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In Pursuit of Bigfoot: Confronting Oil and Gas Mythology in Louisiana

*J. Michael Veron**

“I therefore claim to show, not how men think in myths, but how myths operate in men’s minds without their being aware of the fact.”¹

INTRODUCTION: THE CURIOUS FATE OF SENATE RESOLUTION 142

The connection between wealth and political influence is an obvious one, and it is nowhere more obvious than in the state of Louisiana. From at least the time of Huey Long,² the adjectives “wealthy” and “powerful” have been synonymous with political influence in the Bayou State.

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1. CLAUDE LEVI-STRAUSS, 1 THE RAW AND THE COOKED: MYTHOLOGUES 12 (1983).

2. Huey Long served as the Governor of Louisiana from 1928 to 1932. At the time, he was prohibited by law from serving consecutive terms, so he successfully ran for a seat in the United States Senate, where he served until he was assassinated in the halls of the Louisiana State Capitol on September 10, 1935. Long was a colorful populist whose life and times inspired Robert Penn Warren’s Pulitzer Prize-winning 1946 novel, *All the King’s Men*. Interesting accounts of Long’s life have been written by LSU faculty members. The first noteworthy effort was the 1981 biography by T. Harry Williams, *Huey Long*. More recently, Richard D. White’s 2006 book, *Kingfish: The Reign of Huey P. Long*, told the story again. Regardless of which account one reads, it is generally agreed that Long’s political career was marked by controversy and corruption. As one writer noted, the flamboyant Long was perceived either as a political messiah or a dictator-in-waiting. See David Oshinsky, *Every Man a King: A New Biography Studies the Many Faces of Huey Long, Lawmaker and Lawbreaker*, N.Y. TIMES, Apr. 16, 2006, at F9 (reviewing RICHARD D. WHITE, JR., KINGFISH: THE REIGN OF HUEY P. LONG (2006)), available at <http://www.nytimes.com/2006/04/16/books/review/16oshinsky.html>, archived at <http://perma.cc/AWZ2-C8UT>.

Anyone demanding proof of that proposition need look no further than the 2014 Louisiana Legislature. During that Regular Session, north Louisiana Democratic Senator Richard Gallot, Jr., introduced Senate Concurrent Resolution No. 142.³ The stated purpose of the resolution was to request the Department of Revenue and the Department of Natural Resources to work with the Office of the Legislative Auditor to verify the accuracy of payments received by the state for oil and gas severance taxes and mineral royalties.⁴

The seemingly uncontroversial measure sailed through the Senate on May 20, 2014, by a unanimous 35–0 vote.⁵ It was then sent to the House of Representatives, where less than two weeks later it failed to receive the required majority and was defeated on June 2, 2014, in a roll call vote of 48 to 44.⁶

At first glance, one is hard pressed to understand how such an innocuous measure could receive a single “nay” vote, much less 44 of them. The answer lies in the simple fact that the resolution went unnoticed by the only interest group it could affect adversely when it passed in the Senate. It was only after the resolution was sent to the House that the oil industry’s lobbyists swarmed the lower chamber and successfully lobbied for the required number of votes to defeat the resolution.

The fate of Senate Concurrent Resolution No. 142 is proof of the political influence—indeed, one might argue domination—that the oil industry enjoys in Louisiana. However, the defeat of the resolution does not explain why or how the industry is able to wield such power. Clearly, the rise of the Republican Party in Louisiana, and across the South, has something to do with it. At the time of the 2014 Legislative Session, not a single Democrat held statewide office in Louisiana, and both legislative chambers had Republican majorities.

But no elected official, regardless of political affiliation, willingly admits that he or she is voting for a special interest because of the potential for wealth or power. Like lawyers, all politicians like to speak the language of justification. In other words, they need to have a politically plausible explanation for any

3. See S. Res. 2014 Leg., 114th Reg. Sess. (La. 2014).

4. *Id.* at 1.

5. See *Roll Call: LA SCR142 | 2014 | Regular Session*, LEGISSCAN, <https://legiscan.com/LA/rollcall/SCR142/id/365533>, archived at <https://perma.cc/35E2-VK64> (last visited Mar. 3, 2015).

6. See *LA SCR142 | 2014 | Regular Session*, LEGISSCAN, <https://legiscan.com/LA/bill/SCR142/2014>, archived at <https://perma.cc/F3CH-7DKX> (last visited Mar. 8, 2015).

position they take. And lobbyists serve to provide legislators with that rationalization.

That is where mythology serves a great political purpose. For purposes of this discussion, mythology is defined as a set of exaggerated or fictitious “stories or beliefs about a particular institution or situation.”⁷ The role of mythology in law and politics is not well understood, perhaps because it has rarely been explored as a legitimate academic inquiry, at least in legal circles. But mythology plays a powerful role in how the oil industry effectively wields its political and legal influence in Louisiana, and it is clearly a subject that warrants discussion.

As shown below, a myth can persist only if it is uncritically accepted. In the case of the mythology surrounding oil and gas in Louisiana, false beliefs continue to survive because their underlying premises are accepted as true regardless of whether the facts support them. Indeed, this Article shows that the evidence actually contradicts, rather than supports, their factual underpinnings.

I. A (VERY) SHORT HISTORY OF OIL AND GAS REGULATION IN LOUISIANA

Early efforts to produce hydrocarbons in Louisiana date back to the 1860s. However, the modern history of oil and gas in Louisiana began with an oil well that was drilled in 1901 in a rice field on the “Mamou Prairie” in the community of Evangeline near Jennings,⁸ ultimately leading to the creation of the Jennings Field. From there, oil and gas wells quickly proliferated across the state. The second oil field in the state was Caddo Field in north Louisiana, which was created in 1906 and is the most widely recognized.

Not unexpectedly—at least in hindsight—the infant industry experienced significant growing pains, particularly in the form of waste and contamination. Early efforts to control downhole pressures were largely ineffective, with numerous “gushers”

7. *Mythology Definition*, OXFORDDICTIONARIES.COM, http://www.oxforddictionaries.com/us/definition/american_english/mythology, archived at <http://perma.cc/SD5U-YT5H> (last visited Feb. 13, 2015).

8. For a concise history, see *First Oil Well in Louisiana*, LA. DEP’T OF NATURAL RES., OFFICE OF CONSERVATION, <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=48>, archived at <http://perma.cc/GY35-VBVD> (last visited Mar. 8, 2015).

spewing oil across the landscape.⁹ Natural gas was considered a waste problem and was simply burned with flares.¹⁰

It did not take long for environmental problems associated with oil and gas production in the state to catch the attention of the Louisiana Legislature in a big way. The state's first legislative response to environmental issues created by oil and gas exploration and production activities was enacted in 1906.¹¹ That statute prohibited setting wells on fire and required gas wells to be plugged and abandoned.¹² Two years later, the 1908 Legislature passed legislation forming an agency to regulate oil and gas operations—the predecessor of what is now the state Office of Conservation.¹³ Then, in 1910, the Legislature enacted a law prohibiting the discharge of brine into fresh water sources of irrigation during certain times of the year.¹⁴ This statute was periodically amended until it prohibited brine contamination altogether.¹⁵

Not surprisingly, the history of the state's efforts to regulate oil and gas activities over the ensuing century reflects a constant tension between environmentalists and industry. The environmentalists have suffered from a fundamental political disadvantage: they are a non-profit interest group and therefore are neither as well-organized nor as well-heeled as their counterparts, who comprise the wealthiest industry in the world.¹⁶ This disparity is reflected in the number of

9. JOSEPH R. DANCY, OIL & GAS ENVIRONMENTAL LAW 5 (SMU School of Law).

10. For an interesting account of how gas flaring lit up the countryside surrounding oil fields in the 1930s and 1940s, see generally J. MICHAEL VERON, SHELL GAME: ONE FAMILY'S LONG BATTLE AGAINST BIG OIL (2007) [hereinafter VERON, SHELL GAME]. Nearly 100 years later, the problem persists. In North Dakota, natural gas produced from the Bakken Shale is burned while the more valuable oil is conserved and sold. The flares of natural gas became so large they could be seen in images transmitted from satellites. As a consequence, the state's regulators were compelled to enact flaring standards in late 2014. See Brad Quick & Morgan Brennan, *Inside North Dakota's Latest Fracking Problem*, CNBC (Aug. 22, 2014, 8:00 AM), <http://www.cnbc.com/id/101934384>, archived at <http://perma.cc/5JWN-L4BF>.

