

Legal Torpor: Why So Little Has Happened in India After the Bhopal Tragedy†

MARC GALANTER†

The legal aftermath of the terrible gas leak disaster in Bhopal on December 3, 1984 is a curious tale. The United States rather than India has been the site of most of the legal action. I want to talk about why so little has happened on the legal front in India—an absence that forms the background for the legal developments here.

I. LAW WITHOUT TORTS

India is a society with many lawyers. In absolute numbers Indian lawyers, recently estimated to number over 228,000,¹ are the second largest body of legal practitioners in the world, outnumbered only by their amazingly numerous counterparts in the United States. The ratio of lawyers to population in India—some 336 per million—is roughly that in much of Europe—lower than in West Germany or Belgium, but higher than in France or Holland.² It is much higher than in almost any other Third World country.³ The legal profession in India is not only numerous, but firmly established. Lawyers have played a prominent role in public life for a century. It is widely believed that since Independence lawyers in India have

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† Evjue-Bascom Professor of Law and South Asian Studies, University of Wisconsin-Madison; Visiting Scholar, American Bar Foundation; B.A. 1950, M.A. 1954, J.D. 1956, University of Chicago. This is a revised version of remarks at a colloquium on "The Bhopal Tragedy: Legal and Social Issues" at the University of Texas Law School, February 6, 1985. It should be emphasized that I have not been in India since the Bhopal incident. This account, which draws on long acquaintance with the Indian legal scene, is based on published sources, as cited, and on discussions with other observers of that scene. I am particularly grateful to Rajeev Dhavan, Richard Gordon, Robert Hayden, David Landes, and M. G. Narasimha Swamy for informative discussions and to Gary Wilson for his enterprising and perceptive assistance with this paper. The views expressed here should not be attributed to my benefactors.

1. Personal communication from Dr. N. R. Madhava Menon of the Bar Council of India Trust. A 1981 estimate of 221,000 is found in Oommen, *The Legal Profession in India: Some Sociological Perspectives*, 10 INDIAN B. REV. 1, 19 (1983).

2. See 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 U.C.L.A. L. REV. 4, 52 (1983).

3. See Galanter, *The Study of the Indian Legal Profession*, 3 LAW & SOC'Y REV. 201, 204-05 (1968-69).

lost the preeminence that they once enjoyed. However appreciated their services, they are widely viewed as contentious, unproductive, and parasitic.⁴

Notwithstanding recurring complaints that India's legal system is unsuitable to the country's conditions, courts and lawyers are a highly visible part of Indian life, frequently resorted to in matters ranging from great public issues to village disputes.⁵ Although almost everyone professes a preference for harmonious conciliation of differences, Indians tend to perceive many situations as involving violations of legal entitlements for which the appropriate remedy is vindication in a public forum. Although it is hard to document the common assertion that the rate of litigation is high, it is significant that it is widely perceived to be high. Many Indians think, not approvingly, that their society is a litigious one.

Indeed, part of the story is that the British colonial rulers of India were convinced that Indians were too litigious. To restrain litigation, they decided to make people pay to use the courts. They passed a series of enactments, culminating in the Indian Courts Fees Act of 1870,⁶ subsequently supplemented by the various state governments. The Act provides that if a citizen wants to bring a civil case, he must pay a fee, typically by putting stamps on the complaint. In suits for money damages, the fee is calculated *ad valorem* on a regressive scale. For example, in the State of Madhya Pradesh, of which Bhopal is the capital, a claim for Rs. 1000 (approximately \$80)⁷ must be accompanied by a fee of Rs. 110 (11 percent); a claim for Rs. 100,000 (\$8000) must be accompanied by a fee of Rs. 5,790 (5.79 percent).⁸ One might imagine that this could inhibit litigation. Indeed, that is what it was intended to do. It also turns out that court fees provide a major source of revenue for the state governments.⁹ *Ad valorem* court fees have other

4. On the Indian legal profession, see the various articles in Special Issue, *Lawyers in Developing Societies, Especially India*, 3 LAW & SOC'Y REV. 195, 201-407 (M. Galanter and R. Kidder eds. 1968-69); Kidder, *Formal Litigation and Professional Insecurity: Legal Entrepreneurship in South India*, 9 LAW & SOC'Y REV. 11 (1974); Krishnan, *The Litigant, the Legal Profession and the Judicial Process*, 8 J. B. COUNCIL INDIA 637 (1981); Oommen, *supra* note 1; J. GANDHI, *LAWYERS AND TOUTS: A STUDY IN THE SOCIOLOGY OF THE LEGAL PROFESSION* (1982).

5. On the tension between official and popular notions of legality, see Khare, *Indigenous Culture and Lawyer's Law in India*, 14 COMP. STUD. SOC'Y & HIST. 71 (1972). On the failure of efforts to restore indigenous law after India's independence, see Galanter, *The Aborted Restoration of 'Indigenous' Law in India*, 14 COMP. STUD. SOC'Y & HIST. 53 (1972); Baxi & Galanter, *Panchayat Justice: An Indian Experiment in Legal Access*, in III ACCESS TO JUSTICE 341 (M. Cappelletti & B. Garth eds. 1979); Galanter, *Indian Law as an Indigenous Conceptual System*, 32 ITEMS 42, 42-46 (1978).

6. The Court Fees Act (VII of 1870), 6 INDIA A.I.R. MANUAL 1191 (3d ed. 1970).

7. One rupee is currently worth approximately \$0.08, though it has been worth more in the past.

8. The Court Fees Act (VII of 1870), Schedule I — Table of Rates of Ad Valorem Fees, State Amendments — Madhya Pradesh, 7 INDIA A.I.R. MANUAL 125, 126-27 (3d ed. 1970). Court fees may be waived for poor parties. Specific statutes, like the Motor Vehicles Act providing recovery in automobile accidents, may permit actions without payment of court fees.

9. In 1958, the Law Commission of India observed that "the fee is no longer a fee; it is a

effects—not only is there less litigation, but there is different litigation. For example, claims are diverted into requests for specific relief and into criminal complaints.¹⁰ The ready resort to criminal complaints has recently been displayed in Bhopal, as criminal charges were brought early against Union Carbide employees.¹¹ Habitual resort to other remedial routes has curtailed experience with civil suits for damages and inhibited inventiveness and change in that area.

The absence of tort claims is reinforced by, and reinforces, the absence of tort doctrine. The British brought the common law to India in the 18th century; in the quarter century following the 1857 revolt, the legal system was rationalized and systematized. A unified hierarchy of courts was established in each region. A series of codes, based on English law and applicable throughout British India, were adopted.¹² By 1882, there was virtually complete codification of all fields of criminal, commercial, and procedural law. One major field that was left uncoded was tort law.¹³ Because there are

heavy tax." In spite of the Commission's admonishment that "a modern state cannot with any justification sell the disposition of justice," state governments have continued to charge fees at a level that provides revenues in excess of that needed to support the civil justice system. LAW COMMISSION OF INDIA, FOURTEENTH REPORT: REFORM OF JUDICIAL ADMINISTRATION 490 (1958) [hereinafter cited as LAW COMMISSION OF INDIA]. The Indian Supreme Court has held that the general taxation of litigation is prohibited and that states must justify levies on court use as "fees" by showing a "broad correlation" to the cost of the administration of civil justice. *Government of Madras v. Zenith Lamps & Elec. Ltd.*, 1973 A.I.R. 724, 730 para. 31 (S.C.). This "broad correlation" requirement does not prevent many states from earning a profit on *ad valorem* fees. The Indian judiciary, Alan Gledhill quipped, may be "the most successful of the nationalized industries." Gledhill, *The Expansion of the Judicial Process in Republican India*, in *SOME ASPECTS OF INDIAN LAW TODAY* 4, 8 (Int'l & Comp. L.Q. Supp. Pub. No. 8, 1964).

10. There are many kinds of disputes, say a falling out between business partners, in which criminal charges are often preferred to a civil suit with the onerous requirement of a big upfront payment. The preference for criminal remedies is longstanding. Compare the observations of a colonial police official that "the Indian much prefers, if he can seek its assistance, the criminal court for the redress of his civil wrongs." C. WALSH, *CRIME IN INDIA* 26 (1930). This propensity is supported by the wide scope in Indian law for private criminal complaints.

