to be understandable, and because of the demands in professional culture, must be balanced and impartial. *Id.* at 73-75, 100-09. As they conclude:

> If we are correct that the reformers' assault on excessive litigation represents a moral crusade as much or more than an empirical challenge, then normative arguments about justice, democracy, and social responsibility define the terrain on which the primary political battle must be waged. Scholarly dismissals of the "politics of ideas" – as if this politics were somehow impure or dishonest –retreats from the challenge of demonstrating how individualistic moral frames obscure key issues, how such frames displace concerns about power, how norms of responsibility might be applied differently, and a host of other possible challenges to neoliberal and neoconservative values.

Id. at 108.

some litigation."[118] This research demonstrates compellingly that most accounts of disputing overlook the role of lawyers as winnowers of litigation and, by focusing on trials and other highly publicized legal events, miss the invisible data about grievances that are resolved by other forms of dispute resolution.[119] With respect to "tort tales," even lawyers tend not to rebut the depiction of their role or of their cases in the popular press. As Haltom and McCann note, a lawyer's ability to tell "powerful stories" about tort or any other form of litigation is constrained by professional ethics and law.[120] Thus, contrary to Crichton's assertions, the relative inaccessibility of empirically accurate information about the operation of the legal system, as well as professional and legal constraints against divulging client stories, ultimately leaves lawyers at the mercy of the media rather than in collusion with them. This is exacerbated by the institutional tendencies of news organizations to gloss over the technical aspects of legal stories, and failure to follow cases beyond initial filing in the level of detail that would expose the nuances of litigation.[121] These popular stories, in turn, make it easy to believe the worst about lawyers. The stigma attached to lawyers and their use of the legal system developed as a result of these stories' effect on "other rights based movements" like the environmental movement, and diminished the legal system's clout in the political arena.[122]

118. *Id.* at 80 (drawing heavily on Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) about Our Allegedly Contentious and Litigious Society,* 31 UCLA L. REV. 4 (1983)).

119. DISTORTING THE LAW, *supra* note 112, at 80. Additionally, it is now widely accepted that the trial plays a greatly reduced role in dispute resolution.

120. *Id.* at 129. Their general account of the American Trial Lawyers Association's reluctance to take on tort tales is told in Chapter 4 of their book. Much of this hesitancy arises from the fact that to fully "tell" the story will require divulging client confidences, which is a violation of the professional responsibility rules that prevail in most states.

121. In Chapters 5 through 8, Haltom and McCann chronicle the lapses in media coverage of legal events, and in fact, how the media have been "captured" by purveyors of "tort tales." For example, they describe how "pop tort reformers", who often have a better understanding of how media coverage works, inject "tort tales" into media coverage. *Id.* at 150. Similarly, they undertake an empirical study to understand how civil litigation is (mis)reported in the popular press, partially due to the efforts of tort reformers but also because of the institutional limitations of news coverage. *Id.* at 155-74. Chapter 6 of their account is a detailed, truthful account of the McDonalds "hot coffee" litigation.

122. *Id.* at 288.

In the end, "prevailing commonsense lore about the lawsuit crisis has impeded sophisticated discourse about the complexities of tort law practice, about the most important recent developments in those practices, about alternative modes of productive legal reform, and about a wide array of socially responsible, just, and effective policy options for dealing with risks of harm experienced by citizens."[123]

CONCLUSION: LAW, SCIENCE, AND DELIBERATIVE DEMOCRACY IN AN AGE OF FEAR

Crichton's book touches a raw nerve in the American psyche. Everywhere one looks, Americans are experiencing "fear" of something – terrorism, global warming, rising crime. "Fear Itself" has appeared as a character in the cartoon *Doonesbury*[124], and the *Washington Post National Weekly Edition* ran an article titled "*Fraidy Cat Nation: The Only Thing We Have to Fear is the Hype Over Fear Itself."*[125]

While the headlines may seem new, there is nothing particularly new about dealing with the unknown, the uncertain, and the frightening in literature and fiction. Our preoccupation with global warming and other "scientifically" induced fears did not start with *State of Fear* or the global warming thriller, *The Day After Tomorrow*.[126] In 1871, Lt. Col. George Tomkyns Chesney wrote a story for *Blackwood's Magazine* titled "*The Battle of Dorking,"* recounting an attack on the town of Dorking, England in order to shock the British

123. *Id.* at 295. As they further note, it undermines the ability to pursue rights based causes in the legal system while at the same time diverting attention away from the "chronic tendency of U.S. political institutions to leave so much for the judiciary to do in formulating and administering social policy." *Id.*

124. Gary Trudeau, *Doonesbury*, Oct. 15, 2006, http://www.msnbc.com/comics/daily.asp?sFile=db061015 (last visited Oct. 10, 2009).