11. Act No. 71, 1906 La. Acts 111.

12. *Id.*

13. Act No. 144, 1908 La. Acts 200.

14. Act No. 183, 1910 La. Acts 272.

15. For a more detailed history, see J. Michael Veron, *Oilfield Contamination Litigation in Louisiana: Property Rights on Trial*, 25 TUL. ENVTL. L.J. 1, 6 n.23 (2011) [hereinafter Veron, *Oilfield*].

16. See *Economic Impact*, LA. MID-CONTINENT OIL AND GAS ASS'N, <http://www.lmoga.com/issues-initiatives/economic-impact>, archived at <http://perma.cc/55FK-45LA> (last visited Mar. 4, 2015).

lobbyists who represent the industry before lawmakers.¹⁷ The success of environmental advocates has thus depended more on the existence of a crisis or issue that aroused public interest and attention.

It is beyond the scope of this Article to trace that historic ebb and flow beyond the limited detail presented here. Instead, this Article will focus on the current state of affairs in Louisiana after more than 110 years of oil and gas production and exploration.

It is generally believed that Louisiana enjoys greater oil and gas resources per capita than virtually any state in the United States. To be sure, Louisiana is one of the top oil- and gas-producing states in the nation, regardless of population.¹⁸ Despite that remarkable, God-given advantage, the state continues to rank at or near the bottom of virtually every statistical category—whether it be quality of life,¹⁹ education,²⁰ or income.²¹ At the

17. See Dan Eggen and Kimberly Kindy, *Three of Every Four Oil and Gas Lobbyists Worked for Federal Government*, WASH. POST (July 22, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/21/AR2010072106468.html>, archived at <http://perma.cc/9468-HVKU>. Information about the oil lobby in Washington, D.C., helps illustrate the point. The Center for Responsive Politics reported from public records that the oil industry spent \$144.7 million, or more than \$396,000 per day, lobbying the United States Congress and federal agencies in 2013 alone. Ctr. for Responsive Politics, *Oil & Gas*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/indusclient.php?id=E01&year=2013>, archived at <http://perma.cc/RL3F-BLQS> (last visited Feb. 13, 2015). Another source reports that three out of every four lobbyists who represent oil and gas companies in Washington previously worked in the federal government. This is “a proportion that far exceeds the usual revolving-door standards on Capitol Hill.” See Eggen & Kindy, *supra*.

18. See, e.g., *Louisiana: State Profile and Energy Estimates*, U.S. ENERGY INFO. & ADMIN. (Nov. 20, 2014), <http://www.eia.gov/state/analysis.cfm?sid=LA>, archived at <http://perma.cc/MFW7-WNQB>.

19. CNBC ranked Louisiana second to last in quality of life. See Jennifer Leigh Parker, *Best Quality for Life in CNBC's Top States for Business 2011*, CNBC (June 28, 2011, 4:40 PM), <http://www.cnbc.com/id/43344770#>, archived at <http://perma.cc/VAP7-CD4D>. A survey by the Organization for Economic Cooperation and Development also ranked Louisiana near the bottom for “quality of life.” See *Alabama Ranks Low in Quality of Life Study*, TUSCALOOSANEWS.COM (Oct. 14, 2014, 12:14 PM), <http://www.tuscaloosanews.com/article/20141014/NEWS/141019778>, archived at <http://perma.cc/YW5D-QPP3>. However, another ranking done by British professors gave Louisiana the top spot among American states for “happiness levels.” *Happiest Americans Live in States Ranked Highest for Quality in Life*, SCIENCEDAILY.COM (Dec. 21, 2009), <http://www.sciencedaily.com/releases/2009/12/091217141314.htm>, archived at <http://perma.cc/S9LZ-7Z3T>. Perhaps ignorance is bliss, after all.

20. The American Legislative Exchange Council recently ranked Louisiana 48th among the states and the District of Columbia in education. See Matthew Ladner & Dave Myslinski, *Report Card on American Education: State Education Rankings*, AM. LEGIS. EXCH. COUNCIL, <http://www.alec.org/public>

same time, the financial press routinely reports record profits for every oil company that does business in Louisiana.²²

Thus, there remains an obvious question: Why hasn't the state shared in the massive bounty generated by the exploitation of its natural resources? The answer to that question lies in an understanding of the role that mythology has played in the oil industry's exploitation of the state.

II. HOW OIL AND GAS ARE PRESENTED IN THE LEGAL REGIME

Oil and gas activities attract attention in the legal system in two primary ways. The first manifestation is in public law, which primarily concerns the state's efforts to regulate the manner in which oil and gas operators drill and produce oil and gas wells. That law finds its most pertinent expression in Title 30 of the Louisiana Revised Statutes.²³

cations/report-card-on-american-education/, archived at <http://perma.cc/UM27-YF2H> (last visited Mar. 8, 2015). The United States Chamber of Commerce ranked Louisiana 50th in its most recent education evaluation. See Mike Hasten, *Louisiana Ranks Poorly in National Education Assessment*, SHREVEPORT TIMES (Sept. 15, 2014, 6:56 PM), <http://www.shreveporttimes.com/story/news/education/k-12/2014/09/15/louisiana-ranks-poorly-national-education-assessment/15694709/>, archived at <http://perma.cc/QG7J-3GMK>.

21. As one newspaper account summarized the state of affairs: "Louisiana has one of the highest poverty rates, lowest median income levels and highest percentage of people without health insurance, according to statistics released Wednesday by the Census Bureau." Jeff Adelson, *Louisiana Ranks Poorly on Latest Income, Health Insurance Statistics*, THE TIMES-PICAYUNE (Sept. 12, 2012, 5:20 PM), http://www.nola.com/politics/index.ssf/2012/09/louisiana_ranks_poorly_on_late.html, archived at <http://perma.cc/8TAQ-ZVH2>. A ranking published by Forbes Magazine placed the average income of workers in the two largest cities in the state, Baton Rouge and New Orleans, 74th and 76th, respectively, compared to peer cities across the country. See Jacquelyn Smith, *The U.S. Cities Where People Earn the Biggest and Smallest Paychecks*, FORBES.COM (Nov. 27, 2013, 9:35 AM), <http://www.forbes.com/sites/Jacquelynsmith/2013/11/27/the-u-s-cities-where-people-earn-the-biggest-and-smallest-pay-checks/2/>, archived at <http://perma.cc/G3L6-KV38>.

22. Despite the lowest oil prices in years, the major oil companies reported record profits for the quarter ending October 2014. See, e.g., Bob Pisani, *Look What Lower Oil Prices Do to Company Profits*, CNBC (Oct. 23, 2014, 10:13 AM), <http://www.cnbc.com/id/102113748>, archived at <http://perma.cc/3P3C-SUEL>; John Porretto, *Big Oil's Most Profitable Quarter Ever: \$51.5 Billion*, ABC NEWS, <http://abcnews.go.com/Business/story?id=5503955>, archived at <http://perma.cc/B7CW-BWQD> (last visited Mar. 3, 2015).

23. The primary regulations that govern oil and gas activities are found in Statewide Order 29-B, which is promulgated by the Louisiana Department of Natural Resources, Office of Conservation. LA. ADMIN. CODE tit. 43, pt. 19 (2013), available at <http://doa.louisiana.gov/osr/lac/43v19/43v19.pdf>, archived at <http://perma.cc/F4VC-8SE2>. Although virtually all other environmental issues

The second manifestation is in private law, which primarily governs the legal relations, both in contract and tort, between oil companies

are within the regulatory jurisdiction of the Louisiana Department of Environmental Quality, environmental issues caused by oil and gas operations in Louisiana are not. Instead, they are entrusted to the Department of Natural Resources, Office of Conservation. *See, e.g.*, LA. REV. STAT. ANN. § 30:29.1 (2007). At the same time, the Office of Conservation is also charged with the statutory duty of “promotion and encouragement of exploration, production, and refining efforts for oil, intrastate gas, and other hydrocarbons.” *Id.* § 36:358(C). This gives rise to a significant conflict of interest that forces the regulator to choose which of two masters—the industry or the environment—he should serve.

