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THE ANATOMY OF AN IMAGE: UNPACKING THE CASE FOR TORT REFORM

*Joshua D. Kelner**

I. INTRODUCTION

In recent years, the tort system has been the subject of intense and sustained criticism in the public sphere.[1] Proponents of what is commonly referred to as "tort reform"[2] have addressed themselves quite consciously to the general public, advancing their commentary, for the most part, not in law reviews or other academic journals, but by way of books, op-ed pieces, and the broadcast media. Indeed, their critique of the tort system—not to mention their normative conceptualization of its proper role in American society—diverges considerably from proposals for reform advanced from within the academy. Its familiar refrains include such terms as *litigation explosion*, *personal responsibility*, and *common sense*, and conjure the image of a society overrun by the costs of frivolous lawsuits. Oftentimes, the tone is not dispassionate, but polemical, and the argument for change is predicated more on rhetoric and symbolism than empirical facts.[3]

To be sure, popular dialogue regarding the appropriate functions of the tort system is by no means a new development. William L. Prosser's

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* Associate, Kelner & Kelner, Esqs. J.D., Harvard Law School (2004); B.A., Williams College (2001).

[1] For observations as to the increasing prevalence of such a popular, as opposed to academic, critique, *see generally* Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 Ga. L. Rev. 633, 644-81 (1994); Marc Galanter, *The Day After the Litigation Explosion*, 46 Md. L. Rev. 3, 3-6 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4, 6 (1983); Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 Brook. L. Rev. 1, 1-5 (2002).

[2] To a certain extent, the term *tort reform* is something of a misnomer. In common parlance, it has come to be associated with proposals for "pro-defendant legislative adjustments to common law rules." Joseph A. Page, *Deforming Tort Reform*, 78 Geo. L.J. 649, 650 (1990) (reviewing *Liability: The Legal Revolution and its Consequences* by Peter W. Huber). Nevertheless, it is used herein for the sake of descriptive, if not normative, clarity.

[3] As the reviewer of an early incarnation of the popular tort critique, Peter W. Huber's *Liability*, noted,

> [It] makes no pretense at being scholarly. Indeed, the many inaccuracies and distortions sprinkled throughout the book lend it a certain perverse charm. The book targets the lay reader and sets out to savage the current tort system in no uncertain terms. With a voice that ranges from brisk to acerbic to mean-spirited, Huber is of a mind to take no prisoners as he heaps scorn upon the "naïve" academics and judges whom he accuses of creating the intellectual framework of contemporary tort law, and upon the trial lawyers who have translated theory into practice.

Page, *supra* n. 2, at 659.

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classic treatise observes that "perhaps more than any other branch of the law, the law of torts is a battleground for social theory."[4] Certainly, the tort system, by its very existence, requires society to address difficult questions regarding the role it sees fit for the courts to perform in mediating disputes and enforcing social values. Moreover, in its operation, the system requires the continued interrogation and application of established norms, and this task inevitably draws public scrutiny and can provoke widespread controversy. For these reasons, among many others, it is hardly uncommon for issues concerning the tort system to enter popular consciousness or political discourse.

However, the present debate regarding tort reform is especially noteworthy, this historical background notwithstanding, for at least two reasons. First, to a significant extent, the development of the dialogue and its dynamics has been influenced, if not altogether shaped, by a deliberate and coordinated campaign. This suggestion has been advanced elsewhere with varying degrees of literalism. Professors Michael L. Rustad and Thomas H. Koenig argue that the present tort reform campaign is a "conscious goal-oriented practical activity, designed to produce a dominant discourse that will predispose legislators, judges, legal academics, and the general public to support liability-limiting tort doctrines."[5] Put somewhat more mildly, it can at the least be said that "the new tort reform is a political attack on tort law in the legislative arena."[6] To the extent that this is the case, it fundamentally differs from previous waves of tort reform movements, which were more directly influenced by legal scholarship.[7] A natural consequence of the fact that the movement for reform is thus rooted is that its advocates rely as much on dramatic and emotionally captivating claims as empirical evidence.[8] This is not a pejorative claim on my part. Rather, it is to suggest that, as the movement for tort reform originates in the political context, the manner in which its advocates have pursued their agenda can be expected to reflect as much. For instance, their claims are often rooted in anecdotal evidence and capitalize upon popular perceptions about the system in advocating reform.

There are several institutions that have been particularly influential in promoting the popular movement for tort reform. Perhaps most notable

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[4] William L. Prosser, *Handbook of The Law of Torts* § 3, 14 (3d ed., West 1964).
[5] Rustad & Koenig, *supra* n. 1, at 5.
[6] Page, *supra* n. 2, at 655.
[7] *Id.* at 653-54.
[8] *See e.g.* Richard L. Abel, *Judges Write the Darndest Things: Judicial Mystification of Limitations on Tort Liability*, 80 Tex. L. Rev. 1547, 1548 (2002). Professor Abel notes: "Insurers and well-organized repeat-player defendants have waged a costly and deceptive campaign over several decades - with media complicity - to disseminate the myths that Americans file large numbers of frivolous cases and juries are excessively generous to victims." *Id.*

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among them is the Manhattan Institute, a conservative think tank.[9] It has funded popular authors such as Peter W. Huber and Walter K. Olson, disseminated numerous policy papers, and engaged in lobbying efforts in support of the causes and polices it favors. Kenneth J. Chesebro contends that:

> [T]he Manhattan Institute's objective is to change the minds of the public and mold that consensus by providing this "steady stream" of ideas to the media. To that end, the long-tested techniques developed by Madison Avenue, including the market-testing [sic] of ideas, are used by the Manhattan Institute to sell ideas [and] shape public perceptions . . .[10]

Other organizations, such as Common Good—founded by Philip K. Howard, another popular critic of the tort system—and the American Association for Tort Reform have also contributed to the campaign, as have industrial actors seeking to reduce the extent to which they are threatened by tort liability.[11]

Second, this campaign has been successful not only in dictating the dynamics of public discourse, but in influencing the dynamics of legislative policy regarding the courts. In the political arena, proposals for tort reform have received significant support from legislators on both the state and national levels. One of the components of the Republican Contract With America, which commanded significant support in Congress, was the set of proposals for federal tort reform collectively referred to as the *Common Sense* bill.[12] Significantly, the policy prescriptions advanced in that proposal did not, for the most part, embody the insights or suggestions of recent legal scholarship.[13] Instead, as the preface to the bill included in the published platform suggested, the proposals were motivated by the impression that "America has become a litigious society" and by concern regarding the purportedly increasing prevalence of frivolous lawsuits.[14] More recently, the House of Representatives passed a bill which would have imposed a $250,000 cap on non-pecuniary damages in actions arising from instances of medical malpractice.[15] At the time the legislation was initially unveiled, President Bush commented: "We have a problem in America.