125. *Fraidy Cat Nation: The Only Thing We Have to Fear is the Hype Over Fear Itself,* WASH. POST NAT'L WKLY. EDITION, Dec. 12-18, 2005, at 10. The article reports on the rash of headlines that seek to induce fear from a number of causes: "Terrorism. Weapons of mass destruction. Bird flu. Hurricanes. Sex offenders. New and terrible forms of cancer. Sexually transmitted diseases. Alzheimer's. Crystal meth labs. Lawsuits. Prison breaks! . . . ." It concludes: "The land is in lockdown." The article points to Washington D.C. as the nation's amygdala, the organ of the brain that processes fear, and is capable of processing only one emotion at a time. "So if you are busy fueling your amygdala with fear, the courage, passion, laughter can't get in." The article then details the ways in which the government and the media have used fear, although while it "may be good for business, . . . it's bad for the national psyche." *Id.*

126. THE DAY AFTER TOMORROW (Twentieth Century Fox Film Corporation 2004).

government into doing more to prepare for wars in the future.[127] "[Y]et reaction to it showed that to the reading public the two sensations [shock and entertainment] were intertwined. Chesney had accidentally invented the thriller."[128]

The prevalent theme of thrillers is "an uneasiness about technological change."[129] Many of Crichton's stories have been labeled "techno-thrillers," capturing the combination of science and technology as the source of the thrill, and possibly our salvation from it. In this genre, the scientific phenomenon itself becomes one of the characters in the story, as global warming does in *State of Fear*. This is not unusual; for example, the aliens and their advanced technology are characters in *War of the Worlds*.[130] The characterization of the science is essential to the plot. Commenting on another work by H.G. Wells, he notes that "[t]he book's main character is the nuclear chain reaction itself: a phenomenon portrayed in such intimate and creepy detail that it seems almost like a living thing."[131] The point of this literary diversion is that stories, whether called "thrillers" or "literature," have great power to animate people. Arguably, this kind of fiction is "essential" in a democracy because it can, by a "careful, thoroughly honest search for and analysis of values[,]. . . explore[], open-mindedly, to learn what it should teach."[132]

127. Tom Reiss, *Imagining the Worst: How a Literary Genre Anticipated the Modern World* in THE NEW YORKER 106 (Nov. 28, 2005). His story spawned a host of imitators, of which the most well known, even to this day, is H.G. Wells' *War of the Worlds* published in 1898. *Id.* at 109.

128. *Id.*

129. *Id.*

130. H.G. WELLS, WAR OF THE WORLDS (Aerie Books1898).

131. *Id.* at 114 (commenting on Wells' "*The World Set Free*"). Reiss chronicles how Leo Szilard, a physicist, after reading the novel in German, "conceived how a nuclear weapon might actually be built" and sent a chapter to Sir Hugo Hirst, the founder of British General Electric with a letter in which he wrote "'The forecast of the writers may prove to be more accurate than the forecast of the scientists. The physicists have conclusive arguments as to why we cannot create at present new sources of energy. . . . I am not so sure whether they do no miss the point;'" thus anticipating the development of nuclear energy and the atomic revolution. *Id.*

132. JOHN GARDNER, ON MORAL FICTION 19 (Basic Books, Inc. 1978). Gardner states that: "True art is *by its nature* moral," although he also notes that we are "embarrassed by this idea," finding it "unfashionable." *Id.* at 25. Gardner defines morality to mean "nothing more than doing what is unselfish, helpful, kind and noble-hearted, and doing it with at least a reasonable expectation that in the long run as well as the short we won't be sorry for what we've done, whether or not it was against some petty human