This conflict of interest has manifested itself in lax enforcement of environmental rules and regulations. On May 28, 2014, the Office of the Louisiana Legislative Auditor issued its *Performance Audit Regulation of Oil and Gas Wells and Management of Orphaned Wells, Office of Conservation, Department of Natural Resources*. *See* LA. LEGISLATIVE AUDITOR, REGULATION OF OIL AND GAS WELLS AND MANAGEMENT OF ORPHANED WELLS (2014), available at [http://app.la.state.la.us/PublicReports.nsf/0/D6A0EBE279B83B9F86257CE700506EAD/\\$FILE/000010BC.pdf](http://app.la.state.la.us/PublicReports.nsf/0/D6A0EBE279B83B9F86257CE700506EAD/$FILE/000010BC.pdf), archived at <http://perma.cc/F4VC-8SE2>. The audit examined the records of the Office of Conservation and compared the agency’s performance with that of other states. *See, e.g., id.* at 3. The legislative auditor found numerous deficiencies in the agency’s enforcement efforts, including but not limited to: (1) the agency was granting unauthorized exemptions from its regulations to operators; (2) the agency was not inspecting the majority of oilfield sites with the frequency required by its own rules; (3) the agency “did not consistently or timely address violations cited on inspections”; (4) the agency imposed civil penalties for violations “infrequently” and often did not collect fines when it did impose them; (5) the agency often did not conduct re-inspections of sites where it had found violations to see if the operator had corrected them or otherwise satisfied the agency’s compliance orders; and (6) the agency “did not consistently issue penalties after re-inspections found that operators with compliance orders still had not corrected violations.” *Id.* at 3–4.

Not surprisingly, the legislative auditor concluded that the agency’s “enforcement actions may not be deterring noncompliance” after determining that 63% of violators over the five-year period from 2008 to 2013 had failed multiple inspections. *Id.* at 4. In all, the legislative auditor made 21 “recommendations” for reforming the agency’s deficient enforcement efforts. Each recommendation listed the agency’s response. *See id.* at 6–33. The agency did not dispute a single recommendation.

The 2014 audit was the third legislative audit since 2001 criticizing the enforcement efforts of the Office of Conservation. An audit published on January 5, 2001, entitled *Water Quality in Louisiana* determined that the Department of Natural Resources was not inspecting injection wells in accordance with its own policies. LA. LEGISLATIVE AUDITOR, PERFORMANCE AUDIT REPORT—DEP’T OF NAT. RES., WATER QUALITY IN LOUISIANA (Jan. 2001). In March of 2004, the legislative auditor again concluded that the agency was ineffective in enforcing its own rules and regulations. LA. LEGISLATIVE AUDITOR, PERFORMANCE AUDIT REPORT—DEP’T OF NAT. RES., LOUISIANA COASTAL RESOURCES PROGRAM (Mar. 2004).

and landowners. For the most part, that law is collected in Title 31 of the Louisiana Revised Statutes, which contains the Louisiana Mineral Code.²⁴

The principal focus here is on the private law issues raised by oil and gas operations in the state. They are the ones that inspired the mythology that lies at the heart of the industry's efforts to "reform" the law defining its responsibility.

Unless modified by contract,²⁵ the primary rule establishing the standard of care for mineral lessees in their operations is set forth in article 122 of the Mineral Code.²⁶ That article, in pertinent part, provides:

A mineral lessee is not under a fiduciary obligation to his lessor, but he is bound to perform the contract in good faith and to develop and operate the property leased as a reasonably prudent operator for the mutual benefit of himself and his lessor.²⁷

This duty to act as a "reasonably prudent operator" has become the subject of litigation in three principal ways: (1) drilling or production practices that cause premature loss of production and thus deprive landowners of mineral royalties they otherwise would have received ("downhole claims");²⁸ (2) contamination of soil and

24. See Act No. 50, 1974 La. Acts 237 (referring reader to Volume III of La. Acts); LA. REV. STAT. ANN. § 31:1-217 (2000). The Mineral Code was the product of more than 10 years of study, deliberation, and drafting by the Louisiana State Law Institute before being enacted by the 1974 Legislature and becoming effective on January 1, 1975. See John M. McCollam, *A Primer for the Practice of Mineral Law under the New Louisiana Mineral Code*, 50 TUL. L. REV. 729 (1976) (providing influential commentary on the Mineral Code).

25. The Mineral Code makes it clear that both landowners and oil companies have the contractual freedom to alter their relations by modifying the default rules imposed by the Code. Article 3 specifically provides that the parties can modify the obligations set forth in the Code, so long as they are not prohibited by or against public policy. See LA. REV. STAT. ANN. § 31:3 (2000). Beyond that, article 122 of the Mineral Code expressly provides that the parties can agree to modify the lessee's obligation of reasonable prudence. See *id.* § 31:122. Specifically, it states that the parties "may stipulate what shall constitute reasonably prudent conduct on the part of the lessee." *Id.* The Louisiana Supreme Court has not hesitated to enforce contractual modifications of the default standard if agreed upon between mineral lessor and lessee. See, e.g., *Jurisich v. Jenkins*, 749 So. 2d 597 (La. 1999); *Magnolia Coal Terminal v. Phillips Oil Co.*, 576 So. 2d 475 (La. 1991); *Andrepoint v. Acadia Drilling Co.*, 231 So. 2d 347 (La. 1969).

26. LA. REV. STAT. ANN. § 31:122 (2000).

27. *Id.*

28. See, e.g., *Frankel v. Exxon Mobil Corp.*, 923 So. 2d 55 (La. Ct. App. 2005); *Mobil Exploration & Producing U.S. Inc. v. Certain Underwriters*, 837 So. 2d 11 (La. Ct. App. 2002).

groundwater that gives rise to landowner claims for the cost of restoring their property (so-called “legacy lawsuits”);²⁹ and (3) the dredging of canals in the coastal zone that introduced saltwater intrusion into freshwater coastal marshes and resulted in the destruction of the buffer zone for storm surges (“coastal land loss”).³⁰

These claims are really nothing new. Landowners have filed private damage claims against oil companies in Louisiana³¹ and elsewhere for generations.³² However, the 2003 decision of the Louisiana Supreme Court in *Corbello v. Iowa Production Co.* was perceived by the industry as a watershed event,³³ presumably because the court affirmed a \$33 million restoration award against Shell Oil Company for its contamination of a 320-acre farm in southwest Louisiana.³⁴

29. See, e.g., *Corbello v. Iowa Prod. Co.*, 850 So. 2d 686 (La. 2003).

30. The leading case in this genre was instituted in July 2013 in Civil District Court for Orleans Parish and presents a claim against 97 oil companies for coastal land loss. The case was filed on behalf of the Southeast Louisiana Flood Protection Authority–East. The author and his firm are part of the team of attorneys representing the plaintiff, headed by Gladstone Jones of Jones, Swanson, Huddell & Garrison, LLC. The case was subsequently removed to federal court and was dismissed on February 13, 2015. An appeal is currently pending in the United States Court of Appeals for the Fifth Circuit. See Bd. of Comm'rs of the Se. La. Flood Prot. Auth.–East v. Tenn. Gas Pipeline Co., No. 2:13-cv-05410 (E.D. La. 2014), *dismissed* (E.D. La. Feb. 13, 2015); see also Nathaniel Rich, *The Most Ambitious Environmental Lawsuit Ever*, N.Y. TIMES MAG. (Oct. 2, 2014), http://www.nytimes.com/interactive/2014/10/02/magazine/mag-oil-lawsuit.html?_r=0, archived at <http://perma.cc/X8D3-R8C6>.

31. See, e.g., *Duhon v. Buckley*, 161 So. 2d 301 (La. Ct. App. 1964).

32. See, e.g., *Marblehead Land Co. v. City of L.A.*, 47 F.2d 528 (9th Cir. 1931); *Magnolia Petroleum v. Smith*, 238 S.W. 56 (Ark. 1922); *Hamilton v. E. Kan. Oil Co.*, 173 P. 911 (Kan. 1918); *Shelley v. Ozark Pipe Line Corp.*, 37 S.W.2d 518 (Mo. 1931).