11. Five plant managers and supervisors were arrested the morning after the leakage, 410 *Die in Environmental Disaster near Bhopal*, *The Statesman*, Dec. 4, 1984, at 1, col. 1, and charged with causing death by negligence under Section 304-A of the Indian Penal Code. *Concern mounts over aftermath*, *The Hindu*, Dec. 7, 1984, at 1, col. 5. When Union Carbide Chairman Warren Anderson arrived in Bhopal, he was met by two jeep-loads of police, charged with violation of seven provisions of the Indian Penal Code, including several nonbailable offenses, briefly detained at the Union Carbide guest house, whether under arrest or "protective custody" is not clear, and released on bail of 25,000 rupees (approximately \$2000) on the condition that he leave India. *Drama at airport*, *The Hindu*, Dec. 8, 1984, at 1, col. 1; Reinhold, *Indians Arrest and Then Free U.S. Executive*, *N.Y. Times*, Dec. 8, 1984, at 1, col. 2.

12. See Galanter, *The Displacement of Traditional Law in Modern India*, 24 J. SOC. ISSUES 65 (1968); B. ACHARYA, *CODIFICATION IN BRITISH INDIA* (1914); W. STOKES, *THE ANGLO-INDIAN CODES* (2 vols. 1887).

13. The need for a tort code was urged by Sir Henry Maine, Sir James Stephen, and the Fourth Law Commission which reported in 1879. An Indian Civil Wrongs Bill, drafted by Sir

few Indian tort cases, the applicable law for the most part is the common law of England, even today. Although torts is a required course in law colleges, legal professionals do not perceive it as a major component of the legal system.¹⁴

There are no civil juries in India; when tort cases are brought, liability is determined and damages are assessed by the judge. Judges, themselves career civil servants or recruits from the bar, have little experience with tort cases and have little inclination to innovate in this area. Recoveries have been low, with courts grudging large recoveries, anxious to avoid any wind-fall to claimants. Damage awards for catastrophic personal injuries rarely exceed Rs. 100,000 (approximately \$8,000). Appellate courts can reduce damages they think are inordinately high.¹⁵ Punitive damages, known in India as exemplary damages, are theoretically available, but almost unknown in practice.¹⁶ Cases are protracted. The courts are congested and the opportunities for delay are plentiful.¹⁷ There is a broad scope for interlocutory appeals. Under ordinary circumstances, a civil case for money

Frederick Pollock in 1886 at the instance of the Government of India, was never taken up for legislative action. M. JAIN, *OUTLINES OF INDIAN LEGAL HISTORY* 658 (1966). The failure to enact a code was "inexplicable" according to B. ACHARYYA, *supra* note 12, at 306. But a decade later the Civil Justice Committee 1924-25, noting that the matter "had been under consideration for some years," observed that "there is no branch of law which is more free from the blame of contributing to the law's delays. A large part of this work is done in India, and is better done, by the criminal courts." CIVIL JUSTICE COMMITTEE 1924-25, REPORT 535-36 (Calcutta, Government of India 1925).

14. This absence of tort consciousness is manifested by the invisibility of torts in standard works on the Indian legal system. In Alan Gledhill's authoritative survey, there is not a single mention of tort. A. GLEDHILL, *THE REPUBLIC OF INDIA: THE DEVELOPMENT OF ITS LAWS AND CONSTITUTION* (1951). M.P. Jain's widely used *Outlines of Indian Legal History* devotes only two paragraphs in its 700 pages to tort law, that is, to the absence of codified tort law. M. JAIN, *supra* note 13, at 649-50, 657-58.

15. Consider, for example, the eleven High Court cases, reported over the past decade, cited by a leading textbook as representing "the liberal view in awarding compensation to the claimant who is paralysed." Awards range from Rs. 20,000 (approximately \$1,600) to Rs. 70,000 (\$5,600). The average was over Rs. 46,000 (\$3,680) and the median was Rs. 43,000 (\$3,440). C. RAO, *II LAW OF DAMAGES AND COMPENSATION* 1078-81 (1982). A sense of the level of compensation is given by *Ratanji Kaur v. State of Haryana*, 1981 A.I.R. 159 (Punjab & Haryana H.C.), where a woman of 21, permanently confined to a bed or a wheelchair, unable to bear children, and deprived of all earning capacity, was awarded a total of Rs. 68,000 (\$5,440).

It was recently reported that "[m]iddle class motor accident victims have been of late awarded damages of up to Rs. 2 to 3 lakh. . . ." (i.e., \$16,000 to \$24,000). Khandekar & Dubey, *Bhopal: City of Death*, *INDIA TODAY*, Dec. 31, 1985, at 4, 18. I gather that this is the upper range of recovery in the largest metropolitan areas. A Lufthansa pilot, left a quadriplegic after a New Delhi hotel swimming pool accident, sued the hotel for \$420,000 in 1974. Ten years later the hotel's lawyer estimated that if he would someday get one tenth of that amount, it would be the largest personal injury award ever in India. Stewart, *Why Suits for Damages Such as Bhopal Claims are Rare in India*, *Wall St. J.*, Jan 23, 1985, at 1, col. 1, at 16, col. 2.

16. Cf. Krishnan, *supra* note 4, at 645.

17. See LAW COMMISSION OF INDIA, *SEVENTH-SEVENTH REPORT ON DELAY AND ARREARS IN TRIAL COURTS* (1978).

damages might take more than five years in the trial court with a comparable period consumed in appeals.¹⁸

Another feature of the legal landscape worth mentioning is that the Indian Government has retained broad sovereign immunity.¹⁹ Were there to be mass tort litigation in India, one might imagine the Government as a frequent defendant, in its various capacities as proprietor of a large portion of the nation's modern industrial sector, as provider of its public services, and as ubiquitous regulator. In Bhopal, there is at least some question concerning the contribution of governmental regulatory failures to the toxic leak and of deficient public services response to the resulting injuries.²⁰ But sovereign immunity would apparently bar litigation against the Government in its capacity as a regulator.²¹

In addition to the barriers of court fees and the undeveloped nature of tort law, there is another set of barriers to anything happening in India. These derive from the organization of the legal profession itself. There are, as I said, lots of lawyers. Profession and public concur in seeing the lawyer as a courtroom advocate, rather than advisor or negotiator, much less a business or social planner. Clients typically come to lawyers at a relatively late stage of a dispute, already committed to go to court. In short, lawyers see themselves—and they are seen by the public—as barristers. But it is a system that has no solicitors in it.²² Lawyering revolves around courtroom maneuver and argument with hardly a trace of the investigative, fact-development side of law practice.²³ Factual investigation is something clients are expected to do. Ties with clients, and with legal agencies other than courts, tend to be episodic, not enduring. Lawyers have little incentive to develop new expertise in matters relevant to the client's affairs; nor do they enjoy opportunities to pursue the client's interests in arenas other than courts.

The profession is relatively undifferentiated. Typically, the Indian lawyer

18. Bhat, *Compensating Bhopal Victims*, Indian Express, Jan 1, 1985, at 6, col. 3. In the case of the pilot who sued the New Delhi hotel, it was the opposing lawyer's opinion ten years after filing that "[t]rial is years away and appeals could take decades." Stewart, *supra* note 15, at 16, col. 2.

19. CONST. OF INDIA art. 300.

20. On regulatory failures, see, e.g., *City of Death*, INDIA TODAY, Dec. 31, 1984, at 4, 19; Reinhold, *Disaster in Bhopal: Where Does the Blame Lie*, N.Y. Times, Jan. 31, 1985, at 1, col. 1.

21. *Kasturi Lal v. State of Uttar Pradesh*, 1965 A.I.R. 1039, 1046 paras. 19, 20 (S.C. 1964). For a discussion of the scope of the sovereign immunity of the Government of India from tort liability, see Joshi, *Governmental Liability: An Avoidable Confusion*, 15 INDIAN L. INST. J. 432 (1973).