Jumping from literature to social science, it is perhaps ironic that Cass Sunstein, in *Laws of Fear: Beyond the Precautionary Principle*[133] attacks the same principle that apparently animated Crichton to write *State of Fear*. Both men eschew "the precautionary principle."[134]Sunstein, noting that there are myriad formulations of the principle, defines it generically as "the animating idea . . . that regulators should take steps to protect against potential harms, even if causal chains are unclear and even if we do not know that those harms will come to fruition."[135] At numerous points, Sunstein condemns the principle as being "literally incoherent, . . . it is therefore paralyzing; it forbids the very steps it requires."[136] Rather than a novel, Sunstein presents his view in a scholarly book that is half the size of Crichton's novel. For that reason, it is far less likely, as Haltom and McCann point out, to come to the notice of the reading public.[137]

Regardless, Sunstein's careful dissection and rejection of the precautionary principle serves to illustrate the book that *State of Fear* could have been if Crichton had been interested in writing a "moral tale" rather than a ponderously ideological

law. Moral action is action which affirms life." *Id.* at 23. Read as a whole, Gardner's work suggests that the moral is the equivalent of agape-like love for the world acted out in the character of the hero.

133. CASS SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (Cambridge University Press 2005) [herinafter LAWS OF FEAR].

134. CRICHTON, FEAR, *supra* note 3, at 571. "The 'precautionary principle,' properly applied, forbids the precautionary principle. It is self-contradictory. The precautionary principle therefore cannot be spoken of in terms that are too harsh." *Id.*

135. LAWS OF FEAR, *supra* note 133 at 4.

136. *Id.; See also id.* at 13-14.

137. DISTORTING THE LAW, *supra* note 112, at 100-09. Haltom and McCann note that most scholarship is "relatively unknown to journalists and citizens, virtually ceding the contest for influence to proponents of familiar common sense" because it is "relatively inaccessible," because "the same rigor to which the social scientist proudly aspires generally produces tedious impediments for the nonexperts." *Id.* at 100, 102. Calling for scholars "to connect their powerful debunking efforts to more artful narratives" they characterize this as a moral battle not just an empirical one. *Id.* at 109. They state "If we are correct that the reformers' assault on excessive litigation represents a moral crusade as much or more than an empirical challenge, then normative arguments about justice, democracy, and social responsibility define the terrain on which the primary political battle must be waged. Scholarly dismissals of the 'politics of ideas' - as if this politics were somehow impure or dishonest - retreats from the challenge of demonstrating how individualistic moral frames obscure key issues, how such frames displace concerns about power, how norms of responsibility might be applied differently, and a host of other possible challenges to neoliberal and neoconservative values." *Id.* at 108.

cant. Sunstein's thesis that the "precautionary principle," defined as the principle that in the face of uncertainty and doubt about potential hazards, regulators should take steps to protect from potential harms *even if* uncertain about the cause and the timeframe in which harm may occur,[138] is incoherent. He locates this book in an extended meditation on "fear, democracy, rationality, and the law."[139] Like Crichton, he wants to understand how government and the law should respond to public fear, locating the solution in the framework of deliberative democracy.[140] Along the way, he provides useful insights, garnered from social science and neuroeconomics, about how human beings construct fear.

Sunstein outlines a number of theories that seek to explain why people, and their governments, have such a difficult time regulating in the face of potentially large dangers like global warming. Much of the difficulty is rooted in human behavior, and he seeks to explain this by reference to several theories. First, he notes that the "prospect theory" explains fear of "significant harms that have a low probability of occurring."[141] Governments will sometimes follow their populace in this regard, and wrongly apply the precautionary principle to low-probability risks of serious harm. This is an ill-advised strategy because the precautionary principle does not tell us the "right" amount of precaution or what a reasonable cost for the precaution might be. Ultimately, it, that is, the precautionary principle, "forbids all course of action, including regulation" and he applies this to the cases of genetic modification of goods, global warming, nuclear power, arsenic in drinking water, and the impact of military exercises on marine life.[142] Avoidance of these risks can impose their own costs, whatever form of regulation is undertaken.[143]

138. LAWS OF FEAR, *supra* note 133, at 4.

139. *Id.* at 1.

140. *Id.* at 1–9. Sunstein discusses global warming as well as other "fears," noting that the European community has more warmly embraced the precautionary principle than has the United States. *Id.* at 13–24. In the course of this discussion, he notes that there are "weak" and "strong" versions of the precautionary principle, as well as an infinite number of models in between.

141. *Id.* at 26.

142. *Id.* at 26-28.