33. *Corbello v. Iowa Prod. Co.*, 850 So. 2d 686 (La. 2003). The state Supreme Court has referred to the laws passed since 2003 as “*Corbello* laws.” For instance, the first post-*Corbello* law, passed in 2003, has been referred to as the “*Corbello* Act” in *Marin v. Exxon Mobil Corp.*, 48 So. 3d 234, 240 n.7 (La. 2010). The *Corbello* decision continues to inspire substantial (and industry-sympathetic) commentary in the legal literature of the state. See, e.g., Kaki J. Johnson, Comment, *The Migration from the Rig to the Courthouse: Oil and Gas Legacy Litigation in Louisiana*, 60 LOY. L. REV. 647 (2014); David B. Means, III, *Surface Owner Issues in the Mineral Owner, Lessee and Landowner Relationships*, 53 ANN. INST. ON MIN. L. 219 (2006); Mary Beth Balhoff, Comment, *Corbello v. Iowa Production and the Implications of Restoration Damages in Louisiana: Drilling Holes in Deep Pockets for Thirty-Three Million Dollars*, 65 LA. L. REV. 271 (2004).

34. The award for cleaning up contamination was less than half of the total amount recovered. The majority of the total recovery came from additional

The size of the award, and the widespread publicity about the case throughout the legal community, fueled industry fears that it would soon face an avalanche of multi-million-dollar contamination claims. Industry leaders quickly put an army of lobbyists on full alert and, before the judgment in the *Corbello* case was even final, proposed legislation “reforming” contamination laws.³⁵ The landowner interests responded with lobbyists of their own, and a crude compromise was reached in the 2003 Session that altered certain aspects of the litigation of contamination claims. Since then, the industry has encamped its lobbyists at the state capitol during virtually every legislative session and, with the support of Governor Bobby Jindal, has enjoyed more success in changing the procedures and remedies applicable to claims by landowners.³⁶

Those lobbying efforts—and the rhetoric of sympathetic public officials—have sounded certain themes that warrant close examination.

III. IDENTIFYING THE MYTHS

Even the most casual observer of marketing advocacy recognizes that the key to persuasion is a simple theme, repeated over and over.³⁷ That propaganda tactic is apparent in the industry’s lobbying efforts in Baton Rouge. The oil and gas lobbying theme has three distinct threads:

1. “We need the oil companies more than they need us.”
2. “If we do anything the oil companies do not like, they will leave.”
3. “Greedy lawyers and frivolous lawsuits are driving oil companies out of Louisiana.”

These are the principal myths surrounding oil and gas in Louisiana. Like the legend of Bigfoot, they are persistent even without proof. Because of their impact on the legal process, they need to be tested as all assertions are tested in the legal system: with a careful examination of the facts urged in support of them.

damage awards for unlawful saltwater disposal and trespassing. *Corbello*, 850 So. 2d at 705–08.

35. See VERON, SHELL GAME, *supra* note 10, at 8–12.

36. See, e.g., Act No. 1166, 2003 La. Acts 3511; Act No. 312, 2006 La. Acts 1472; Act No. 400, 2014 La. Acts.

37. “The most brilliant propagandist technique will yield no success unless one fundamental principle is borne in mind constantly—it must confine itself to a few points and repeat them over and over.” Statement of Nazi Minister of Propaganda Josef Goebbels.

A. Debunking Myth No. 1: “We need the oil companies more than they need us.”

A consistent theme of national television marketing by the major oil companies is the economic benefit generated by their activities—particularly, job creation. A prominent example of this has been BP’s television advertising in Louisiana in the aftermath of the Gulf Oil Spill,³⁸ which emphasizes the great economic impact of BP’s activities. In the process, this advertising message also plays upon the unspoken fear that, if the state is not entirely hospitable to the oil interests, the industry will pull back its business activities—the drilling and production of oil and gas—and in the process, bad things will happen to the state’s economy.

Any reasonable analysis of this fear tactic should logically begin by testing the assertion that the industry is a critical job-creator that deserves special consideration under the law. That suggests, at the very least, an investigation into how many jobs are actually created by the energy sector as compared to other parts of our state’s economy. A reliable source for this information can be found in the governor’s annual executive budget, which lists various job sectors in the state by industry.

Governor Jindal’s executive budget for the fiscal year 2013–2014 lists ten different employment sectors.³⁹ For “natural resources and mining”—presumably the industry sector for oil and gas—the governor’s budget figures estimate 58,000 jobs.⁴⁰ In comparison, the budget identifies the leisure and hospitality industry—the sector dependent on the environment for fresh seafood, good hunting, restaurants, and tourism—as creating 210,000 jobs.⁴¹ To put this into perspective, the “natural resources and mining” sector is ninth out of ten employment sectors identified in the governor’s budget in terms of jobs created. “Leisure and hospitality” is ranked third.⁴²

38. For an interesting discussion of BP’s advertising strategy for Louisiana in the wake of the Deepwater Horizon Spill, see Cain Burdeau, *BP Ad Campaign Following Gulf Oil Spill Deemed “Propaganda” by Some*, HUFFINGTON POST (Jan. 8, 2012, 2:16 PM), http://www.huffingtonpost.com/2012/01/08/bp-ad-campaign-gulf-oil-n_1192600.html, archived at <http://perma.cc/K2RJ-6AV2>.

39. OFFICE OF PLANNING & BUDGET, GOVERNOR’S EXECUTIVE BUDGET: FISCAL YEAR 2013–2014, at 5 (2013), *available at* <http://www.doa.louisiana.gov/opb/pub/FY14/FY14ExecutiveBudget.pdf>, archived at <http://perma.cc/EY79-G56F>.

40. *Id.*

41. *Id.*

42. *Id.*

In simple terms, these figures would appear to indicate that the economic sector that depends on a clean environment is responsible for nearly four times more jobs in Louisiana than the oil industry.⁴³ Of course, outside of television ads by the lieutenant governor, the statewide official charged with promoting tourism,⁴⁴ there is no financially interested, unified economic force to speak for the environment or pay for its commercials. If there were, it might sponsor advertising messages that contamination and coastal land loss from oilfield operations can potentially cost many more jobs and cause far greater economic disruption than the prospect of oil companies pulling up stakes for lack of sympathy.

Beyond that, there is considerable collateral damage caused by oilfield operations in Louisiana. Neither the fact of the damage nor its cost of repair is imaginary—and the best source of evidence on that is not Greenpeace or Save the Whales, but rather the industry itself and the state agencies with whom it is so friendly.

The industry's literature has documented the environmental disasters associated with historic oil and gas operations, particularly its use and abandonment of oilfield waste pits. For instance, in 1987, members of the petroleum engineering faculty at LSU authored a peer-reviewed study in the *Journal of Petroleum Technology*—the official journal of the Society of Petroleum Engineers—documenting extensive contamination from abandoned oilfield pits.⁴⁵ The authors concluded that “[t]here are . . . about 12,000 abandoned pits in Louisiana that are suspected of chronic damage to the environment and to public health.”⁴⁶ Nor can anyone seriously claim that this state of affairs was a surprise to the industry. Its leading organization, the American Petroleum Institute, began warning its oil company members about the environmental consequences of utilizing unlined waste pits as far back as 1932.⁴⁷ In one paper, a leading representative of the organization stated: “We are only ‘kidding’ ourselves when we

43. Given that Governor Jindal is an outspoken ally of the oil industry, one would expect these statistics to be as favorable to energy as possible.

44. *Office of Lieutenant Governor*, LA. DEP'T OF CULTURE RECREATION & TOURISM, <http://www.crt.state.la.us/lt-governor/terms-of-office/index>, archived at <http://perma.cc/E79C-CAJ5> (last visited Mar. 6, 2015).

45. See A.K. Wojtanowicz, S.D. Field, & M.C. Osterman, *Comparison Study of Solid/Liquid Separation Techniques for Oilfield Pit Closures*, J. PETROLEUM TECH., July 1987, at 845.