22. An exception must be made for the cities of Bombay and Calcutta where the High Courts had an Original Side (i.e., original as well as appellate jurisdiction). In practice on the Original Side, the profession was divided into barristers and solicitors. Although no longer technically required, solicitors firms still exist in these cities, devoting themselves mainly to large commercial practice. In 1958, there were 1,100 solicitors among the 75,000 lawyers in India. LAW COMMISSION OF INDIA, *supra* note 9, at 584-85.

23. Indian civil procedure permits interrogatories, but wide-ranging discovery by deposing witnesses and obtaining documents is unknown.

spends his working life at a particular court. Within each level, lawyers are stratified by skill, influence, prestige, and wealth—with lawyers at the higher levels of courts enjoying more of these on the whole. But in spite of this stratification, lawyers at each level do much the same sort of thing. There is little division of labor by specialization beyond a rudimentary civil-criminal distinction. The institutions to support specialized knowledge—specialist organizations, specialized periodicals, continuing education, collaborative relations with other lawyers—are virtually absent from the Indian legal scene.

There is little coordination in the form of partnerships or firms, which would allow for economies of scale and for a division of labor among specialists. With recent and numerically minor exceptions, all Indian lawyers are solo practitioners.²⁴ There are no forms of enduring professional collaboration. Hence, the capacity for undertaking major research and investigative tasks is limited. Basically, all lawyers offer the same narrow range of services under conditions of chronic oversupply and intense competitiveness.

Breaking out of this atomistic style is inhibited by notions of propriety regarding solicitation and fees. Utilization of specialized expertise would be rendered difficult by the existing barriers on recruiting an appropriate set of cases. Indian lawyers are supposed to wait passively for clients to come; advertising is unknown and solicitation is forbidden. In practice, there are intermediaries who steer business to lawyers—touts and “village lawyers” that one judge has dubbed “the *de facto* solicitors” of India.²⁵ But there is no respectable, above-board way of recruiting a set of cases that would optimize the development of specialized expertise.

Clients, once found, must pay not only court fees, but the lawyer's fees as well. Contingent fees are not permitted.²⁶ Again, practice departs from precept. Percentage contingent fee arrangements are often found in Motor Vehicles Act cases and there are some *de facto* contingent fees in other kinds of cases as well. But again, there is no respectable way for lawyers to openly finance litigation by claimants who are unable to afford lawyers' fees. Pioneering litigation may also be inhibited by the practice of awarding costs including lawyer's fees against the losing party.²⁷

24. More prosperous senior lawyers often have “juniors”—young lawyers who work in their offices for a few years, often with minimal remuneration.

25. E. MACK, *MAINLY SCRIPTS AND TOUTS* (1955). The prevalence and persistence of such intermediaries is analyzed in Khare, *supra* note 5; Morrison, *Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation*, 9 *LAW & SOC'Y REV.* 39 (1974); J. GANDHI, *supra* note 4.

26. Contingent fees are defined as misconduct under section 10 of the Bar Councils Act (XXXVIII of 1926), 1 *INDIA A.I.R. MANUAL* 1013, 1022 (3d ed. 1969), as well as being void as contracts against public policy under section 23 of the Indian Contract Act (IX of 1872), 6 *INDIA A.I.R. MANUAL* 450, 542 (3d ed. 1970). *In re 'G,'* a Senior Advocate of the Supreme Court, 1954 A.I.R. 557 (S.C.). On the financing of litigation, see CIVIL JUSTICE COMMITTEE 1924-25, *supra* note 13, at 502.

27. In practice, Indian courts seldom award full costs to successful litigants. Fearful that

In this setting, there are few incentives to invest in developing expertise in problems like toxic or environmental torts. The paucity of learning on these matters is reinforced by the absence of specialization and the absence of larger units of practice that would make feasible the efficient application of such expertise. Such litigation would involve factual investigation, but the emphasis on courtroom argument and the barrister role reinforces lawyers' rule-mindedness. When the lawyer's task is to win disconnected battles rather than to pattern relationships, there is little to induce the practitioners to go beyond the arid conceptualism that characterizes so much of Indian legal scholarship and that pervades Indian legal education. Legal work, like writing and teaching about the law, with a few exceptions, is confined to textual analysis on a verbal level with little consideration of factual patterns, problems of implementation or underlying policies. With honorable but numerically insignificant exceptions, these are just not things that concern Indian lawyers.

The Indian lawyer has thus remained locked into a restricted professional role. The roles of investigator, intermediary, negotiator, trustee, planner, advisor, and spokesman that might have gravitated to the lawyer are performed, if at all, by others—clerks and touts, village notables and businessmen, politicians, and administrators. It is only a slight exaggeration to think of the lawyer as a popularized and accessible version of the barrister-half of his British counterpart.²⁸ Yet even as a barrister, the lawyer is limited. Few are able to marshal the resources and take the risks of moving into new fields. The standard repertoire of lawyers is limited and there is little capacity for innovation. Indian lawyers are reminiscent of the Indonesian bazaar merchants described by Clifford Geertz, who display the calculating rationality deemed requisite for economic development, but remain locked into a hyper-individualized, undifferentiated, and inefficient bazaar economy.²⁹

On the customer side of the equation, there is a low level of tort consciousness. Of the few tort cases that are brought, a very large portion are for

such awards might create incentives for extravagant legal maneuvers, courts follow the principle that only those costs "necessary to enable a party to conduct the litigation" are compensable. Expenses incurred to conduct a suit more conveniently are considered "luxuries" and are not recoverable. LAW COMMISSION OF INDIA, *supra* note 9, at 479. Those costs considered "necessary" are determined by fixed schedules which are conceded to have "no relation to the actual cost of the proceeding." Accordingly, successful litigants are usually awarded only a small percentage of the expenses they incur. *Id.*

28. But in Britain, barristers make up less than ten percent of the divided legal profession.

29. C. GEERTZ, *PEDDLERS AND PRINCES: SOCIAL DEVELOPMENT AND ECONOMIC CHANGE IN TWO INDONESIAN TOWNS* (1963). As in the case of those Indonesian merchants, possession of the "right" culture does not confer the ability to navigate the transition to more productive forms of organizing their work.

intentional torts.³⁰ Courts are viewed as places to pursue disputes with intimates and neighbors rather than to secure redress from remote and impersonal entities.³¹ Very low standards of accountability apply to the government, to private employers, and to property owners. Dangerous substances and dangerous conditions abound. People are accustomed to tolerating inconveniences and afflictions, moving on, pursuing whatever kind of self-help may be available. But they do not expect remedies from the legal system for such occurrences.³² This is visible in the whole realm of industrial and agricultural accidents. The Bhopal disaster is an enormous, dramatic event, but the slaughter of the innocent that goes on in India's roads, fields, mines, and factories is constant. There are little "Bhopals" many times over every year—say in the harvest season when new kinds of machinery are brought into the fields to be used alongside laborers who are completely unfamiliar with such machinery. In case of injury, there may be a payment on the spot. But ordinarily there is no expectation of any legal remedy. Modern technology with its great injury producing capacities has arrived, but not a consciousness that these harms are going to be controlled by the legal system. Disasters large and small in India typically have no legal consequences.³³

The reaction to Bhopal marks a striking break from the prevalent fatalism or indifference. There was an immediate and palpable sense that compensation should and could be paid. For many, it was important that compensation be calculated at American levels. This issue was raised almost

30. According to an Indian scholar, a survey of tort litigation revealed that 30 percent (184 of 613) of the reported tort cases from 1914 to 1965 were actions for malicious prosecution. Thanvi, *Law of Torts*, in *THE INDIAN LEGAL SYSTEM* 614 (J. Minattur ed. 1973). Negligence was the runner-up in frequency. *Id.* at 620. Negligence is probably better represented in the lower courts, whose decisions are not reported. Thanvi observes that malicious prosecution suits are "a mode of revenge for criminal prosecution . . . resorted to by the victorious party as the spoils of victory . . . to teach a lesson [to the defendant] rather than to repair . . . [the plaintiff's] injury." *Id.* at 630.