143. It should be noted that unlike Crichton, Sunstein does recognize that "there is general agreement that global warming is in fact occurring" although "[s]cientists are

Second, Sunstein points to the "availability heuristic, probability neglect, loss aversion, belief in the benevolence of nature, and system neglect" to demonstrate how politics can exploit these behavioral and cognitive traits to explain how the operation of fear and precaution can determine the regulations a particular polity might adopt.[144] All of these devices are ones that all human beings use to deal with the incomprehensible, be it global warming or the threat of nuclear war. Briefly explained, the availability of the heuristic captures our tendency to "assess the magnitude of risks by asking whether [familiar] examples [or comparisons] can come readily to mind."[145] If so, we are more likely to be frightened. This can be magnified by our familiarity with a particular object of fear as well as its salience. For example, seeing a burning house is more frightening than reading about it. What is "available" will vary from culture to culture, depending upon the social context of that culture, e.g., its media, its government, etc.[146]

A third feature of our assessment of risk of harm, according to Sunstein, comes from probability neglect. Different from the availability heuristic, which can produce "inaccurate assessments of probability," probability neglect describes our failure to assess probability or likelihood at all, especially if a strong emotion is involved.[147] Here, Sunstein points to global warming as a place where we have focused on worst case scenarios and then called for aggressive regulation, without necessarily assessing all of the evidence and the probabilities in each case. While in the case of global warming, he notes that this reaction may seem "warranted," his point is to demonstrate how our ability to visualize imagery about harm matters "a great deal to people's reactions to risks."[148] Images of rising water levels and of New York under layers of snow and ice, as depicted in the movie *Day After Tomorrow,*[149] can crowd "out probability judgments."[150] He concludes at this point, "[i]n many

not in accord about the dangers associated with" it. *Id.* at 27.

144. *Id.* at 35.
145. *Id.* at 36.
146. *Id.* at 36-39.
147. *Id.* at 39.
148. *Id.* at 40.
149. DAY AFTER TOMORROW, *supra* note 126.
150. LAWS OF FEAR, *supra* note 133 at 40.

contexts, the law itself is a response to fear of bad outcomes without close attention to the question of probability. . . ."[151]

This lack of attention to probability is compounded by the operation of our tendency to be loss averse, and to be more comfortable with "familiar risks [rather] than unfamiliar ones, even if they are statistically equivalent."[152] People are more worried about the statistically low probability of a terrorist event rather than the higher and statistically predictable likelihood of death or injury in a car accident.[153] Finally, Sunstein introduces our completely counterfactual belief in the benevolence of nature, i.e. that "nature implies safety" and "system neglect."[154] The last trait, system neglect, is particularly important because it means that "much of the time, people neglect the systemic effect of one-shot interventions."[155] In turn, people tend to forget or ignore that changing one part of a system will affect the other parts, and that "people fail to see the frequent need to weigh competing variables against one another."[156]

The blind application of the precautionary principle, in the face of these human characteristics, means that we tend to take drastic precautions against something that may well be statistically rare, and empirically unstudied without understanding how to evaluate whether a "drastic," rather than "small, reversible" intervention, may be the better precautionary approach.

One of Sunstein's reactions to this quandary is to suggest that the precautionary principle, acting alone and in the face of these human characteristics, does not provide a "sensible

151. *Id.* at 39-41. Sunstein undertakes a sustained analysis of probability neglect and its relation to fear, noting that people often ignore probability in the face of strong emotions such as fear. *Id.* at 67-88. This may lead regulators to engage "in extensive regulation precisely because intense emotional reactions are making people relatively insensitive to the (low) probability that dangers will ever come to fruition." *Id.* at 69. Similarly, he notes that many people cannot evaluate low probabilities of risk, and thus ignore the difference between "1/100,000 and 1/1,000,000." *Id.* at 73.

152. *Id.* at 42.

153. *Id.* at 43.

154. In this sense, Crichton and Sunstein agree that the belief that nature is benevolent may be ill-founded; in fact, they would probably agree that the opposite is true – at times, nature is sinister.

155. *Id.* at 45.