46. *Id.*

47. V.L. Martin, *Disposal of Production Division Wastes*, Presentation Before the American Petroleum Institute (Apr. 12, 1932).

think we can dispose of salt water by solar evaporation from earthen ponds.”⁴⁸ Explaining further, the author said:

What we have attributed to evaporation was due to seepage Eventually, such seepage may either follow an impervious stratum to the surface where it may affect vegetation or may find its way to fresh water sources, either surface or subsurface, and in such quantities as to be objectionable.⁴⁹

The industry literature published further warnings from the American Petroleum Institute, the Society of Petroleum Engineers, and other recognized authorities over the decades thereafter that storing brine, or salt water, in unlined pits contaminated subsurface soil and water.⁵⁰

For these reasons, Louisiana’s neighbors in Texas and Oklahoma began to outlaw the use of unlined earthen pits as early as 1955.⁵¹ Regrettably, Louisiana was unable to muster the political will to do so until 1986, when the Office of Conservation promulgated its first oilfield pit rules.⁵² Even then, however, oilfield operators were put on the honor system to register their pits and were given three years to close them.⁵³ They were not even

48. *Id.* at 7.

49. *Id.* at 8.

50. See, e.g., R.M. Russell, *Environmental Liability Considerations in the Valuation and Appraisal of Producing Oil and Gas Properties*, J. PETROLEUM TECH., Jan. 1989, at 55; Arthur J.J. Leuterman, Fredrick V. Jones, & John E. Candler, *Drilling Fluids and Reserve Pit Toxicity*, J. PETROLEUM TECH., Nov. 1988, at 1441; Roy D. Payne, *Salt Water Pollution Problems in Texas*, J. PETROLEUM TECH., Nov. 1966, at 1401; Henry Lewelling & Monte Kaplan, *What To Do About Salt Water*, 31 PETROLEUM ENG’R, July 1959, at B-19; H.H. Elliston & W.B. Davis, *A Method of Handling Salt-Water Disposal, Including Treatment of Water*, in DRILLING AND PRODUCTION PRACTICE 122–45 (Am. Petroleum Inst., 1944).

51. For Texas, the appropriate regulatory agency is the Texas Railroad Commission. Its first order outlawing the use of unlined pits for brine storage was issued in 1955. See Special Order Pertaining to Disposal of Salt and Sulphur Water Produced Incident to the Production of Oil and Gas in the Rodman-Noel (Grayburg) Field, Upton County, Texas, Oil and Gas Docket No. 7-32,629, December 19, 1955. For a general discussion, see Ivan M. Rice, *Crack Down on Oil Field Pollution*, PETROLEUM ENG’R, July 1967, at 33 (stating that Texas and Oklahoma had outlawed the use of unlined pits).

52. These rules came in the form of an amendment to Statewide Order 29-B. *History*, LA. DEP’T NATURAL RES., OFFICE OF CONSERVATION, <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=47&pnid=0&nid=22>, archived at <http://perma.cc/B7AH-CVBM> (last visited Feb. 13, 2015).

53. One industry expert, petroleum engineer Calvin Barnhill, described the system as “self-reporting.” Dep. of Calvin Barnhill at 152, C.F. Henry Props. LLC v. Apache Corp., (No. 10-18063) (2011) (on file with author). Presumably,

required to submit tests regarding pit constituents or impacts on the surrounding area—just to keep such information on file in case it was needed.⁵⁴

As the Department of Environmental Quality has recognized, “[s]everely polluted water can be cleaned, but only at high cost.”⁵⁵ Thus, the greatest challenge posed by the thousands of abandoned oilfield pits is the enormous cost and difficulty associated with cleaning them up. Left unattended, most contamination spreads over time, which expands the contamination plume and in turn raises the cost of remediation exponentially. Thus, even if the job creation myth were entirely true, it does not come without a significant cost.

Another environmental cost associated with oilfield operations that is easily measured is the number of “orphaned” wells in Louisiana. Under the state’s regulatory scheme, any well that is no longer productive must be “plugged and abandoned” in accordance with Statewide Order 29-B.⁵⁶ The purpose of this procedure is to protect the soil and water around the well by requiring that it be properly sealed. However, only the last operator of record is responsible for plugging and abandoning a well in accordance with Statewide Order 29-B.⁵⁷ Thus, if the last operator of record—typically a marginal entity who took over the well after previous operators picked all the “low-hanging fruit”—becomes impecunious, the well becomes an “orphan” and must be plugged by the state.⁵⁸

this is akin to allowing speeding motorists to report themselves to the state police.

54. See Dep’t of Natural Res., Amendment to Statewide Order of No. 29-B (Jan. 20, 1986). Amendment section 2.6(E) states:

Documentation of testing and closure activities, including onsite disposal of NOW, shall be maintained in operator’s files for at least three (3) years after completion of closure activities. Upon notification, the Office of Conservation may require the operator to furnish these data for verification of proper closure of any pit. If proper onsite closure has not been accomplished, the operator will be required to bring the sit into compliance with applicable requirements.

Id.

55. LA. DEP’T ENVTL. QUALITY, WATER QUALITY ASSESSMENT DIV., WATER QUALITY STUDY GUIDE 1 (2005).

56. See LA. ADMIN. CODE tit. 43, pt. 19, § 137 (2005) [hereinafter Statewide Order 29-B].

57. See *id.*

58. *Oilfield Site Restoration (OSR) Program*, LA. DEP’T NATURAL RES., OFFICE OF CONSERVATION, <http://dnr.louisiana.gov/index.cfm?md=pagebuilder&tmp=home&pid=155>, archived at <http://perma.cc/4BRJ-7TJK> (last visited Feb. 13, 2015).

A fund was created for this purpose in 1993, financed in the form of a fee on oil and gas production that is paid quarterly by operators in the state.⁵⁹ The fund is administered by the Department of Natural Resources for the declared purpose of “address[ing] the growing problem of unrestored orphaned oilfield sites across the State.”⁶⁰

However, the fund is plainly inadequate. As of 2010, the Office of Conservation reported that there were 2,833 “orphaned” wells registered in the program. Because of minimal funding, only 160 are plugged each year.⁶¹ Thus, assuming no new “orphaned” wells appear, it would take 17 additional years just to plug the existing orphan wells.⁶²

Another consequence of oilfield operations is coastal land loss in south Louisiana. In order to drill and operate wells in the freshwater coastal marshes, operators had to dredge canals to reach drilling locations. In order to dredge canals in those protected areas, they were required to secure state permits. Those state permits—which the operators were required to sign—more often than not included a stipulation that the canals that were dredged would be maintained and would be restored to original condition when operations were concluded.⁶³

59. The program is known as the Louisiana Oilfield Site Restoration (OSR) Program. *Id.*

60. *Id.*

61. *Louisiana’s Orphaned Well Program: Fact Sheet*, LA. DEP’T NATURAL RES. (June 30, 2010), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=17>, archived at <http://perma.cc/6VY4-C7YZ>.

62. *Id.*

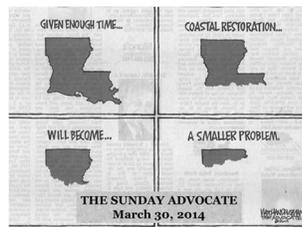
63. The permits are issued by the Office of Coastal Management in the Department of Natural Resources. The agency publishes a “Coastal User’s Guide” that explains the rules governing operations within Louisiana’s coastal zone. See LA. DEP’T NATURAL RES., OFFICE OF COASTAL MGMT., A COASTAL USER’S GUIDE TO THE LOUISIANA COASTAL RESOURCES PROGRAM (2015), available at <http://data.dnr.louisiana.gov/LCP/LCPHANDBOOK/FinalUsersGuide.pdf>, archived at <http://perma.cc/8GBD-FGCQ>. The boundaries of the coastal zone are set by statute and include most of south Louisiana below Interstate 10. See LA. REV. STAT. ANN. § 49:214.23 (2012). Permits to conduct oil and gas operations within the coastal zone are referred to as “Coastal Use Permits” (CUPs). They are a matter of public record and can be accessed at the Department of Natural Resources. Copies of numerous permits for the dredging of canals in the coastal zone are on file with the author. Beyond the permits themselves, state coastal zone regulations also require restoration of oilfield sites to their original condition: “Mineral exploration and production sites shall be cleared, revegetated, detoxified, and otherwise restored as near as practicable to their original condition upon termination of operations to the maximum extent practicable.” LA. ADMIN. CODE tit. 43, pt. 1, § 719(M) (2012).