31. Kidder, *Courts and Conflict in an Indian City: A Study in Legal Impact*, 11 J. COMMONWEALTH POL. STUD. 121 (1973). Cf. Morrison's report that "[v]illagers often commented that Netaji [a chronic litigant] would even take a complete stranger to law—proof that his energies were misdirected." Morrison, *supra* note 25, at 57.

32. Even in motor accidents, where the barrier of court fees is absent, the rate of claims is very low. For example, in Madhya Pradesh there were some 19,594 recorded, and thus presumably serious, motor accidents in the years 1971 through 1974, but there were only 2410 claims for compensation to the Motor Accident Claims Tribunal. MINISTRY OF LAW, JUSTICE & COMPANY AFFAIRS, REPORT ON NATIONAL JURIDICARE: EQUAL JUSTICE—SOCIAL JUSTICE 43 (1977).

33. The 1978 crash of an Air India 747, which killed hundreds, produced no lawsuits in India. Similarly, no wrongful death actions followed the 1982 incident in Bangalore in which 365 persons died after drinking contaminated liquor. Stewart, *supra* note 15, at 1, col. 1. Apparently, four earlier accidents at the Union Carbide plant in which one person was killed and thirty injured produced no litigation. *Death Toll Rises from Lethal Gas at Carbide Plant*, Wall St. J., Dec. 6, 1984, at 2, col. 2.

immediately by Indian officials.³⁴ Whether or not it is an issue for the victims, its recurrence suggests that it is an issue for the concerned newspaper-reading public. Significantly, Indian officials were talking about a remedy in the United States as early as December 7, before the American lawyers appeared on the scene³⁵ or filed suit in the United States.³⁶ This quickened sense of accountability is apparently derived not only from the size and horror of the disaster, but from its American provenance. That the culpable party is a large American corporation, or its agent, mobilizes outrage at colonial exploitation; it promotes empathy with the victims and it focuses blame on arrogant foreigners violating India's integrity by polluting it for profit. The sense of violation by a foreign malefactor has distinguished Bhopal from routine instances of victimization. The sense that the victimization in this situation requires redress, although here focused on intruding foreigners, contains a potential for raising expectations of accountability more generally. It portends a major enhancement of the emergent sense of entitlement, marked by the making and recognizing of new kinds of claims.³⁷

II. ONLY IN AMERICA?

If Bhopal aroused a demand for a remedy, it was assumed that it would be delivered in the United States, not in India. It is striking how readily the major potential actors on the Indian legal scene acquiesced in the displacement of the legal action to the United States.

Governmental action to afford or secure compensation in India was minimal. The Central and State Governments each set up an investigation. On

34. Three days after the gas leak, V.P. Sathe, the Central Minister for Petroleum and Chemicals said that "he expected Union Carbide to provide the same kind of relief that it would have provided if the accident had taken place in the United States." Lewin, *Company Expected to Face Many Claims*, N.Y. Times, Dec. 7, 1984, at 8. A similar notion was expressed by the Madhya Pradesh Government even earlier. *Firm chairman and experts denied entry*, The Statesman, Dec. 7, 1984, at 1, col. 1.

35. *India may sue Union Carbide in U.S. Courts*, The Hindu, Dec. 8, 1984, at 6, col. 1. The arrival of American lawyers in Bhopal was first reported on December 9. *State to seek damages from Carbide*, The Statesman, Dec. 10, 1984, at 1, col. 6. But according to a recent account, John Coale arrived December 7. Adler, *Bhopal Journal: Only The Victims Lack a Strategy*, AM. LAW. 128 (April 1985).

36. A suit against Union Carbide for \$15 billion was filed in Charleston, West Virginia on December 8 and was reported in the Indian press the following day. See, e.g., *\$15 billion suit filed in USA*, The Statesman, Dec. 9, 1984, at 1, col. 8.

37. In 1983, the Supreme Court held in *Rudul Sah v. State of Bihar*, [1983] 4 Supreme Court Cases (S.C.C.) 141, that a man jailed for 14 years after being acquitted by a sessions court had a cause of action against the Government for violation of his personal liberty. The State Government was ordered to pay him Rs. 35,000. Subsequently, the Supreme Court awarded Rs. 100,000 each to the families of two persons who disappeared in the custody of a state government. *State agency can recover costs*, The Statesman, Dec. 8, 1984, at 14, col. 2. The first suit filed by the family of a Sikh killed in the riots following the assassination of Indira Gandhi asked for compensatory damages of Rs. 600,000. Singh, *Delhi Riots: Legal Battle*, INDIA TODAY, Feb. 15, 1985, at 38.

December 6, the State Government announced a commission of inquiry, to report in three months.³⁸ It was not until late March that this Commission held its first hearing.³⁹ In December, the Central Government directed the Central Bureau of Investigation to investigate.⁴⁰ In late March, the Bureau said it would be months before its report was finished.⁴¹

The Government immediately undertook to make *ex gratia* compensation payments to victims.⁴² Stations were opened to distribute payments of Rs. 10,000 to survivors, Rs. 2,000 to the seriously injured, and Rs. 100 to 1,000 for minor injuries. But there was just no way to identify the victims. The distribution was suspended after four days. Some 5,724 victims had been paid—but there were estimated to be some 170,000 persons injured, including 10,700 with serious ailments that had been treated.⁴³ In late March, "death payments . . . [had] been paid to less than half the 1900 survivors who applied for them," and injury payments had not been resumed.⁴⁴

The problem of identifying the victims is deep-seated. India is a society in which about the top three percent of earners pay income tax. It is not an orderly, highly regulated society like Japan where everyone is known by the police or has an identity card. Few Indians have driver's licenses. There is no social security system or national health system. It is a society in which many people can go through life without leaving any definitive official record of their identity. Many, perhaps most, of the seriously injured were rural

38. *Concern mounts over aftermath*, *supra* note 11, at 1, col. 5. The Commissioner is Justice N.K. Singh.

39. Kramer, *For Bhopal Survivors, Recovery is Agonizing, Illnesses are Insidious*, Wall St. J., Apr. 1, 1985, at 1, col. 1, at 10, col. 2.

40. It predicted that it would have a final report within four weeks. *Ramachandran to head CBI probe team*, Indian Express, Dec. 12, 1984, at 7, col. 4. After seven weeks, the investigators announced that they would publicly disclose their findings "within a month or so." Press leaks of that report reveal that the inquiry found safety features that were inadequate or malfunctioning and a history of small methyl isocyanate leaks at the plant. Sharma, *Frightening Findings at Bhopal*, TIME, Feb. 18, 1985, at 78. According to a subsequent account, an "as yet unreleased report" produced by "a team of Indian government officials" attributes responsibility to "a combination of design flaws, operating errors, defective systems, and managerial mistakes." *Confidential Indian report blames both U.S. firm and subsidiary for Bhopal disaster*, Christian Sci. Monitor, Mar. 26, 1985, at 1.

41. Kramer, *supra* note 39, at 10, col. 2.

42. A tentative decision to pay Rs. 5,000 each to the families of those killed was reported on Dec. 4. *Bhopal gas leak toll 1,200*, The Statesman, Dec. 5, 1984, at 1, col. 1.

43. *Relief for gas victims under study*, Indian Express, Jan. 19, 1985, at 1, col. 6. According to accounts, neither the Finance Department nor the district authorities were willing to undertake the onerous task of determining eligibility. Lack of coordination was compounded by clamour from local politicians (the gas leak occurred at the height of the election campaign) that their areas had been affected. Faced with a chaotic situation that it considered a threat to law and order, the Government suspended payments on December 8 and promised that they would be resumed on December 12. Khandekar, *Painful Indecisions*, INDIA TODAY, Jan. 31, 1985, at 48. This move provoked demonstrations in which 7,000 people blocked traffic in Bhopal for six hours. *Gas Victims in India Protest Payment Delays*, N.Y. Times, Jan. 2, 1985, at 5, col. 1.