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[9] Manhattan Institute For Policy Research, *Home Page*, http://www.manhattan-institute.org (accessed Jan. 16, 2006).

[10] Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 Am. U. L. Rev. 1637, 1710-1711 (1993).

[11] Common Good, *Home Page*, http://cgood.org (accessed Jan. 16, 2006).

[12] *Republican Contract With America*, "The Common Sense Legal Reform Act: Description Background ¶ 1" http://house.gov/house/Contract/CONTRACT.html (accessed Dec. 28, 2005).

[13] *"Common Sense" Legislation: The Birth of Neoclassical Tort Reform*, 109 Harv. L. Rev. 1765, 1782 (1996).

[14] *Republican Contract With America*, *supra* n. 12.

[15] *See* current Sen. 11, 108th Cong. (June 26, 2003).

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There are too many frivolous lawsuits against good doctors, and the patients are paying the price."[16]

The political movement for tort reform has been still more successful on the state level. Since 1980, thirty-two states have passed limits on the recovery of punitive damages, thirty-five states have imposed joint and several liability limitations, and eleven have limited potential recoveries for pain and suffering.[17] These developments, as Professors Koenig and Rustad have observed, suggest that "proponents of tort retrenchment are winning by controlling the language and imagery of the political struggle," perhaps so much so as to justify the notion that the system is "under siege."[18] Tellingly, however, the supposed *litigation explosion*—to offer one example—has been persuasively debunked. As one scholar noted, "The outcome thus far of the political debate over the litigation explosion presents a sobering example of how ideological currents and political organization can overwhelm sociolegal scholarship."[19]

The increasing prevalence, stridency, and influence of the popular case for tort reform have not gone unnoticed within the legal academy. Primarily, commentators have responded to its development by advancing two sorts of analyses. First, a litany of scholars has adeptly refuted the arguments propounded by the proponents of tort reform.[20] Most typically, they have called attention to the logical and empirical fallacies that have tended to characterize these polemical works. In so doing, they have demonstrated that many of the analyses put forth by tort reform advocates lack serious scholarly merit; at times, they have even exposed tort reform advocates as disingenuous. Second, though with less frequency, scholars have devoted attention to understanding how the critique of the legal system functions, on both logical and symbolic levels.[21] Most typically, though, these studies have been conducted as threshold components of empirical refutations. Perhaps for this reason, those articles that have sought to explain the manner in which the case for tort reform has been framed have tended to cluster the arguments advanced by its proponents into a handful of distinct and generally insular categories (e.g, frivolous lawsuits, greedy plaintiffs, deceitful lawyers, etc.). For instance, in his article, *The Day After the Litigation Explosion*, Professor Marc Galanter notes that the empirical

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[16] President George W. Bush, Speech, *President Announces Framework to Modernize and Improve Medicare* (D.C., Mar. 4, 2003) , at http://www.whitehouse.gov/news/releases/2003/03/20030304-5.html (accessed Dec. 28, 2005).
[17] Rustad & Koenig, *supra* n. 1, at 67.
[18] Thomas H. Koenig & Michael L. Rustad, *In Defense of Tort Law*, 3 (NYU Press 2001).
[19] Robert L. Nelson, *Ideology, Scholarship, and Sociolegal Change: Lessons From Galanter and the "Litigation Crisis*," 21 L. & Socy. Rev. 677, 689 (1988).
[20] *See e.g.* Chesebro, *supra* n. 10; Galanter, *Litigation Explosion*, supra n. 1, at 3.
[21] *See e.g.* Bruce A. Finzen & Brooke B. Tassoni, *Regulation of Consumer Products: Myth, Reality, and the Media*, 11 Kan. J.L. & Pub. Policy 523 (2002); Rustad & Koenig, *supra* n. 1.

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claim regarding the increased frequency of frivolous lawsuits underlies many of these proposals for reform and then proceeds exhaustively to refute it.[22]

While attempts to discredit the most prevalent arguments for tort reform have been thoughtful and persuasive, those that have sought to understand the manner in which the critique has been framed have not been as successful. While they have isolated a somewhat circumscribed set of arguments as component parts of the case for tort reform, they have failed to perform the next, and perhaps most important, analytical step: understanding the relationship of these arguments *to one another*. What scholars have failed to appreciate is that the variant arguments advanced by proponents of tort reform cohere—and complement one another—as an overarching critique of the court system itself. This is not merely to suggest that, by adopting an appropriate level of generality, one can characterize the variant strands of argumentation as originating in a common impulse or classifiable in a common rubric. Rather, it is to contend that they are intertwined with one another: they are not diverse arguments advanced in support of a common proposition, but components of a logical network which, in their origins and implications, are mutually reinforcing.

An additional, albeit closely related, point is that the case for tort reform is based not only upon criticism of the legal system as it presently exists, but on a common normative conception of societal values. There are not just arguments about the legal system, lawyers, or plaintiffs' questionable morality; there are also *mirror image* arguments about what individuals and societal institutions presently are or ideally should be. For example, the idea that frivolous lawsuits result from the failure of a plaintiff to take "personal responsibility" for his actions rests, in significant part, upon the idea that *we*, as putative members of the rest of society, should and would assume such personal responsibility if we were placed in the same situation. To an extent, this is a logical inevitability of the agenda of the tort reform movement, which at its core operates on the contention that society does not truly *need* the legal system (at least not for any essential social objective). If one is to suggest that the legal system is unnecessary, he must also explain how the objectives it is thought to pursue would otherwise be fulfilled. But in addition to being, as I suggest, a logical inevitability, it is also rhetorically appealing. It posits that society is demeaned by its acceptance of and reliance on the tort system, and that must be cast aside in pursuit of higher values.