It is now estimated that nearly 10,000 miles of canals were dredged through the freshwater marshes of coastal Louisiana.⁶⁴ Those canals exposed the roots of the fresh water marsh grasses to salt water from the Gulf of Mexico. The salt water killed the roots. When the roots died, the dirt they held in place sloughed off. The canals widened, exposing new roots, which the salt water then killed as well. This cycle resulted in a remarkable widening of the canals. Photographs over time show entire regions becoming submerged. Numerous small communities in south Louisiana disappeared. Despite the promises made by the oil companies in the permits, virtually none of the hundreds of canals dredged across the coastal region of Louisiana have been restored.

The extent of coastal land loss in Louisiana is well documented. Between 1930 and 2000, over 1900 square miles disappeared from south Louisiana.⁶⁵ That is an area roughly the size of the State of Delaware or, closer to home, the size of Orleans Parish, Jefferson Parish, St. Bernard Parish, Plaquemines Parish, and St. John the Baptist Parish combined.⁶⁶

There is a very practical, cascading consequence to this reality of coastal land loss. Hurricanes strengthen over water and weaken

64. See, e.g., Cain Burdreau, *Oil Canals' Role in La. Losses Debated*, ABC NEWS, <http://abcnews.go.com/Business/story?id=4162431>, archived at <http://perma.cc/VAQ7-UMTX> (last visited Mar. 6, 2015); John Tibbetts, *Louisiana's Wetlands: A Lesson in Nature Appreciation*, ENVTL. HEALTH PERSPS., Jan. 2006, at A40. Walt Handelsman, the editorial cartoonist for *The Advocate*, portrayed the problem in the March 30, 2014 edition of the newspaper in this manner:



See Walt Handelsman for March 30, 2014, THE ADVOCATE (June 11, 2014), <http://theadvocate.com/multimedia/walthandelsman/8756888-123/walt-handelsman-for-march-30>, archived at <http://perma.cc/NV8E-4KUY>.

65. See, e.g., Russel L. Honore, Op-Ed., *Safeguarding Louisiana's Coastline*, N.Y. TIMES (May 28, 2014), http://www.nytimes.com/2014/05/29/opinion/safeguarding-louisianas-coastline.html?_r=0, archived at <http://perma.cc/28GX-998K>; Press Release, Nat'l Wetlands Research Ctr., Without Restoration, Coastal Land Loss to Continue (May 21, 2003), http://www.nwrc.usgs.gov/releases/pr03_004.htm, archived at <http://perma.cc/75VU-HYH2>.

66. U.S. Geological Survey, *How Are Louisiana Wetlands Changing?*, USGS (June 2, 2011, 2:00 PM), <http://www.usgs.gov/newsroom/article.asp?ID=2816#.VQn-xE1uiUk>, archived at <http://perma.cc/EE3Q-Z3NS>.

over land. The land in south Louisiana forms a vital buffer zone for storm surge that constitutes the state's first line of defense against hurricane damage. As that buffer zone disappears, the last line of defense—the levees of the Mississippi River—become further exposed.

Those levees were built to withstand a 100-year storm, which happens to be the lowest standard in the civilized world.⁶⁷ Simply put, the levees—and the cities they protect, such as New Orleans—need the buffer zone to weaken storm surge before it strikes them. Unrestored oil industry canals have destroyed that line of protection and now imperil New Orleans and other critical areas of the state.

This is well documented. Indeed, over the past 50 years, numerous studies have been conducted to document coastal land loss.⁶⁸ Some of them have been either sponsored by industry or conducted with the input and participation of industry partners.

One study, by the U.S. Geological Survey, concluded that “[o]il and gas ranks the highest process of coastal land loss at 249,152 acres or 36.06% of the total loss.”⁶⁹ Even the Louisiana Mid-Continent Oil & Gas Association agreed that “[the] effects of canal development tend to be the overwhelming cause of wetland losses.”⁷⁰ The Coastal Protection and Restoration Commission also posted the following statement on Governor Jindal's website:

Canal dredging has had one of the most dramatic effects on wetland growth and regeneration. In addition to directly destroying marshes in the path of the canal, the plants are unable to recolonize, and thus the marsh is unable to

67. See, e.g., Robert L. Reid, *Defending New Orleans*, AM. SOC'Y OF CIVIL ENG'RS (Nov. 2013), http://www.arcadis-us.com/Content/ArcadisUS/docs/News/AUS_DefendingNewOrleans_ASCE.pdf, archived at <http://perma.cc/T6UL-6FGW>; U.S. ARMY CORPS OF ENG'RS, LOUISIANA COASTAL PROTECTION AND RESTORATION—FINAL TECHNICAL REPORT (June 2009); JOS DIKMAN, A DUTCH PERSPECTIVE ON COASTAL LOUISIANA FLOOD RISK REDUCTION AND LANDSCAPE STABILIZATION (Oct. 2007); NAT. ACADEMIES KECK CTR., GILBERT F. WHITE NATIONAL FLOOD POLICY FORUM, REDUCING FLOOD LOSSES: IS THE 1% CHANCE (100-YEAR) FLOOD STANDARD SUFFICIENT? (2004).

68. See SHEA PENLAND ET AL., U.S. GEOLOGICAL SURVEY, PROCESS CLASSIFICATION OF COASTAL LAND LOSS BETWEEN 1932 AND 1990 IN THE MISSISSIPPI RIVER DELTA PLAIN, SOUTHEASTERN LOUISIANA (2000), available at <http://pubs.usgs.gov/of/2000/of00-418/ofr00-418.pdf>, archived at <http://perma.cc/ACZ5-BMTL>.

69. *Id.*

70. LA. UNIV. MARINE CONSORTIUM ET AL., ENVIRONMENTAL IMPACT OF PRODUCED WATER DISCHARGES IN COASTAL LOUISIANA: REPORT TO THE LOUISIANA DIVISION OF THE MID-CONTINENT OIL AND GAS ASSOCIATION (July 1989).

regenerate itself. Once canals are dredged, most grow larger as the sustainable areas of marsh subsequently decrease.⁷¹

All of this calls into question whether we need oil companies more than they need us. Indeed, the myth of oil company dependency completely ignores that the resource bringing the oil companies here belongs to us, not them. At the risk of stating the obvious, the oil companies are here only because of oil. They are not here to create jobs; they are here to make a profit producing a resource belonging to the state and its citizens. That is a perfectly legitimate motive, but it needs to be recognized for what it is. Obviously, the oil companies will not be drilling wells after that resource is exhausted.

B. Debunking Myth No. 2: "If we do anything the oil companies do not like, they will leave."

The second myth is that the oil companies will leave Louisiana if we do anything they do not like. This is a corollary of the first myth, which is that we need the oil companies more than they need us. Those who unthinkingly repeat this myth often overlook obvious facts.

Oil company profits come, obviously, from producing oil. Profits are maximized by producing the best prospects—the low-hanging fruit. The low-hanging fruit in Louisiana was picked long ago. After 60 to 70 years of production, the major oil companies (e.g., Exxon, Amoco, and Texaco) began to leave Louisiana in the 1980s and 1990s in search of low-hanging fruit elsewhere. For instance, Amoco sold most of its Louisiana interests to Apache in a \$515 million transaction in May of 1991.⁷²

71. Shortly after the SLFPA-E lawsuit was filed, the statement was modified to read: "Dredging canals for oil and gas exploration and pipelines provided our nation with critical energy supplies, but these activities also took a toll on the landscape, weakening marshes and allowing salt water to spread higher into coastal basins." *Coastal Crisis*, COASTAL PROT. & RESTORATION AUTH., <http://coastal.la.gov/whats-at-stake/coastal-crisis/>, archived at <http://perma.cc/6H69-URQB> (last visited Mar. 3, 2015). Although evidence of Governor Jindal's original statement has since been removed from his website, a copy of the statement is on file with the author.