44. Kramer, *supra* note 39, at 1, col. 1.

migrants who had settled in shanty-towns adjacent to the Union Carbide plant. These are the people for whom there are likely to be few records. Thus, the problem of identifying who they are and who their survivors are is an enormous one.⁴⁵

Not only is it hard to identify the genuine victims, but the temptation and opportunity for dissimulation to share in the compensation are sizable.⁴⁶ To many nonvictims or those whose suffering was less severe, this may seem to be a chance to have a fortune poured into their lap. There was a revealing incident on December 11 at Hamidia Hospital where most of the victims were being treated. Nine hundred junior doctors and medical students went on strike to protest the alleged assault on two senior physicians by a local politician upbraiding them for discharging a patient.

Dr. Sahni [a spokesman for the striking doctors] said that since the time the Government announced that gas victims would be monetarily compensated, "politicians are interfering in our work and not allowing us to take independent decisions on how long a patient should remain in the hospital."⁴⁷

There has already been a good deal of effort expended by people positioning themselves for eventual compensation. So getting the right people, and not getting the wrong people, are very major and perhaps intractable problems.

Early on, the State Government took some measures to facilitate claims. Within days of the leak, it announced that it would suspend the Court Fees Act for cases arising from this incident. The fees were waived in a notification dated December 20, but the filing of cases was delayed for weeks after because of a delay in publication in the official Gazette.⁴⁸ On December 6, the State Government directed legal aid committees to "examine avenues for filing claims on behalf of the victims"⁴⁹ and on December 30, announced that three or four "legal aid and guidance camps" would be opened to dispense free legal advice and help in filling out forms.⁵⁰ By February 20, one

45. But perhaps not impossible. According to one report, "[i]dentifying the families in the bastis [shanty-towns] should not pose a problem, as only in last April the government had updated its record of slum-dwellers after conferring *pattas* [land rights] on them." Ramaseshan, *Callousness Abounding*, *ECON. & POL. WEEKLY*, Jan. 12, 1985, at 56, 57. Another possibility could be to go through religious authorities, as in this instance a majority of the most severely injured are Muslims.

46. Such opportunities are augmented by the standard practice of applicants for government benefits having their identity, and sometimes their eligibility, certified by any member of a whole stratum of government officers or political officeholders. On the role of such certificates in India's "affirmative action" programs, see M. GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 282, 343 (1984).

47. *Bhopal not to be evacuated; Junior doctors go on lighting strike*, *The Statesman*, Dec. 12, 1984, at 1, col. 2.

48. Notification F9184 B21m dated 12/20/84. The delay is explained in *The Legal Damage*, *INDIA TODAY*, Jan. 15, 1985, at 60, 63.

49. *Firm chairman and experts denied entry*, *The Statesman*, Dec. 7, 1984, at 1, col. 1.

50. Reinhold, *India State Plans to File U.S. Suits on Gas Leak*, *N.Y. Times*, Dec. 31, 1984, § 1, at 4, col. 1.

legal aid committee had reportedly filed over 2,000 claims against Union Carbide of India.⁵¹

But facilitating claims at home was a decidedly minor part of the State Government's response. A few days after the disaster, the Government of Madhya Pradesh announced that it was going to sue Union Carbide, presumably in the United States, within a week.⁵² At the end of December, the State Government again declared its intention to file suit in the United States on behalf of the Bhopal victims.⁵³ Presumably this possibility was ended when the Central Government passed an ordinance appointing itself the representative of the victims.⁵⁴

The Central Government was even more unwavering in its focus on the United States. Early declarations that a remedy would be sought in the United States were followed by the dispatch of Attorney General K. Parasaran to the United States. According to a Government announcement, his mission was to consult American lawyers about the "jurisdiction of the American courts in relation to the cases to be filed on behalf of the gas tragedy victims."⁵⁵ For three days the Attorney General held meetings at the Indian Embassy in Washington, speaking with ten to twelve law firms and receiving "'80 to 100' offers of advice."⁵⁶ Although the purpose of the meetings was said to be purely informational, it was perceived by lawyers and the press in the United States that the Indian Government was planning to retain counsel and that the meetings were, in effect, "job interviews."⁵⁷ The subsequent retention of one of the interviewed firms suggests there was some substance in this. The Minneapolis firm of Robins, Zelle, Larson & Kaplan, interestingly, exemplifies precisely the kind of specialized expertise in this kind of litigation that is utterly unavailable in India.⁵⁸ The Attorney General also met with Union Carbide Chairman Warren Anderson during

51. *Ordinance to file cases against UCC*, Indian Express, Feb. 21, 1985, at 1, col. 8. The animation of legal aid was at least partly in response to the objectionable practices of some American lawyers. *The Legal Damage*, *supra* note 48, at 63.

52. On December 9, Madhya Pradesh Chief Minister Arjun Singh said there was "no question" that a suit would be filed by the State. He added that the filing would take place after consultations with the Attorney General of India. *State to seek damages from Carbide*, The Statesman, Dec. 10, 1984, at 1, col. 6. A New Delhi report on December 8—before the arrival of the United States lawyers in Bhopal—referred to negotiations between the State Government and a United States law firm. *Compensation from Union Carbide: no decision yet*, The Hindu, Dec. 9, 1984, at 1, col. 2.

53. Reinhold, *supra* note 50, at 4, col. 1.

54. Riley, *New Bhopal Law May Affect Future Role of U.S. Lawyers*, Nat'l L.J., Mar. 11, 1985, at 4, col. 3.

55. *Indian Official Set to Visit U.S. Over Bhopal Case*, Wall St. J., Jan. 9, 1985, at 4, col. 3.

56. *On & Off the Record*, Nat'l L.J., Jan. 28, 1985, at 2.

57. *Bhopal Claims: A Vast Burden*, N.Y. Times, Feb. 5, 1985, at D2, col. 4.

58. On the Government's choice, see Lewin, *India Plans to Sue Carbide in the U.S.*, N.Y. Times, Mar. 9, 1985, at 1, col. 4; Robins, Zelle Passage to India, AM. LAW. 23 (April 1985). The firm, of over 150 lawyers, has a "full-time nine man investigative team . . . [made up of] engineers, former FBI experts, ex-firemen . . ." *Kings of Catastrophe*, TIME, April 22, 1985, at 80.

his trip, suggesting that he may have been testing the possibilities for settlement while moving toward litigation.

After the Attorney General's return from this "exploratory mission," the Government of India passed an ordinance making itself the legal representative of the victims.⁵⁹ The scope of the planned representation remains unclear, as the Bhopal Gas Leak Disaster Ordinance both designated the Government as the "exclusive" representative of the victims and preserved the right of individual claimants to retain their own counsel.⁶⁰ There are indications that the Indian Government intends to assert control over all the United States litigation. The Minister of State for Law said that "American Lawyers have unnecessarily complicated the situation. They will now have to operate under the instructions of the main counsel for the Indian government."⁶¹ As the Government pursued settlement negotiations without consultation with the other plaintiffs' lawyers, one faction of the latter, fearing they were being excluded from the case, announced their intention to file suit in India to challenge the right of the Indian Government to exclude them from representing the victims.⁶²

Apparently eager to reach a settlement without formally becoming a party—and thus exposing itself to claims by other plaintiffs—the Government of India pursued a settlement before filing suit. As early as March 10, it was reported that the Government was seeking a settlement.⁶³ A week later, the Chairman of Union Carbide reported that "active discussion" of settlement was "a continuing event."⁶⁴ After another week, the Indian Parliament was informed that a "concrete proposal" by Union Carbide was imminent.⁶⁵ On April 6, Prime Minister Gandhi reported rejecting Union Carbide's offer as insufficient. An Indian paper reported that the offer was for \$200 million⁶⁶—coincidentally, an amount equal to the insurance coverage reportedly carried by Union Carbide.⁶⁷ On April 9, the Government of

59. Bhopal Gas Leak Disaster (Processing of Claims) Ordinance, No. 1 of 1985, dated 20 February 1985 [hereinafter cited as Ordinance] (copy on file with the *Texas International Law Journal*). In late March, the Ordinance was enacted by the Indian Parliament as the Bhopal Gas Leak Disaster (Processing of Claims) Act, 1985.

60. *Will the Bhopal Ordinance Leave Lawyers for Plaintiffs Without Their Lawsuits?*, *Legal Times*, Mar. 4, 1985, at 1.