If one accepts my understanding of the case for tort reform, two implications present how it should be addressed. First, refuting the myriad

[22] Galanter, *Litigation Explosion*, *supra* n. 1.

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components of the argument on a piecemeal basis is rather like cutting the heads off a Hydra: it fails to address the essence of the challenge, and, while it may parry the foe's advance, the tactic is ultimately ineffectual. Second, the case has a psychological, and not just rational, dimension. If one comes to regard the tort system as a disempowering institution, it is of limited consequence that, say, a particular critique of the uses of scientific evidence rests on faulty premises. The broader implication of the argument against the tort system, and the fear that it inspires, remains unaddressed.

In developing this argument, this article will proceed in three sections. Section II provides a contextual framework for the argument traced above. To this end, it will survey the claims that most commonly have been advanced by proponents of tort reform. In doing so, it will draw not only from articles and speeches by those advocating changes to the tort system, but also from popular periodicals that advance similar types of claims. In addition to surveying claims, this section will consider how particular arguments function and the purpose they serve in advancing the broader case for tort reform. In this sense, it is both foundational and analytical. Section III will attempt to understand how these arguments interact with one another to form a coherent whole. Section IV concludes by considering the implications of my analysis for those who would seek to refute the case for tort reform and by suggesting how the popular debate regarding tort reform could be enriched.

II. THE CONTENT OF THE CASE FOR TORT REFORM: AN ANALYTICAL PRIMER

In this section, I survey the rhetorical landscape in attempting to provide a sense of the component arguments of the case for tort reform. I will divide the arguments into six categories: (1) criticism of lawyers; (2) criticism of plaintiffs; (3) the "litigation explosion" (and the attendant suggestion that we are becoming a "litigious society"); (4) the randomness of the system; (5) the inordinate costs litigation entails; and (6) the deficiencies of juries. They will be addressed in turn.

A. *The Arguments Against Lawyers*

As a general matter, several variant, though interrelated, arguments have been advanced as parts of the negative portrayal of "trial lawyers" that underlies the case for tort reform.[23] According to tort reformers, plaintiffs'

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[23] The term "trial lawyers" is something of an imprecise manner in which to characterize the plaintiff's attorneys who appear to be the target of the case for tort reform. *Cf.* Alan Dershowitz, *Steroetyping Trial Lawyers: Dear Mr. President Stop Picking on Lawyers, Exhorts Dershowitz*, Apr./May JD Jungle 24, (2003) (available at http://www.jdjungle.com/main.cfm?chID=0&schid=0&inc=INC_article.cfm&artid=50806&template=0 (noting that "trial lawyers" engage in many different sorts of litigation).

lawyers wield influence on two levels. First, plaintiffs' lawyers—trial lawyers, as it were—are extraordinarily influential and are able to realize their policy goals through manipulation of the political process and other public channels. Second, they adeptly utilize the legal system for personal enrichment. Both these contentions rest on a negative assessment of lawyers' character traits. These arguments will be discussed in turn.

1. Lawyers as Manipulators Outside the Legal System

The notion that lawyers wield influence in shaping legislative policy is based most directly upon the claim that they parlay vast wealth into political access. An op-ed piece written by former Solicitor General Theodore Olson in the Wall Street Journal contended that trial lawyers had become "America's 'third political party,' contributing more money to political elections than any other segment of American society."[24] The American Tort Reform Foundation's home page includes a search program labeled "Tracking the Trial Lawyers."[25] By clicking on the link, the viewer is directed to a page which displays the total amount of money donated by "trial lawyers" to candidates for, respectively, the Presidency, Senate, House of Representatives, and to party committees since January of 1999.[26] One may also narrow the search for a given state, race, or lawyer's last name.[27] The claims that were made against Senator John Edwards, a Democratic candidate for President and former trial lawyer, by the Republican National Committee took this contention regarding the inordinate influence of lawyers a step further, arguing that his attainment of public office represented a direct infiltration of the political process by the trial bar.[28] One of its releases declared, "Edwards Isn't Just Beholden to Personal Injury Trial Lawyers, [sic] He Is One Himself."[29] Once a trial lawyer, always a trial lawyer, the argument implies.[30]

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[24] Theodore B. Olson, *Clinton's Payoffs to the Trial Lawyers*, Wall St. J. A10 (Mar. 15, 1996).
[25] *See American Tort Reform Foundation*, http://www.atrafoundation.org (accessed Dec. 30, 2005).
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *See Who Is John Edwards*, http://www.davidsongop.com/edwards.htm (accessed, Dec. 30, 2005).
[30] Suffice to say, the claim that lawyers essentially control the political process is oftentimes accompanied by accounts of the personal wealth of members of the trial bar. *See e.g.* Michael Freedman, *Judgment Day*, Forbes 132, (May 14, 2001). The article names the top ten highest paid plaintiff's lawyers from the year 2000. Regarding the second highest earner, Texas lawyer Fred Baron, it notes: "The 53-year-old Baron founded Baron & Budd in 1977 and made a fortune in asbestos cases. His wife Lisa Blue and partner Russell Budd led the Dallas firm in recovering an estimated $150 million in asbestos claims in 2000, of which it kept $45 million. Baron, who prefers to handle other toxic tort cases, is president of the Association of Trial Lawyers of America, whose political action committee gave $3.6 million to Democrats last year. He and his firm gave another $700,000—all to make sure tort reform stays buried." *Id. See also* Jeffrey O'Connell & Patrick B. Bryan, *More Hippocrates, Less Hypocrisy: "Early Offers" as a Means of Implementing the Institute of Medicine's Recommendations on Malpractice Law*, 15 J.L. & Health 23, 43 (2001).