72. *Apache to Double Reserves with Amoco Deal*, OIL & GAS J. (May 13, 1991), <http://www.ogj.com/articles/print/volume-89/issue-19/in-this-issue/drilling/apache-to-double-reserves-with-amoco-deal.html>, archived at <http://perma.cc/2FXT-9CKW>.

That had nothing to do with litigation outcomes; indeed, the watershed *Corbello* decision was years away.⁷³ Rather, it was driven by fundamental oilfield economics. When the price of oil is high, drilling activity increases. When prospects are accessible and cheap to drill, drilling activity in that locale increases. Easy prospects are drilled before difficult prospects.

There is no better example of this than the Haynesville Shale play in north Louisiana. When that prospect was first discovered, leases were purchased at astronomical prices per acre.⁷⁴ Landowners became overnight multi-millionaires in the rush among the oil companies to acquire acreage overlaying the shale. However, lease prices dropped precipitously when wetter gas was discovered in other shale formations in Pennsylvania, Alabama, Texas, and North Dakota.

All of this indicates that displays of sympathy and hospitality in the legislative and court systems play no role in exploration and production decisions. The oil companies will come to Louisiana and drill for its oil and gas as long as there are profitable amounts of accessible oil and gas to produce. If not, all the “friendly” laws and court decisions in the world will not influence the geologists and petroleum engineers’ evaluations of prospects in the state.

C. Debunking Myth No. 3: “Greedy lawyers and frivolous lawsuits are driving oil companies out of Louisiana.”

The third myth is most frequently cited by political leaders to justify enacting “reforms” of oil company responsibility for damage. Specifically, the mantra in Baton Rouge—one that was first sounded during the tort reform movement in the 1990s—has been that “greedy lawyers and frivolous lawsuits are driving oil companies out of Louisiana.” The legal profession—both lawyers and the courts—has served as a kind of whipping boy for the Legislature in recent years. Noticeably, this theme has become more pronounced as the number of lawyers in the Legislature has declined.

This theme has been a drum beat of certain industry representatives, the most vocal of whom has been Don Briggs, the president of a group called the Louisiana Oil and Gas Association

73. See *Corbello v. Iowa Prod. Co.*, 850 So. 2d 686 (La. 2003).

74. See, e.g., *Coe v. Chesapeake Exploration, L.L.C.*, 695 F.3d 311, 314 (5th Cir. 2012) (“In July 2008 Chesapeake Exploration LLC entered into an agreement to purchase deep rights held by Peak Energy Corporation in certain oil and gas leases in the Haynesville Shale formation, for the hefty sum of \$15,000 per acre.”).

(LOGA).⁷⁵ In marshalling support for legislative favors for the industry, Mr. Briggs declared:

Plaintiff attorneys are slowly killing your economy. . . . The personal injury and class action plaintiff's bar is running business out of your state. My perception and experience is that the plaintiff's bar owns the Louisiana judiciary.⁷⁶

As a corollary of this, Mr. Briggs repeatedly declared that there was a direct causal effect between lawsuits and declining rig counts.⁷⁷

There was a day of reckoning for this myth. In late 2013, Mr. Briggs and LOGA filed a lawsuit against the attorney general of Louisiana seeking a declaration that his approval of a contract by which the Southeast Louisiana Flood Protection Authority-East hired lawyers to pursue coastal land loss claims against the oil industry was illegal.⁷⁸ Having voluntarily subjected himself to the jurisdiction of the court, Mr. Briggs was required to sit for a deposition. Under questioning by one of the lawyers for the flood protection authority, Mr. Briggs admitted under oath—over and over—that he had no evidence or information that any oil company

75. See *Don Briggs*, LOGA, <http://loga.la/loga/loga-staff/don-briggs/>, archived at <http://perma.cc/DWT4-TKPY> (last visited Mar. 8, 2015).

76. Don G. Briggs, *Legacy-Site Litigation: A Feeding Frenzy of Nuisance Lawsuits*, LOGA (Sept. 16, 2004), <http://www.loga.la/articles/040916.html>, archived at <http://perma.cc/FML2-9MZG>.

77. See, e.g., Don G. Briggs, *As Legacy Lawsuit Count Rises, Rig Count Falls*, LA. RECORD (Mar. 13, 2014), <http://louisianarecord.com/arguments/259337-as-legacy-lawsuit-count-rises-rig-count-falls>, archived at <http://perma.cc/4PSG-PXM6>. Mr. Briggs's son, Gifford Briggs, tours the state regurgitating the same thing. See Billy Gunn, *Industry Leaders Blame "Greedy Lawyers" for Drop in Offshore Drilling*, THE ADVOCATE (Mar. 20, 2014), <http://theadvocate.com/news/8622813-123/greedy-trial-lawyers-blamed-for>, archived at <http://perma.cc/8ZES-538K>. In signing the most recent legislation sought by the industry, Governor Jindal declared that the coastal land loss litigation brought by one of the state's flood protection agencies was "frivolous" and that he was "proud" to sign a law directed to defeating that lawsuit because it "further improves Louisiana's legal environment by reducing unnecessary claims that burden businesses so that we can bring even more jobs to our state." Neela Banerjee, *Louisiana Governor Signs Law to Block Suits against Oil Industry*, L.A. TIMES (June 6, 2014), <http://www.latimes.com/nation/la-na-louisiana-lawsuit-jindal-20140606-story.html>, archived at <http://perma.cc/4FD7-KLVZ>. Award-winning author John M. Barry, who helped initiate the lawsuit while on the board of the flood protection authority (before being removed by Governor Jindal), responded: "Is there a single person in Louisiana who believes the governor is putting the state's interest ahead of his personal ambition?" *Id.*

78. The lawsuit was filed by LOGA in the 19th Judicial District Court in East Baton Rouge Parish on December 13, 2013. See *La. Oil & Gas Ass'n, Inc. v. Caldwell*, No. 626,798 (La. 19th Jud. Dist. Ct. 2013).

had ever left Louisiana or failed to drill a single oil or gas well because of the threat of lawsuits or the legal climate.⁷⁹

Despite this well-publicized setback,⁸⁰ Mr. Briggs's theme continues to enjoy support from an organization called the American Tort Reform Foundation, which publishes an annual ranking that usually lists Louisiana as among states it characterizes as "judicial hellholes" of the United States.⁸¹ Leaving aside that this organization does not identify its constituents or funding sources, its only criterion for qualifying a state as a "hellhole" appears to be its

79. Consider the following excerpts from Mr. Briggs's sworn testimony:

Q: Do you have any evidence that any oil company considers the Louisiana legal climate in deciding whether they will drill for oil and gas in Louisiana?

A: No.

Q: Is it your opinion that oil and gas companies are leaving Louisiana because of the threat of lawsuits?

A: Yes.

Q: Which oil companies have left Louisiana because of lawsuits?

A: I don't know.

Q: Do you have any facts or data to support your opinion?

A: No.

...

Q: Do you know of any oil companies that specifically have not drilled because of the legal climate?

A: No.

...

Q: Give us a name of an oil company that has refused to do business in Louisiana because of lawsuits.

A: I don't know any.

Q: You don't have any facts or data anywhere else?

A: No.

...

Q: Can you name any wells that were not drilled because of lawsuits?

A: No.

Dep. of Donald G. Briggs at 47–48, 62, 63, *Caldwell*, available at <http://www.theind.com/extras/Official-Transcript-Briggs-Depo.pdf>, archived at <http://perma.cc/RG7P-ARRJ>.

80. Briggs was roasted in the media, which understandably felt betrayed to learn that the propaganda he had been feeding them over the years had no factual basis. See, e.g., Clancy DuBos, *Briggs' Pathetic Performance*, GAMBIT (Feb. 27, 2014, 12:50 PM), <http://www.bestofneworleans.com/blogofneworleans/archives/2014/02/27/briggs-pathetic-performance>, archived at <http://perma.cc/5FHZ-VDXR>; James Gill, *Industry Spokesman Doesn't Worry about the Facts*, THE ADVOCATE (June 12, 2014), <http://theadvocate.com/columnists/8496400-55/james-gill-industry-spokesman-doesn't>, archived at <http://perma.cc/P8VA-PHB6>.