61. *Next Bhopal Step Remains Unclear*, *Nat'l L.J.*, Mar. 25, 1985, at 3, col. 1.

62. Diamond, *U.S. Lawyers Plan Suit to Keep Bhopal Clients*, *N.Y. Times*, April 4, 1985, at 27, col. 1. The differences among the three factions of the American plaintiffs' lawyers are sketched in Diamond, *Lawyers' Fees in Bhopal Case*, *N.Y. Times*, April 9, 1985, at 30, col. 1.

63. *Settlement Broached*, *N.Y. Times*, Mar. 11, 1985, at 29, col. 4.

64. *Union Carbide Holds Talks with Indians in Bid to Settle Bhopal-linked Lawsuits*, *Wall St. J.*, Mar. 19, 1985, at 4.

65. *India Expects Bhopal Offer*, *N.Y. Times*, Mar. 26, 1985, at 39, col. 1.

66. *\$200 Million for Bhopal Rejected*, *Wisconsin State J.*, April 6, 1985, at I-3. Other versions had the offer as \$60 million plus \$180 million over 30 years, *India's Bhopal Suit Could Change All the Rules*, *BUS. WK.*, Apr. 22, 1985, at 3, and as \$500 million over 30 years, *Kings of Catastrophe*, *supra* note 58.

67. Union Carbide's liability insurance coverage was reported to be at least \$200 million

India filed suit for an unspecified amount in federal district court in New York.⁶⁸

Pursuit of recovery in the United States has the obvious virtues of targeting the wealthier parent corporation, opening the possibility of punitive damages, and staking a claim to the higher levels of compensatory damages awarded in United States courts. But the first two might well be secured in India; and it is not clear that the last is available in the United States, as the Indian measure of damages will presumably be employed, at least in theory. And the American path is not without its dangers. The Government is exposing itself to the risk that its invocation of the courts in the United States will amount to a waiver of its sovereign immunity in connection with claims based upon its failure as a regulator.⁶⁹ Furthermore, Indian Government leadership of the plaintiffs' cases may undermine any argument against the anticipated motion to dismiss on grounds of forum non conveniens based on the unavailability of an adequate remedy in India. Such an argument might carry little persuasiveness when made by a government that is the architect and manager of an admittedly inadequate system of civil justice, which incidentally makes a profit for the state.

Litigation in the United States may have another, unacknowledged attraction for the Indian Government. Although its stance in this case is as representative of the victims, the Government is, as proprietor and regulator, potentially the most prominent defendant on the Indian scene, albeit one partially shielded by sovereign immunity.⁷⁰ If new mechanisms of accountability were to develop in India, the Government would surely be a prime target of such claims—a prospect which the Government must regard with some misgiving.

The Bhopal Gas Leak Disaster Ordinance not only positions the Government for participation in United States litigation, it also derails any litigation in India. It empowers the Government of India to interpose an administrative compensation process as the exclusive primary resort of the victims.⁷¹ Apparently victims are cut off from direct recourse to the courts; Indian courts are perforce foreclosed from any innovations that would enlarge their capacity to address such instances of mass victimization.

If the Government's contentment with displacement to the United States is understandable, the acquiescence of other legal actors is more puzzling.

in nine layers. Ranii & Lauter, *Next Bhopal Step Remains Unclear*, Nat'l L. J., Mar. 25, 1985, at 3.

68. Lewin, *Carbide Is Sued In U.S. by India In Gas Disaster*, N.Y. Times, April 9, 1985, at 1, col. 5.

69. 28 U.S.C. § 1607 provides for waiver of sovereign immunity with respect to "any counterclaim . . . arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state" Even if this were construed to bar cross-claims by other plaintiffs, the Government of India might be exposed to claims by Union Carbide or by other potential defendants.

70. See *supra* notes 19-21 and accompanying text.

71. Ordinance, *supra* note 59, at §§ 5, 6, 9.

The response of the Indian legal elite—in which I include the higher judiciary, leading legal academics, and the upper reaches of the metropolitan bar—was one of dazed pessimism; the export of the legal action to the United States was acquiesced in without a murmur of protest—indeed, with some encouragement. The Chief Justice of the Supreme Court of India is reported to have said: "It is my opinion that these cases must be pursued in the United States. . . . It is the only hope these unfortunate people have" ⁷² The Chief Justice's pessimism about the capacity of the Indian courts to forge a remedy was shared by elite lawyers, who observed that the system was in a virtual "breakdown" and that in light of the existing backlogs, the notion that the district courts could accommodate the Bhopal litigation was "ludicrous." ⁷³ This pessimism about the legal possibilities in India often co-exists with untroubled faith in the United States legal system ⁷⁴—and anticipation of enormous recoveries. ⁷⁵

Why have these claims failed to enlist the energies and excite the imagination of elite lawyers? It would be mistaken to regard them as unenterprising. They have been very inventive and energetic, for example, in elaborating on the constitutional provisions for writ petitions ⁷⁶ against violation of guaranteed Fundamental Rights, ⁷⁷ to vastly enlarge the remedial opportunities of their well-heeled clients. But it is an inventiveness within the severe limits imposed by the atomistic format of law practice. One may discern in the Bhopal situation a portent of a different kind of law practice that would require massive and painstaking investigation, sustained coordination of large numbers of experts of various kinds, and campaigns of advocacy in forums remote from the courts. The pessimism and passivity inspired by Bhopal are a "realistic" response to its invitation to abandon the comfortable, hermetic world of individualistic, doctrinal courtroom lawyering. If the

72. Stewart, *Why Suits for Damages Such as Bhopal Claims are Very Rare in India*, Wall St. J., Jan. 23, 1985, at 1, col. 1.

73. *Id.* at 1, col. 1, at 16, col. 3 (quoting Indian lawyers S. Kurshid and V.M. Tarkunde). Thinking about how Indian legal institutions might be adapted to rise to the occasion surfaced only rarely. See Bakshi, *Bhopal tragedy and Indian courts*, The Statesman, Apr. 5, 1985, at 9. The rudiments of an imaginative scheme by Narasimha Swamy, an Indian lawyer practising in the United States, are discussed in Adler, *supra* note 35, at 132.

74. Bhat, *Compensating Bhopal Victims*, Indian Express, Jan. 1, 1985, at 6, col. 3; Srinivasan, *The Case for Fighting Union Carbide in America*, Indian Express, Mar. 10, 1985, at 6.

75. One reporter mentions \$10 billion, Srinivasan, *supra* note 74, which coincidentally happens to be the approximate net worth of Union Carbide.

76. CONST. OF INDIA arts. 32, 226.

77. CONST. OF INDIA pt. III. One of the few visible attempts to improvise new legal remedies was a grandiose writ petition, filed in the Supreme Court by a practitioner "by way of public interest litigation," alleging that the Fundamental Rights of the Bhopal victims had been violated by the State and Central governments' failure to enforce industrial safety laws, and claiming damages of Rs. 500,000 for each victim. *Supreme Court moved for compensation*, The Hindu, Dec. 11, 1984, at 9. It disappeared from view after the lawyer was "severely criticized" by the judges "for drafting the petition in a very casual manner without proper facts or arguments." *Supreme Court notice to Centre, MP Govt*, Indian Express, Dec. 12, 1984, at 1.

present format of practice is accepted as immutable, then the very different contours of this situation are insuperable obstacles, not opportunities for reform.

Perhaps acceptance of the status quo should be expected from the most comfortably ensconced. But there are those within the Indian legal world who have sought to go beyond individualistic fee for service lawyering. One component of this is legal aid, long a declared aspiration of the Indian bar, honored largely in the breach until interest quickened during the 1975-1977 State of Emergency. The Constitution was amended to include in the Directive Principles a provision directing the State to provide free legal aid.⁷⁸ Legal aid programs on a more extensive scale have started up in most of the Indian states in the past five years.

Most legal aid departs little from the prevailing style of lawyering. A typical program is oriented toward pursuit of individual claims in court; it is passive in case selection and paternalistic in relation to clients. It eschews any deliberate impact on the design or administration of government policy. It envisions attorneys entering cases after the dispute has already taken shape and focusing their efforts on courtroom advocacy. There is little provision for investigation, monitoring results, aggregating similar claims, developing specialization, and operating in arenas other than courts. In short, most legal aid replicates the prevailing atomistic style of lawyering.