156. LAWS OF FEAR, *supra* note 133, at 44-46. This last variant of system neglect he calls "tradeoff neglect."

basis for structuring democratic discussion."[157] In order for deliberative democracy to make intelligent precautionary choices, there needs to be more information, and "uncertainty and irreversibility should lead to a sequential decision-making process."[158] In this regard, he points to global warming as an example, stating that the precautionary principle has caused us to go "all out" without assessing the losses or costs to certain avenues of regulation.[159] As we make our way to an informed response to risk, Sunstein notes, echoing Mill, that an honest appraisal of the likelihood of harm should diminish the danger of interest-group manipulation because he deems public alarm a harm of its own.[160] Thus, a "sensible approach to risk" will address public fear, even if baseless.[161]

By the end, in addition to proposing an alternate to the precautionary principle, Sunstein also discusses the role of the media and government to address risk in the face of these embedded human characteristics. Government, most likely because it is the collection of citizens acting under conditions of imposed rationality, can "permit deliberation" and "do a lot better" than, say, the ordinary person confronted with an emergency.[162] He acknowledges that "it should be clear that news sources do a great deal to trigger fear, simply by offering examples of situations in which the 'worst case' has actually come to fruition."[163] But unlike Crichton, this is not the product of some great conspiracy, but rather that the media suffer from the same availability heuristic and probability

157. *Id.* at 55.
158. *Id.* at 59.
159. *Id.*
160. *Id.* at 63.
161. *Id.* at 63. Contrast, however, what Gardner has to say about a belief in free speech and the war of ideas: "But. . . what we generally get in our books and films is bad instruction. . . ." The Jeffersonian ideal that truth will emerge, in his reckoning, is an empty theory that "lie[s] then, in an excessively timid idea of democracy." GARDNER, *supra* note 132, at 42.
162. LAWS OF FEAR, *supra* note 133, at 87.
163. *Id.* at 88. *See also id.* at 102 ("[I]n the real world, some voices are more important than others, especially when availability and salience are involved. In particular, the behavior and preoccupations of the media play a large role. Many perceived 'epidemics' are in reality no such thing, but instead a product of media coverage of gripping, unrepresentative incidents." Thus, rather than attributing media coverage of these events to the "PLM," he notes that "media's coverage reflects its economic self-interest" to attract attention and boost ratings.)

neglect as do most citizens. In this sense, government and institutions like the media can matter: "A deliberative democracy would attempt to create institutions that have a degree of immunity from short-term public alarm."[164] In the end, reminiscent of John Dewey and Oliver Wendell Holmes, Sunstein states what we ought to do:

If we are committed to a deliberative conception of democracy, we will be neither populists nor technocrats. Law and policy ought not to reflect people's blunders; democracies should not mechanically follow citizens' fears, or for that matter their fearlessness. Nor does anything here suggest the virtues of rule by a technocratic elite. As I have suggested, citizens make qualitative distinctions among quantitatively identical risks, and when their reflective values account for those qualitative distinctions, the judgments of the citizens deserve respect."[165]

As he moves to create an anti-catastrophe principle that recognizes both the role of economics, cost-benefit and a Rawlsian assessment of values that may dictate a particular outcome regardless of the cost, Sunstein suggests that in a deliberative democracy the government will need to do a better job of educating the populace about risks and disclosing information about them.[166] "At a minimum, any disclosure, if it is worthwhile, should be accompanied by efforts to enable people to put the risk in context."[167] For Sunstein, this

164. *Id.* at 88. Some recent commentators, including Crichton, suggested that this may not be true of our government in recent years. *See* Michael Spector, *Political Science: The Bush Administration's War on the Laboratory,"* NEW YORKER, Mar. 13, 2006, at 58. The relation between the scientific community and the political one matters deeply: "Science largely dictated the political realities of the twentieth century." *Id.* at 61. Says one scientist in response to the Bush administration's efforts to politicize science, "You can't do science without understanding that theories are public and views often clash. You resolve differences by experiments and research, not by toeing the line." *Id.* at 62. In the example of whether the government should begin needle exchange to prevent HIV transmission, which both Clinton and Bush opposed, another scientist said, importantly, "As a scientist, the answer has to be *I believe in the data*. . . . Asking the question 'Do you believe in needle exchange?' is a real violation of science. It so happens that needle exchange is a good public-health measure. And we need also to understand that there are issues in society that will trump scientific information. For many people, this is one of them. That is a political decision, and I have no problem with politicians making it. But that is a terribly unfair question to put to a scientist." *Id.* at 64.

165. LAWS OF FEAR, *supra* note 133, at 105-06.

166. *Id.* at 124.