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Accompanying this line of rhetoric is the allegation that lawyers are adept manipulators of imagery and argumentation, and as such they can manipulate public discourse to suit their own ends. In part, this claim rests upon the notion that the lawyers' prowess at developing persuasive arguments in support of a given position is not confined to the courtroom. For instance, Walter K. Olson implores his readers to "[o]bserve how the litigation lobby skillfully switches back and forth between presenting itself as 'public' and as 'private,' the more deftly to obtain for itself the privileges of both kinds of status and the responsibilities of neither."[31] Trial lawyers wield this skill for disingenuous, but effective, argumentation to optimal effect, the contention follows. As Max Boot noted in an op-ed in the Wall Street Journal regarding one attorney:

> [He] is not only a skilled manipulator of the media but he's also hired a series of public relations companies to (as one of the firms put it in a brochure) "establish the firm O'Quinn, Kerensky & McAninch as the leading breast implant litigation firm in Texas." Thus his complaint about the companies' defensive PR efforts – undertaken only after they were swamped by bad publicity – is more than a little disingenuous.[32]

Essentially, trial lawyers have both the skill and resources to capitalize upon an unsuspecting public and a permissive media in the advancement of their cause.

Perhaps somewhat surprisingly, it is generally alleged that the trial lawyers put this influence to the end of *perpetuating* the status quo, not changing it. The final two chapters of Walter Olson's recent book, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law*, are devoted to explaining this contention.[33] His account centers upon the rejection of tort reform bills in the legislative arena, noting that the politicians who did so were beholden—personally and politically—to the trial lawyer "lobby."[34] His overarching point is that the policies that presently govern the litigation system operate to the benefit of lawyers, who thus seek to foster "legislative gridlock."[35]

2. Lawyers Using the Legal System for Their Own Ends

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[31] Walter K. Olson, *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law*, 303 (St. Martin's Press 2003).
[32] Max Boot, *Rule of Law: King John's Guide to Breast Implant Riches*, Wall St. J. A21 (June 19, 1996). This article and several others are cited as part and parcel of a thorough discussion regarding the media's favorable treatment of the case against trial lawyers. *See* Finzen & Tassoni, *supra* n. 21, at 525.
[33] Boot, *supra* n. 32, at 261-314.
[34] Olson, *supra* n. 31, at 266-77.
[35] *Id.* at 287.

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Proponents of tort reform further contend that the trial lawyers are able to manipulate the legal system for their own ends. It is perhaps a tautology that most any argument about the deficiency of the legal system is logically connected to trial lawyers. However, it should be noted, there are two divergent lines of argumentation regarding trial lawyers' effects on the system. First, proponents of tort reform posit that lawyers are complicit with other parties in bringing about certain negative effects through the legal system. Their accomplices in this respect are, for instance, the plaintiffs who bring frivolous suits and the juries who are deluded by clever arguments into awarding vast sums of money. Second, though, they contend that the lawyers themselves are primarily, if not entirely, responsible for a certain set of ills that flow from the operation of the legal system. In essence, these arguments are predicated upon the suggestion that the trial lawyers *wag the dog*.

a. Invalidation of Statutes

The first such argument is that lawyers are able to brandish the law as a weapon, both in achieving the judicial invalidation of tort reform measures which are enacted and in effecting extensions of existing law to create more favorable (and lucrative) grounds for recovery. While this view has been advanced by a number of commentators, it is perhaps notable that law review articles have occasionally served as the vehicle for its delivery. Victor Schwartz, a partner in a Washington law firm and a current or former member of several advisory committees of the American Law Institute, has been especially prominent in leveling this criticism of plaintiffs' lawyers.[36] For instance, in a recent article in the South Carolina Law Review, he (with Leah Lorber) wrote:

> Plaintiffs' lawyers know that efforts to curb punitive damages "run wild" will eventually eat into their profits. They recognize that punitive damages are taxable under federal law, while compensatory awards are not. . . . Consequently, plaintiffs' lawyers, as this Article will show, have poured new wine of punishment evidence, once used to obtain punitive damages, into old bottles of pain and suffering awards.[37]

His analysis, however, focuses rather minimally on the motivations or actions of lawyers and is primarily concerned instead with examining developments in case law.[38] Indeed, the only further mention of attorneys

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[36] *See* Victor E. Schwartz & Leah Lorber, *Twisting the Purpose of Pain and Suffering Awards: Turning Compensation into "Punishment,"* 54 S.C. L. Rev. 47 (2002).
[37] *Id.* at 48-49.
[38] *Id.* at 49-69.

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occurs when, in the course of noting that state courts had invalidated caps on non-pecuniary damages, Schwartz observes that "[p]laintiffs' lawyers in key litigation states" had been at the forefront of the challenge to the constitutionality of the measures.[39] Nonetheless, the article concludes by reiterating its criticism of attorneys in a final rhetorical flourish, asserting that "plaintiffs' lawyers looking for the next deep pocket" can be "stopped in [their] tracks if judges do the job they have taken an oath to do."[40] While the resort to criticism of attorneys is, for the most part, relegated to the periphery of the article, it establishes a thematic context within which the analysis must be read—that is, to the extent courts have allowed the expansion of legal doctrine, they have been either "activist judges"[41] or otherwise deluded by the trial bar.[42]

This argument has been presented prominently in periodicals such as the Wall Street Journal as well. For instance, one news article, detailing a spate of decisions from state courts holding various tort reform measures to be violative of state constitutions, commented, "Personal injury lawyers don't take defeat lying down. Unable to keep state legislatures from curbing plaintiffs' rights, these attorneys are fighting back in the forum they know best: the courts."[43] In certain instances, this argument conflates the judges who invalidate the laws with the trial lawyers themselves. For instance, Walter Olson insinuated as much, writing in Fortune Magazine, "The folks who get to implement tort reform are the same ones it is meant to constrain: the judges on state courts. As skilled lawyers, they know a hundred ways over, under, and around mere parchment barriers."[44]

The sum and substance of the claim is that, when lawyers are unable to prevail through the political process, despite the numerous advantages their largesse confers upon them in that arena, they are able to command the apparatus of the legal system to fend off the threat to their livelihood posed by tort reform.

b. Creation of Business

The second argument arising from the notion that trial lawyers exploit the legal system is that they conceive of lawsuits they want to bring

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[39] *Id.* at 61.
[40] *Id.* at 70.
[41] *Id.* at 61.
[42] For additional law review articles with similar rhetoric regarding trial lawyers, *see e.g.* Victor E. Schwartz, Mark A. Behrens, & Leah Lorber, *Tort Reform Past, Present, and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 246 (2000) ("The tactic of judicial nullification was developed by the plaintiffs' bar as a response to successful state tort reform efforts. . . . Plaintiffs' lawyers further 'game' the legal system by relying on obscure state constitutional provisions . . . .").
[43] Paul M. Barrett, *Tort Reform Fight Shifts to State Courts*, Wall St. J. 37 (Sept. 19, 1988).
[44] Walter Olson, *Why Business Loses in Court*, Fortune 127 (May 23, 1988).