There have been some significant departures from this pattern in the past decade. The most visible is what is called in India "public interest litigation." This refers to infrequent but symbolically important cases in which the Supreme Court or a High Court permits volunteer lawyers to bring a case on behalf of some victimized group—prisoners, bonded laborers, inmates of a home for neglected girls, pavement dwellers threatened by relocation.⁷⁹ Traditional notions of remedy are often stretched to devise appropriate relief. Typically there is no active participation by the would-be beneficiaries. Often the court actively invites, or induces, the bringing of the case.⁸⁰

This public interest litigation departs from typical Indian lawyering in its proactivity, its remedial innovation, and its orientation to large questions of

78. CONST. OF INDIA art. 39A provides:

The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to insure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

79. On public interest litigation, see PUBLIC INTEREST LITIGATION: SOME INTRODUCTORY READINGS (Committee for Implementing Legal Aid Schemes, R. Dhavan ed. 1982).

80. This public interest litigation has been undertaken by a small number of judges on the Supreme Court and High Courts. The persistence of such enclaves of judicial activism is made possible by the attenuation of hierarchic control of Indian courts, rendering them "colleges" within which can flourish many inconsistent strands of doctrine and practice. See M. GALANTER, *supra* note 46, at 490, 496-98.

policy, particularly vindication by the Indian Government of its commitments to welfare and the relief of the oppressed. Although broader in scope than typical legal aid schemes, in crucial ways it replicates the prevailing atomistic style. Public interest litigation is also initiated and controlled by elites and is responsive to their sense of priorities. It carries no accountability to a specific client constituency nor does it imply a sustained commitment to such a constituency. It is typically an episodic response to a particular outrage. It does not mobilize victims nor help them to develop capabilities for sustained effective use of law.

The Indian scene does contain a scatter of programs that break from the prevailing atomistic style of legal services delivery. Such programs, located in the voluntary sector, have given rise to a profusion of innovations that address the deficiencies of atomistic lawyering: the development of proactive mobilization and investigatory capacity by the use of paralegals; the development of the capacity for discovering patterns in the caseload and for aggregating cases by use of staff attorneys; the vertical linkage from village mobilization through the high court, overcoming the separation of levels typical of Indian law practice; the use of cumulative educational efforts to support legally informed direct action; and the development of linkage with technical experts. These programs are small and not firmly institutionalized, but they are noteworthy because they suggest that the ingredients present in the Indian legal setting can be rearranged to provide legal services that are more innovative, more effective, and more responsive to the needs of unrepresented groups.⁸¹

Legal aid programs, public interest litigators, and community activists have different agendas and different ideologies. Although in different ways, they depart from prevailing models of lawyering, they are scattered, small, and have little capacity for coordinated action. Attempts to create institutions to provide services to and promote collaboration among the various components of the "public interest/social action" sector have not so far borne any fruit. Although groups within this sector have been concerned with problems of substance (such as environmental depredation) and procedure (such as the aggregation of multiple claims) and with groups (such as slumdweller), which are all centrally implicated in the Bhopal disaster, the response to Bhopal on the part of these groups—including their supporters and patrons within the legal elite—has been virtually inaudible.⁸²

81. On these innovations, see Galanter, *Making Law Work for the Oppressed*, 3(2) *THE OTHER SIDE* 7, 12-13 (1983); see also the proceedings of the Workshop on the Effective Uses of Law by Social Action Groups, held in Ahmedabad, India, Dec. 29, 1982-Jan. 3, 1983, whose publication is forthcoming.

82. The single exception that has come to my attention is the action of the Lawyers Collective, a Bombay public interest law firm, representing three victims before the N.K. Singh Commission. *Probe body directive to Union Carbide*, *Overseas Hindustan Times*, Apr. 13, 1985, at 11.

The inaction of those actors on the Indian national stage who appeared best equipped to respond innovatively to the Bhopal challenge—the Central Government, Supreme Court, legal elite, public interest sector—meant that the legal initiative in India fell to the local lawyers in Bhopal. By late February, some 2,000 cases had been filed against Union Carbide (India) in the District Court in Bhopal, claiming damages up to Rs. 400,000 for wrongful death and somewhat less for injury—unprecedented amounts in India.⁸³ The Legal Aid Society was reported to have assembled data preparatory to bringing 36,000 more cases. All cases were assigned to a single judge, whose request to the State Government for 15 additional judges had borne no fruit by late March. No measures had been taken to consolidate the cases. In keeping with the individualized, highly competitive style of the Indian bar, plaintiffs' lawyers, operating with virtually no support staff, have not established any facilities for collaboration. And the defendant corporation, whose legal work is more coordinated, has adopted the nitpicking, foot-dragging defense tactics typical of Indian litigation.⁸⁴ Apparently, these cases have been brought to a halt by the legislation making the Government of India the exclusive representative of the victims.⁸⁵

Finally, we come to a set of actors who were new players on the Indian stage—the carpetbagging American lawyers who arrived at Bhopal within a week.⁸⁶ While the "score or more"⁸⁷ of American lawyers in Bhopal signed up thousands of clients, their colleagues in the United States kept up a barrage of filings and pronouncements, and pursued at least rudimentary research. Indian norms against solicitation and contingency fees were systematically and openly violated. Some of the visitors were reported to have engaged in outrageous conduct by paying for signatures, misinforming clients, contracting for extremely high contingency fees, and taking full authority to settle.⁸⁸ The result was the filing of about 50 lawsuits in the United States, claiming over \$250 billion; more than 80 plaintiffs' lawyers were involved, claiming to represent over 400,000 victims.⁸⁹

The plaintiffs' lawyers were subjected to an outpouring of professional and journalistic condemnation in the United States. A widely reprinted cartoon

83. See *The Legal Damage*, *supra* note 48, at 63, reporting claims of Rs. 300,000 for wrongful death and Rs. 205,000 for injuries. For many of the Bhopal victims, this would be 50 years income. But in dollar terms, Rs. 300,000 is only \$24,000.

84. See Adler, *supra* note 35; *The Legal Damage*, *supra* note 48.

85. See *supra* note 59.

86. They included several Indian lawyers practising in the United States and affiliated with Indian lawyers in Bhopal and elsewhere in India.

87. Reinhold, *supra* note 50, at 4, col. 1.

88. *Id.* at 4, cols. 1-2; Adler, *supra* note 35; Bergman, *The Scandal of U.S. Lawyers Seeking Clients in Bhopal*, N.Y.L.J., Jan. 17, 1985, at 1, col. 4.

89. Adler, *supra* note 35, at 134. The 46 cases filed in federal court were consolidated in a multidistrict proceeding and assigned for pretrial procedures to the Southern District Court of New York. Taylor, *Bhopal Suits Combined in New York*, N.Y. Times, Feb. 7, 1985, at D1. Cases were also filed in state courts in Texas, Connecticut, California, and Florida. Adler, *supra* note 35, at 132.

depicted them as vultures preying on the Indian victims.⁹⁰ As one syndicated columnist put it, "U.S. negligence lawyers invade India—on the wings of greed."⁹¹ An environmental mediator, writing in the *New York Times*, called their rush to Bhopal "insulting and inappropriate."⁹²

One curious corollary of this reproach of the American lawyers and their efforts to remove the matter to the United States was a bouquet of encomia for the Indian legal system that would surely bemuse its intimates. The *Wall Street Journal* editorialized that:

Justice can be done in Indian courts. India is not Ruritania. The British left behind a perfectly good legal system—better in fact than the U.S. system because contingency fees are outlawed so that only the injured benefit. If Union Carbide was negligent, Indian courts will make sure the company compensates the victims.⁹³

Chairman Warren Anderson of Union Carbide opined that waiver of court fees and provision of legal aid would resolve the problems of handling things in India. "[T]hey have a system of jurisprudence. They're not ashamed of it. They can solve this problem themselves. They don't need all this additional help."⁹⁴

If few in India shared this sanguine optimism about the Indian system, many in India, repelled by the bluster and cupidity of the Americans, were critical of their intervention. By the end of December, it was reported that Indian newspapers "often carried strident articles and editorials calling the lawyers ambulance chasers."⁹⁵ The State Cabinet appealed to the public not to enter into agreements with foreign lawyers. And, unkindest cut of all, the chairman of the State Congress Party's legal cell called them "hirelings" of Union Carbide.⁹⁶

90. The cartoon originally appeared in the *Chicago Tribune*, Dec. 19, 1984.

91. Cohen, *U.S. negligence lawyers invade India—on the wings of greed*, *Capital Times*, Dec. 19, 1984, at 16. Vigorous defense of their intervention was not entirely absent. For example, one columnist contended that: "Lawyers who file multimillion-dollar lawsuits are the consciences [sic] of corporations. They whisper in their ears in a language they can understand. So quit thinking of them as vultures. They are more like Jiminy Cricket." McNally, *The Innocent Bystander*, *Milwaukee Journal*, Dec. 31, 1984, at 11, col. 1. This column carries the legend "A satirical column of personal opinion." On the reactions to the American lawyers in Bhopal, see generally *Bhopal Blowup*, 71 A.B.A. J. 17 (Jan. 1985).