167. *Id.*

approach means that "[g]overnment ought to treat its citizens with respect" and not "manipulate" what we now know about creating fear.[168] But recognizing that this fear may sometimes be inescapable, he states that the government should reject regulation when "there is no good reason for it," and that such a government will "suggest[] the importance of ensuring a large role for specialists in the regulator process."[169] That said, however, he is direct in saying that "[n]othing in a cost-benefit analysis can solve the evaluative questions."[170] Therefore, in a deliberative democracy, regulatory choices should be made after a debate about preferences and values. "I have suggested that a good constitutional system is a deliberative democracy, not a maximization machine. Many social judgments should be made by citizens engaged in deliberative discussion with one another rather than by aggregating the individual choices of consumers."[171] This is because for some targets of regulation, e.g. sexual harassment or endangered species, the choice is ultimately an informed value choice rather than an economic one.[172] After suggesting that libertarian paternalism may be an approach government takes to regulation, Sunstein concludes:

> Fear is an ineradicable part of human life. Often it points us in the right directions. Nations, no less than individuals, pay attention to it. But in democratic societies, governments do not capitulate to the fears of their citizens, or pretend that a general idea of precaution can provide helpful guidance. Democratic governments care about facts as well as fears. Because they respect liberty and self-government, and because they want to improve human lives, they listen closely to what people have to say. But for the same reasons, they take careful steps to ensure that laws and policies reduce, and do not replicate, the errors to which fearful people are prone.[173]

168. *Id.* at 125.
169. *Id.* at 126.
170. *Id.* at 131.
171. *Id.* at 158.
172. *Id.* He addresses global warming, noting "There is no good a-contextual way of calculating the aggregate costs of global climate change by 2050; actually that is a ludicrous question, because it does not have any point." *Id.* at 171-74. A far more sensible question is whether it would make sense for any particular nation to accept a particular way of responding to the problem, such as the Kyoto protocol." *Id.* at 171.
173. *Id.* at 226.

Annihilation, whether it be at the hands of nuclear weapons, toxic bacteria or global warming, is terrifying, and for that reason can make great fiction. In the case of *State of Fear*, Crichton could have advanced the discussion about the role of government, law, science and the media in responding to global warming by also creating a *moral* fiction. Above, I have demonstrated that lawyers are not part of a conspiracy to usurp the right of citizens to make informed choices about global warming policy. In fact, the opposite is true. Working as cause-lawyers, and hopefully gaining a greater knowledge of science, they help to further our deliberation about policy. As much as Crichton lambastes trial lawyers, it may be that the now rare trial provides another forum for our discussions. Consider this comment about one of the intelligent design trials:

> The trial also allowed the lawyers to act as proxies for the rest of us, and ask of scientists questions that we'd probably be too embarrassed to ask ourselves. In a courtroom, you must lay an intellectual foundation in order to earn a line of questioning—and so the lawyers stripped matters neatly back to the first principles of science. Considering how often it is said that evolution is 'just' a theory, for instance, it is clear that many people either do not know or do not accept the scientific definition of a theory. The lawyers for the pro-evolution side went to great lengths to make the point that, although all science is provisional, a scientific theory is a powerful explanation that unites a large body of facts and relies on testable hypotheses. As Padian testified, it is not 'something that we think of in the middle of the night after too much coffee and not enough sleep.[174]

As John Gardner points out, a book of moral fiction that attempts to create true heroes and wrestles with impossible human dilemmas is its own experiment. "True art imitates nature's total process: endless blind experiment. . . and then ruthless selectivity. Art, in sworn opposition to chaos, discovers *by its process* what it can say. That is art's morality."[175] It is not surprising that where the "characters are stick figure - cartoons of good and evil - and where plot is kept minimal and controlled by message, not by the developing will of life like human beings" that Crichton fails

174. Margaret Talbot, *Darwin in the Dock: Intelligent Design has its Day in Court,* NEW YORKER, Dec. 5, 2005, at 66, 68.

175. GARDNER, *supra* note 132, at 14.

us by allowing the characters, within their character, to confront the reality of being a lawyer for a cause such as the environment.[176] Crichton fails all of his characters, which "exist for the sake of the predetermined message, not as subjects for the artist's open-minded exploration of what he can honestly say."[177] And in so doing, he fails us all.

176. *Id.*

177. *Id.* at 85. He later notes that discoveries are made while asking whether a character would do that, a question that Crichton fails repeatedly to ask. *Id.* at 109. The test of the theory would be in "lifelike situations" that create the suspense of the novel [rather than technological feats], because ultimately fiction "deals in understanding, not knowledge." *Id.* at 114, 135.