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and then recruit plaintiffs to facilitate them. By this argument, trial lawyers conceive of new, and often innovative, avenues for recovery; the litigation which follows is therefore more readily the result of lawyers' greed than that of the plaintiffs who ultimately collaborate in the venture. Most typically, this criticism pertains to the class action context. For instance, Catherine Crier, a former 20/20 correspondent who has since hosted shows on Fox News and Court TV, alleges as much in her colorfully titled book, *The Case Against Lawyers: How the Lawyers, Politicians, and Bureaucrats Have Turned the Law into an Instrument of Tyranny – and What We as Citizens Have to Do About It*. She writes:

> Groups of lawyers regularly meet to peruse newspapers, the *Federal Register*, and other publications for ideas. When they find a "wrong," they then troll for plaintiffs, particularly in communities known to favor large awards against the evils of corporate America.[45]

Olson's book dedicates considerable space to the development of this argument. While it is perhaps unnecessary to reproduce his argument here, for it substantially resembles that advanced by Crier, the manner in which he describes the lawyers themselves is significant. He suggests that "mass tort litigation was following an entrepreneurial model" and that this resulted in "a more or less continual stream of shareholder and investor actions against big companies."[46] The point that seems to be advanced by this argument is that, at least with respect to certain actions that are brought, the lawyers themselves are the parties with the significant interest. By this token, the litigation not only lacks a public purpose, but is an instrument in the furtherance of a private, entrepreneurial venture. By induction, it suggests the malleability of plaintiffs.

3. The Composite Portrait of Lawyers

These arguments regarding lawyers are predicated upon a set of common themes regarding lawyers and their role in society.[47] Professor Galanter observes that there are three primary currents that appear to underlie the public indictment of lawyers. First, they are "corrupters of discourse," which, in significant part, encompasses the notion that they

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[45] Catherine Crier, *The Case Against Lawyers: How the Lawyers, Politicians, and Bureaucrats Have Turned the Law into an Instrument of Tyranny – and What We as Citizens Have to Do About It* 192 (Broadway Books 2002).
[46] Olson, *supra* n. 31, at 84-85.
[47] *See generally* Galanter, *Predators*, *supra* n. 1; Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. Cin. L. Rev. 805 (1998). My classification of arguments regarding lawyers is different from the one he uses, in that it heretofore has segregated aspects of the critique which are centered on lawyers from those which concern other actors as well. Nevertheless, the themes he identifies are apropos of this portion of my discussion here.

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adeptly engage in rhetorical sophistry in furtherance of their advocacy efforts.[48] Second, they are "fomenters of strife," provoking conflict and controversy where there otherwise would have been social harmony.[49] Third, they are "economic predators," essentially parasites who drain society's resources.[50] As Galanter insightfully notes, these negative sentiments regarding lawyers correlate, in significant part, with what we perceive to be the characteristics that assist them in their profession. To wit:

> In the sins of discourse we can recognize the inventiveness of lawyers and their obsession with precision and relevance. Fomenting conflict mirrors the lawyer's zealous advocacy and insistence on vindicating rights. In economic predation, we see appreciation of the lawyer's prowess as an agent of redistribution.[51]

Several additional observations, though not necessarily specific to the case in favor of tort reform, but at the least more prominently featured in that context, may warrant further mention. First, the lawyers are portrayed as a cohesive unit, cooperating effectively to a common end. There is no sense given that there is internal dissent within the community of lawyers, much less that their interests might diverge with respect to any particular issue. Indeed, it is occasionally suggested that the civil *defense* bar tacitly supports the plaintiffs' attorneys in order to justify their own fees.[52] Second, lawyers are, it is asserted, better able to wield influence than are their political adversaries. It is rare that groups who would benefit from tort reform and the resistance to trial lawyers they offer are even mentioned, and when they are, they are cast as defenseless before the lawyers' exertion of political might.

B. *Arguments Against Plaintiffs*

Alongside the arguments against lawyers, there are advanced a series of criticisms that pertain directly to the individuals who choose to file lawsuits. In part, these contentions relate to plaintiffs' passive participation in the lawyers' expeditions. However, an entirely separate point emerges as well: the idea that people should take personal responsibility for their

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[48] Galanter, *Predators*, *supra* n. 1, at 635.
[49] *Id.* at 636.
[50] *Id.* Galanter identifies a fourth theme, "Betrayers of Trust," which is less prominent in the case for tort reform. *Id.* The theme operates upon the notion that lawyers will, often without hesitation, turn on their own clients. Because the case for tort reform rests, in significant part, upon the idea that lawyers and plaintiffs seamlessly cooperate at the expense of society, *see supra*, it is perhaps unsurprising that this theme does not permeate the arguments made by its proponents.
[51] *Id.*
[52] *See e.g.* Olson, *supra* n. 31, at 281 (noting that the 22,000 member Defense Research Institute "regularly, if quietly, sends officials to legislative hearings to testify against proposed curbs on litigation").

actions or otherwise refrain from filing most lawsuits and that the decision to file a cause of action to gain redress for a grievance is therefore inappropriate. These arguments operate upon common conceptions of plaintiffs and are advanced within the context of broader normative understandings of how society ought to be. Crier offers a simplified version of the overarching point:

> The omnipotence of the rule of law has altered our very mind-set. The image of ourselves that we export, that of the frontier-minded, self-reliant, and free-spirited American, is all show. For every problem, there is someone or something else responsible. . . . For every complaint, no matter how worthless, there is an advocate.[53]

Three interrelated points, recurrent throughout the critique, may be drawn from her paragraph. First, plaintiffs fail to accept responsibility for their actions, and thus, instead seek monetary gain through the legal system. This is contrary to the sort of social value structure upon which society should operate, which includes self-sufficiency and a hardy resiliency. Second, this increasing tendency on the part of members of society to attribute their own failings to others has been, in significant part, facilitated and encouraged by the legal system's willingness to vindicate such claims. Third, and finally, lawyers are willing to bring such tenuous cases. This third claim, functions analogously to the argument that lawyers are able to conceive of new claims and then recruit clients who will assert them. In both instances, plaintiffs and lawyers complement one another—one conceives of the claim, and the other cooperates in its prosecution. Society, the point concludes, cannot count on either party to act as a check upon the profit-seeking impulses of the other.