92. Stein, *Paying Bhopal Victims*, *N.Y. Times*, Dec. 18, 1984, at A31, col. 3.

93. Editorial, *Non Causus Belli*, *Wall St. J.*, Dec. 12, 1984, at 30, col. 1. The writer seems to share the impression that in the absence of contingency fees, claimant's net recovery is not reduced by payments for legal services. Faith in the capacity of the Indian system is shared by a "recent Fulbright professor" who tells of "skilled Indian tort lawyers," McLeod, Letter to the Editor, *N.Y. Times*, Jan. 2, 1985, at 18, col. 3, and a "law student" who attacks disparaging comparisons of adequacy of tort law, Itzkowitz, Letter, *Nat'l L.J.*, Feb. 4, 1985, at 12.

94. *Carbide's Anderson Explains Post-Bhopal Strategy*, *CHEMICAL AND ENGINEERING NEWS*, Jan. 21, 1985, at 9, 10.

95. Reinhold, *supra* note 50, at 4, col. 2.

96. *Id.* This same lawyer had filed 120 cases in the district court in Bhopal by early January. *The Legal Damage*, *supra* note 48, at 63.

Yet the intervention of the American lawyers should be credited with profound effects, both raising consciousness and creating bargaining leverage. Their visible and energetic presence conveyed a promise of prompt and aggressive remedial action. Their public recital of alternative theories of liability and of claims for damages of a magnitude unknown in India, made palpable to all the possibility of pursuing a remedy in the United States—and thus reinforced the neglect of the possibilities in India. The suits they brought constituted a formidable threat to Union Carbide and both a goad to and constraint on the Government of India, simultaneously increasing its leverage while decreasing its room for maneuver. Whether the true victims will ever receive any compensation remains far from certain. But it seems fair to say that the possibilities of a sizable recovery—or any recovery for that matter—have been enhanced by the intervention of the American negligence lawyers. As one prominent Indian lawyer told an American reporter: "But for the American lawyers there wouldn't be any litigation against Union Carbide. I say God bless them. They deserve to be thanked by the Indian nation."⁹⁷

Indian Government officials have minimized the contribution of the American lawyers, but from afar it appears that their intervention blazed a trail that the Indian Government followed and that their momentum forced the Indian Government to act quickly and resolutely to gain control of the litigation.⁹⁸ In spite of complaints about the "unnecessary complications" produced by the American lawyers, it is difficult to believe that the victims' ultimate bargaining position—and even the Indian Government's attractiveness as a negotiating partner—is hurt by their presence.⁹⁹

III. CONCLUSION

In the days following the disaster, many outsiders converged on Bhopal to bring relief of various sorts. Among the first was Prime Minister Rajiv Gandhi, who arrived on December 4 to study the situation and who promised prompt rehabilitation of the injured and a rethinking of policies about location of dangerous plants.¹⁰⁰ Two days later, Chairman Warren Anderson of Union Carbide arrived with offers of aid and was subjected to symbolic arrest.¹⁰¹ On December 11, Mother Teresa, accompanied by seven

97. Stewart, *supra* note 72, at 16, col. 2 (quoting Ram Jethmalani, who is also a leading opposition politician).

98. In the light of the risks and uncertainties of litigating in the United States, see *supra* note 69 and accompanying text, it is not clear that such a course would have been more appealing to the Government than, say, an arbitrated or mediated settlement.

99. Generally, the presence of an outsider making claims that are more extreme, and that have sufficient credibility so they can not be ignored, is thought to help rather than hurt the position of a bargainer. This is a variant on the famous "evil partner" ploy.

100. *Bhopal gas leak toll 1,200*, *The Statesman*, Dec. 5, 1984, at 1; *Rajiv visits Bhopal*, *The Hindu*, Dec. 5, 1984, at 1.

101. Reinhold, *Indians Arrest and Then Free U.S. Executive*, *N.Y. Times*, December 8, 1984, at 1, col. 2.

helpers, arrived, distributed miraculous medals, was heartened by the courage of the victims, spoke of the need for forgiveness, and undertook to care for some of the orphans.¹⁰² The next day Melvin Belli arrived, joining American tort lawyers already on the scene.¹⁰³ Each member of this series of distinguished visitors expressed concern, promised aid to the victims, and in due course departed. But the last of these introduced a modification in the well-established routines of consoling and patronizing victims. Belli and the other American lawyers embodied the notion of accountability to the victims, not *ex gratia*, but as of right—of an entitlement to full compensation. The arrival of these strangers reflected the absence of such accountability in Indian institutional procedures, professional routines, and public expectations. Their sojourn, with its bluster, exaggeration, and misunderstanding, may be an outlandish and bathetic prefiguration of the emergence in India of such accountability!

Feeble accountability in India led to a focus on the American forum and that in turn reinforced neglect of the possibilities in India. The focus on redress in the United States has eclipsed consideration of what needs to be done in India, both to effectuate relief to the Bhopal victims and to create institutional capacity to deal with instances of mass victimization in the future. Even if the preventive and regulatory fallout of Bhopal were to reduce the incidence and toll of future disasters, the coming years will surely bring many instances of explosions, wrecks, building collapses, mass poisonings, traumatic relocations, and other life-destroying and life-disrupting events. Most often, it will be the lives of the poorest and most vulnerable that will be destroyed and disrupted.

In addition to its preventive and regulatory lessons, Bhopal is a reminder of the remedial agenda that remains unaddressed. Some of the items on that agenda would surely be:

- the development of institutional mechanisms for simple, expeditious, and cheap recovery of compensation;
- designing methods of providing interim relief pending final determination of claims;
- addressing the problem of reliable identification of victims—a problem that would increase were recovery to become more available;
- the provision of organized advocacy for the victims—a task for which government is not well suited in view of its cross-cutting interests and competing responsibilities.
- the development of expertise in advocacy for disaster victims, including skills in fact-investigation;
- the development of mechanisms of coordination among the advocates for victims, to permit economies of scale in investigation,

102. Hazarika, *Mother Teresa Carries Her Message to Bhopal*, N.Y. Times, Dec. 12, 1984, at 8; *Teresa offers to adopt orphans*, The Hindu, Dec. 13, 1984, at 9.

103. *Three groups of leading U.S. lawyers in Bhopal*, The Statesman, Dec. 13, 1984, at 1.

research, and use of technical experts, and to make possible strategic coordination in campaigning for the interests of victims through litigation and other means;

—providing ways to consolidate these claims to eliminate costly and wasteful duplication, such as a single consolidated proceeding to determine common questions (for example, liability) and special tribunals to make individualized determinations of damages; and

—providing a mechanism for lawyers to take such cases and get paid later; for example, by devising a revolving fund that would pay for legal services and be replenished from recoveries.

In referring to prefiguration, I do not mean to imply that Indian law must become like American law. A search would surely find much that is instructive and some that is worth adapting from the United States legal system. But the accountability gap must be filled by Indian standards and techniques. It is high time for the search to begin in earnest.