81. AM. TORT REFORM FOUND., JUDICIAL HELLHOLES 2014–2015, at 3, 4–5 (2014), available at <http://www.judicialhellholes.org/wp-content/uploads/2014/12/JudicialHellholes-2014.pdf>, archived at <http://perma.cc/NQ7L-QU4C>.

subjective determination that “judges in civil cases systematically apply laws and court procedures in an unfair and unbalanced manner, generally to the disadvantage of defendants.”⁸² Apparently, the bar for becoming a judicial “hellhole” is set rather low: there is no evidence of any other criterion, such as whether there was any identifiable error in either the evidence or the law in any given court decision.

The industry continued its attack on lawyers and the courts by enlisting the aid of David Dismukes, now the executive director of the LSU Center for Energy Studies. Dismukes authored an essay in February 2012 entitled “The Impact of Legacy Lawsuits on Conventional Oil and Gas Drilling in Louisiana.”⁸³ This publication essentially repeated LOGA’s charge that lawsuits by landowners for the contamination of their property were discouraging oil companies from drilling in the state.⁸⁴

However, e-mails obtained from LSU under state public records laws revealed that Exxon had furnished the alleged data for the essay, had apparently instructed Dismukes on how to present the data, and had retained editorial approval of the essay.⁸⁵ Another e-mail from Dismukes to his assistant complained about feeling pressure from Exxon and Chevron and wanting to get them “off my back.”⁸⁶ When attorneys attempted to subpoena Dismukes to depose him about his essay, he ran his car into the process server’s vehicle while attempting to avoid being served.⁸⁷

82. *Id.* at 2.

83. DAVID E. DISMUKES, THE IMPACT OF LEGACY LAWSUITS ON CONVENTIONAL OIL AND GAS DRILLING IN LOUISIANA, LSU CTR. FOR ENERGY STUDIES (2012), available at http://www.enrg.lsu.edu/files/images/presentations/2012/DISMUKES_LEGACY_RPT_02-28-12_FINAL.pdf, archived at <http://perma.cc/6S2Q-87VN>.

84. *Id.* at 3–17.

85. See Patrick Flanagan, *Big Oil’s Behind-the-Scenes Role in LSU’s “Legacy Lawsuit” Study*, ABIZ (Mar. 9, 2014), <http://theind.com/article-16499-big-oil-s-behind-the-scenes-role-in-lsu-s-legacy-lawsuit-study.html>, archived at <http://perma.cc/WH6W-HLAQ>.

86. Deanna Narveson, *LSU Professor’s Study Disputed*, DAILY REVEILLE (Mar. 18, 2014), http://www.lsureveille.com/news/l-su-professor-s-study-disputed/article_46f3bada-af14-11e3-a8c3-0017a43b2370.html, archived at <http://perma.cc/PJB7-6VEX>.

87. *Id.* The accident report of the Baton Rouge Police Department is dated March 20, 2012, and a copy is on file with the author. Despite its evident flaws and biased data, at least one student commentator recently discussed Dismukes’ essay with apparent approval. Johnson, *supra* note 33, at 672–73. This Comment uncritically accepts and reiterates the myth that the “reforms” of oilfield contamination litigation were motivated by a desire to deter frivolous lawsuits. *Id.* at 682. It was apparently beyond the scope of that Comment to examine whether the underlying factual premise for that assertion was valid.

Aside from proving that confronting myths is not for the faint of heart, this kind of scapegoating is not new. Indeed, spokesmen of the oil industry have long reverted to the “greedy lawyers/frivolous lawsuits” refrain whenever a legal outcome is not to their liking. When the Supreme Court of Louisiana decided *Corbello* in 2003,⁸⁸ the industry hired LSU economist Loren C. Scott to tour the state, educate civic groups, and discuss the allegedly catastrophic effects of the decision. As part of his presentations, Scott warned a Houma audience that the *Corbello* decision had “really hammered your area.”⁸⁹

Of course, the sky did not fall after *Corbello*. To the contrary, drilling permits in Louisiana—which are a matter of public record—rose for six consecutive years after the Supreme Court’s ruling. Indeed, within two years of the decision, the number of drilling permits issued annually had actually doubled over the number they had been in the year before *Corbello* was handed down.⁹⁰ Not surprisingly, the record number of drilling permits issued in Louisiana from 2005 to 2010 coincided with record

The rhetoric of “frivolous lawsuits” camouflages the real concern of those who seek to avoid being sued. Few defendants concern themselves with frivolous lawsuits. Certainly, none of the tort or oil and gas reformers is ever able to cite a frivolous lawsuit that was successful. The real concern, obviously, is that non-frivolous, or meritorious, lawsuits will be brought. Those are the ones that general genuine legal exposure or risk.

It also bears noting that landowners who sue oil companies bear the burden of proving their claims and that lawsuits against oil companies for destruction of formations, contamination, or coastal land loss must be supported by objective scientific and engineering evidence that meets the competency and reliability requirements of evidence law. *See* LA. CODE EVID. art. 702 (2015); *State v. Foret*, 628 So. 2d 1116 (La. 1993). Unlike an automobile collision, oilfield cases cannot be won with subjective eyewitness recollections about who ran the red light. And while the reformers call for laws to prohibit “frivolous” lawsuits, none seem aware that a law already exists—and has since 1989—imposing sanctions against parties and lawyers who bring frivolous lawsuits. *See* LA. CODE CIV. PROC. art. 863 (2015).

88. *Corbello v. Iowa Prod. Co.*, 850 So. 2d 686 (La. 2003).

89. Jason Mayo, *Economist: Lawsuits Hurt Houma Job Growth*, DAILY COMET.COM (June 16, 2004, 11:39 AM), <http://www.dailycomet.com/article/20040616/BUSINESS/406160308>, archived at <http://perma.cc/QU9V-P8C6>. *See* VERON, SHELL GAME, *supra* note 10. Professor Scott was also paid to perform an economic study proving that the oil industry is a “giant economic engine” for the state. LOREN C. SCOTT, THE ENERGY SECTOR: A GIANT ECONOMIC ENGINE FOR THE LOUISIANA ECONOMY (1996).

90. That was the experience not only in Louisiana, but also in Texas and Arkansas. *See* Veron, *Oilfield*, *supra* note 15, at 16 and authorities cited therein.

prices for oil, proving that oil and gas activities are dictated by the price of the commodity, not litigation outcomes.⁹¹

CONCLUSION: DOES BIGFOOT EXIST?

Psychologists have long contended from studies that people tend to believe what they want to believe.⁹² In the extreme, legal scholars have referred to this condition as “deliberate ignorance.”⁹³ Thus, the answer to whether Bigfoot exists presumably depends to some extent on the predisposed eye of the beholder, something the cynic might say requires a fair amount of gullibility. However, one of the underlying purposes of our adversarial legal system is to test assertions of fact instead of accepting them uncritically. Viewed in this manner, the record does not support the mythology of oil and gas in Louisiana any more than it does the existence of Bigfoot. At the very least, confronting the false premises for these myths forces those who embrace them to re-evaluate their position or to admit the real reasons behind it.

91. Speaking at the LSU Law Center’s 57th Mineral Law Institute on April 15, 2010, DNR Secretary Scott Angelle was unabashedly enthusiastic about the record numbers of drilling permits being issued in the state: “Well, what a heck of a run it’s been for all of us over the last five years. . . . Without question, it is time to end the ‘either/or’ debate on energy policy versus the environment.” Scott Angelle, Sec’y of La. Dep’t of Natural Res., Comments to LSU Law Center’s 57th Mineral Law Inst. (Apr. 15, 2010), <http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=29>, archived at <http://perma.cc/3KER-NN3L>.

92. See, e.g., Anthony Bastardi, Eric Luis Uhlmann, & Lee Ross, *Wishful Thinking: Belief, Desire, and the Motivated Evaluation of Scientific Evidence*, ASS’N FOR PSYCHOLOGICAL SCI. (Apr. 2011), http://socialjudgments.com/docs/Bastardi_Uhlmann_and_Ross_Wishful_Thinking.2011.pdf, archived at <http://perma.cc/J3AH-DK4H>.

93. See, e.g., Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. CRIM. L. & CRIMINOLOGY 191 (1990).