Because Crier's short passage may not provide a complete sense of the contours of the former two arguments, I discuss them each in greater depth.[54]

1. Plaintiffs Fail to Accept Personal Responsibility for their Actions

The "personal responsibility" argument is not frequently developed in a coherent and thorough manner; rather the term itself is asserted as an objective good—i.e., that people should take personal responsibility for their own failings—and it is then insinuated or explicitly indicated that plaintiffs

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[53] Crier, *supra* n. 45, at 21.

[54] It is perhaps unnecessary to devote further attention to the point, occasionally made, but generally implicit, that lawyers are loath to turn away viable claims, their questionable *common sense* merits aside.

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have refused to accept it.[55] In part, this may flow from the fact that the term and the implications that it connotes have been commonly accepted for a sufficiently long period of time that its very invocation is sufficient to advance the argument, at least in shorthand form. In any event, as Professor Douglas H. Cook notes, though the precise meaning of the term is somewhat vague, its implications are discernible.[56] He writes, "If all persons exercised personal responsibility, would there be any real need for tort-based compensation? The answer is no."[57] For Cook, this development would be a positive one; by his reckoning, absent the tort system, "society may progress in a direction where the first words uttered after an auto accident or other injury are 'Can I help?' rather than 'Can I sue?'"[58]

More typically, though, the term "personal responsibility" appears to describe a particular type of frivolous lawsuit that plaintiffs purportedly often file—i.e., one predicated upon tenuous claims regarding the defendant's negligence. (At least in theory, this can be contrasted with those in which the injury suffered is dubious, though in practice, they oftentimes dovetail with one another.) The paradigmatic example of such a suit is the oft-ridiculed *Liebeck* case, better known as the "McDonald's Coffee case."[59] There, the plaintiff, an elderly woman, suffered severe burns when the cup of coffee she had purchased at a McDonald's drive-thru window spilled in her lap.[60] According to the tort reform argument, she should have accepted that the accident was her own fault (for putting the hot coffee in a precariously balanced position), rather than seeking recompense through the legal system. Walter Olson's website, www.overlawyered.com, at one point included a collection of cases that appear to fit within the same general mold. The page, labeled "archived personal responsibility items," grouped articles from newspapers into, *inter alia*, the following categories: "blamed for suicides," "warning labels and disclaimers," "couldn't help eating it" [lawsuits against McDonalds and other restaurants related to the fat content of food products], "sports risks," "gambling," and "hot

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[55] *See e.g.* Richard B. Schmitt, *Truth is the First Casualty of Tort-Reform Debate*, Wall St. J. B1 (Mar. 7, 1995) (noting simply, "Mr. Meese says the case, which reform groups have been citing for a decade, illustrates how a lack of personal responsibility has motivated unscrupulous lawyers and plaintiffs"); Milo Geyelin, *Knock at Clinton Puzzle legal Reforms*, Wall St. J. B10 (Sept. 8, 1992) ("Legal reform has never been a burning issue in Arkansas. The state's rural culture, said former Insurance Commissioner Rober Eubanks, embraces a community involvement and personal responsibility."); Roger Parloff, *Is Fat The Next Tobacco?; For Big Food, the supersizing of America is becoming a big headache*, Fortune 50 (Feb. 3, 2003) ("Though many people recoil at the idea of obesity suits – eating habits are a matter of personal responsibility, they protest – the tobacco precedents show that such qualms can be overcome.").
[56] Douglas H. Cook, *Personal Responsibility and the Law of Torts*, 45 Am. U. L. Rev. 1245, 1249 (1996).
[57] *Id.*
[58] *Id.* at 1274.
[59] *Liebeck v. McDonald's Restaurants*, 1995 WL 360309 (D.N.M. 1994).
[60] For a summary of the *Liebeck* case and its popular satirization, *see* Mark B. Greenlee, *Kramer v. Java World: Images, Issues, and Idols in the Debate Over Tort Reform*, 26 Cap. U. L. Rev. 701 (1997).

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beverages."[61] A block of text beneath the compilation of anecdotes noted, perhaps as a crystallizing insight, that, as a result of various trends in the evolution in legal doctrine, "today's American legal environment is [one] in which plaintiffs routinely try their luck at suits after being injured climbing high-voltage utility structures while drunk, skinny-dipping in icy pools with captive killer whales, trying 'wheelies' and other stunts on industrial forklifts, and smoking for decades."[62]

A related point is that the law encourages plaintiffs to sue in such instances by virtue of its asserted permissiveness. The core of this contention is, intuitively, that because the court system grants relief in such frivolous cases, plaintiffs have a strong incentive to file suit. On his website, Olson notes:

> Most states moved from contributory negligence to *comparative negligence*, which allows a plaintiff whose negligence helped cause an accident to sue over it anyway, though for a reduced recovery. Waivers and disclaimers began to be struck down as unconscionable, against public policy, not spelled out with sufficient clarity, etc. . . . The result is today's American legal environment . . .[63]

In essence, this argument appears to suggest, plaintiffs will seek recovery wherever the law *enables* them to do so. Interestingly, this presents the law as a classic enabler, something that should interpose an obstacle to a harmful course of action, but fails to do so. In short, the law fails to act as a check on the plaintiffs who, the argument goes, crowd the entrance of the courthouse.

2. Plaintiffs File Frivolous Lawsuits

The final argument specially pertaining to the character and disposition of plaintiffs is perhaps the most familiar: that plaintiffs file frivolous lawsuits based upon dubious injuries. In this sense, it poses an effective complement to the point about personal responsibility—whereas one of them is chiefly about questionable theories of *liability*, the other about incredible claims of damages. Of course, the two can, and often do, intersect in individual cases. But as a conceptual matter, they can be seen as discrete.

By the terms of the argument, plaintiffs seek to exploit the legal system for profit, rather than, seek redress for severe and serious injuries;

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[61]Overlawyered, *Archived Personal Responsibility Items, Pre-July 2003*, http://www.overlawyered.com/2003/06/archived_personal_responibili.html (accessed Jan. 1, 2006).
[62] *Id.*
[63] *Id.*

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they are, succinctly put, "golddiggers."[64] The familiar image the argument conjures is that of the man wearing a neck brace in the courtroom for the benefit of the jury, but who no doubt will remove it once a verdict is delivered. It may also extend to allegations of injuries that would strike the observer, on an intuitive level, as odd, or even inane. For instance, Professor Galanter recounts a case in which a woman alleged that the dye from a CAT scan procedure had extinguished her psychic powers and caused her welts and other skin irritations.[65] The trial judge dismissed the claim regarding her lost clairvoyance, but allowed the physical injuries to go to the jury, which, in turn, awarded her $988,000.[66] Though the appellate court ultimately ordered a new trial with respect to damages, the story entered popular lore as a paradigmatic example of what was wrong with the tort system. It was referenced not only by Peter Huber in his book, *Junk Science*, but in speeches by President Ronald Reagan.[67] Certainly, the story was popular fodder for proponents of tort reform because it involved the intersection of several of their lines of criticism (greedy or otherwise unsympathetic plaintiffs, impressionable juries, and crushing damages). But suffice to say, the presence of an intuitively frivolous claim serves as an instrumental component of the point.

It is further important to note that the term "frivolous lawsuits" encompasses more than cases in which an alleged injury is questionable. Additionally, it includes cases where the *injury* is not physical, or even psychological, at all, as where a litigant seeks vindication of an intuitively suspect claim of right or duty as against another party. For instance, on his website, Walter Olson discussed one such case:

> "Parents may stop helping out on their kid's teams if a Springbank lawyer successfully sues volunteers within his own son's league, says the head of minor hockey in Calgary. . . . Michael Kraik is suing the Springbank Minor Hockey Association because he says his nine-year-old son Alexander was deliberately placed on a weaker team due to favouritism [sic] from league officials for their own children." The suit seeks C$50,000 [sic] and names two officials individually.[68]

Anecdotes such as this one extend the point that plaintiffs are filing suits

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[64] Greenlee, *supra* n. 60, at 709.
[65] Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 Ariz. L. Rev. 717, 727-29 (1998).
[66] *Id.* at 727.
[67] *Id.* at 728-729.
[68] *See* Overlawyered, *Canada: Nine-Year-Old's Hockey Suit*, http://www.overlawyered.com/2003/12/canada_nineyearolds_hockey_sui.html (accessed Jan. 12, 2006) (citing *Hockey crisis looms*, Calgary Sun, (Dec. 19, 2003)).

primarily in pursuit of undeserved financial gain, rather than redress of grievous injuries.

C. *Too Many Lawsuits/The Litigation Explosion*

These accounts of plaintiffs, lawyers, and lawsuits beget a separate, though closely related, criticism of the legal system: that it has placed society in the throes of a *litigation explosion*. It is fairly evident that the term "litigation explosion," a colorful expression of the notion that too many lawsuits are filed, is intended to appear as an observation regarding a posited trend in the legal system.[69] It takes the portrayals of plaintiffs anxious to file suit and lawyers eager to assist them (or vice versa) and extrapolates it outwards to observe the development of a trend. However, it builds upon them as well, and in so doing, subtly recasts the argument being made. It is not so much a point about the actions of individuals or groups, but rather, takes the form of an observation about a natural phenomenon. As an editorial in USA Today noted:

> Everybody in the USA suddenly seems to want to sue anybody with liability insurance coverage. The explosion of litigation has choked court dockets. And too-few lawyers tell potential clients that some cases are a waste of time. . . . The greed has turned the temple of justice, long a hallowed place, into a pigsty. The time has come to clean it up.[70]

The extent to which it is afforded explanatory credibility makes it a convenient springboard for other arguments.[71] For instance, in an article regarding "America's Worst Judges," Max Boot writes:

> A state appeals court eventually tossed out the smelly-water award, finding that Judge Fostel had allowed the plaintiffs to admit junk science and had wrongly ruled that their claims weren't barred by the statute of limitations. That the case even got that far raises serious questions about whether the litigation explosion is compromising the integrity of the judiciary.[72]

The observation that there are too many lawsuits is a premise, an assumption,

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[69] What may be surprising about the *litigation explosion* is the extent to which it has attained popular credibility. For a discussion of this point, *see e.g.* Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 Fordham L. Rev. 199, 201 (1991).

[70] Galanter, *Litigation Explosion*, *supra* n. 1, at 4 (quoting *Hold Down Awards to Ease the Crisis*, USA Today 12A (June 6, 1986)).

[71] Ironically, the hypothesis itself appears to lack descriptive accuracy. *See generally* Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. Rev. 4 (1983).

[72] Max Boot, *America's Worst Judges*, Wall St. J. A22 (May 28, 1998).

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or an assertion accepted as fact. The manner in which it is couched—an "explosion"—creates an ambience of crisis, and the evident need to address the matter becomes a virtual imperative. As the above-quoted passages may reflect,[73] the use of the term "litigation explosion" places a patina of empiricism upon the critique and thereby facilitates the deployment of further points regarding the trend.

In *The Collapse of the Common Good*,[74] Philip K. Howard purports to offer an explanation as to why American culture has evolved in such a way. The book, it could fairly be said, is about the effects of the ostensibly litigious culture on the remainder of society. Nevertheless, he suggests an explanation for the rise of this mindset. Howard argues that an excessive cultural affinity for the jurisprudence and logic of "individual rights" leads Americans to accept, unquestioningly, "that being sued is the price of freedom."[75] The result is a "rhetorical society dedicated to individual self-interest."[76] This argument, in linking plaintiffs' apparent inclination to sue to a sociocultural trend, operates to the same effect as does Olson's argument that the law has become more accommodating of them. In either event, plaintiffs are encouraged to sue by a permissive social and legal climate; the primary difference is that Howard's version attempts to offer additional explanation for the development of the legal climate itself.

The significance of this point may be subtle, but should not be underestimated. In parlaying the conceptualization of plaintiffs into something more general, the argument for tort reform becomes as much a desire to remedy social costs as monetary ones. It suggests that society interacts with the legal system in harmful ways and that reliance upon courts rends the moral fabric of the culture itself. By this token, plaintiffs who file frivolous lawsuits cannot safely be regarded as *them*; to the contrary, *they* are a reflection on or of *us*. Tort reform, then, is a way to save society from itself by reasserting the importance of vital social values.

As suggested above, the litigation explosion argument provides a segue way into a series of arguments about the costs of lawsuits for society as a whole. As a general proposition, proponents of tort reform tend to

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[73] As to the dual significance of the term, *see also* Editorial, *Haven for Lawyers*, Wall St. J. A14 (Mar. 1, 1996) (noting that, "The American Bar Association and the legal profession in general consistently deny that the litigation explosion is anything to worry about—indeed they even deny that there is a litigation explosion.").

[74] Philip K. Howard, *The Collapse of the Common Good: How America's Lawsuit Culture Undermines Our Freedom* (Ballantine Publg. Co. 2001). Howard is presently a partner in the New York office of Covington & Burling, and founded an organization called "Common Good" to assist in the movement for tort retrenchment. *Id.*

[75] *Id.* at 22.

[76] *Id.* at 27. For a humorous review of Howard's book, *see* W. Taylor Reveley III, *Is the Republic Circling the Drain?*, 96 Nw. U. L. Rev. 1579 (2002).

identify three sets of costs that result from the apparent proliferation of lawsuits: (1) those sustained by the courts; (2) costs from paying for lawsuits; and (3) consequences of fearing the possibility of lawsuits. They will be discussed in turn.

1. Costs for the Courts

First, proponents of tort reform argue that the courts, having been deluged with frivolous lawsuits, are unable to perform their appropriate function effectively. This is a less emphasized point, perhaps because it lacks rhetorical force or because the upshot of the case for tort reform is to minimize the role appropriately vested with the courts in the first instance. In any event, the basic point is that courts are unable to tend to legitimate business because of the monumental exertion of effort required to filter out frivolous lawsuits. For example, a news article in the Wall Street Journal noted that "[a]s the litigation explosion has hit the appeals courts, they have responded by disposing of more cases summarily, often refusing to hear oral argument and sometimes omitting written reasons for decision."[77] As a result, it follows, the reliability and quality of the judgments rendered by these courts is diminished.

2. Costs from Paying Lawsuits

A second variant of the costs from paying lawsuits is that American businesses and organizations, deluged with lawsuits, are forced to modify their behavior, ultimately resulting in adverse consequences for the recipients of their services.[78] In its most common form, this argument posits that, as a result of costs sustained by virtue of litigation, an organization cannot afford to provide the products or services people expect. For example, an op-ed piece in the Washington Times, authored by three United States Senators, contended that non-profit organizations were unable to continue their activities because defending against lawsuits had become inordinately costly.[79] The article asserted that "[n]onprofits must spend an increasing amount of time and resources preparing for, avoiding and/or fighting lawsuits."[80] As a result, the article continues, certain organizations

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[77] John G. Kester, *Rule of Law: Appeals Courts Keep More and More Opinions Secret*, Wall St. J. A15 (Dec. 13, 1995).

[78] *See e.g.* Spencer Abraham, Paul Coverdell, & Mitch McConnell, *Lawsuits are Killing our Charities*, Wash. Times A21 (Apr. 25, 1997); Jeff Nesbit, *Tort Reform Crucial to Reining in Lawyers*, Wash. Times B6 (Dec. 27, 1996); Ralph Reiland, *Court Repair Job on Punitive Damages*, Wash. Times A13 (May 28, 1996); Joseph Perkins, *Putting a Lid on the Litigation Explosion*, Wash. Times A15 (July 9, 1995); Richard Benedetto, *Quayle Slams Lawyers Who Sue Schools*, U.S.A. Today (May 19, 1999); Max Boot, *Rule of Law: Stop Appeasing the Class Action Monster*, Wall St. J. A15 (May 8, 1996); Max Boot, *Rein in Robin Hood*, Wall St. J. A16 (June 27, 1995); Ward R. Jones, *Businessmen Really Feel those Hidden Legal Costs*," Hous. Chron. A21 (Mar. 18, 1993).

[79] *See* Abraham, Coverdell, & McConnell, *supra* n. 78.

[80] *Id.*

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must cease their activities altogether, while others must direct scarce financial resources to fund legal defense efforts, rather than devoting them to the provision of socially beneficial services.[81] The Red Cross, most prominently, "must self insure," and thus, is left with "fewer funds available for providing services than would otherwise be the case."[82]

More frequently than charities, businesses are cast as the unfortunate bearers of the costs of litigation. Another article in the Washington Times notes, "[w]hether ATLA admits it or not, whole industries are being crippled by a civil justice system dependent on junk science. And new medical advances that save lives and demonstrably help people are being flushed down the river because of the same junk-science tort fever."[83] The assertion that underlies this argument—that lawsuits are an encumbrance of business activities—can be extrapolated to a systemic level as well. For example, in a speech to the American Bar Association, Vice President Dan Quayle asserted that the "litigation explosion" was placing the nation at a "competitive disadvantage" to foreign businesses.[84] Consumers, for their part, sustain the costs of litigation in the form of a "tort tax," which, Max Boot contends, "costs America an estimated $132 billion annually, a toll that no other country in the world bears."[85]

The argument about the consequences of lawsuits for businesses is often presented as one about the effects of the development for individuals.[86] Perhaps the paradigmatic incarnation of the individual hurt by the litigation explosion is the doctor who can no longer afford to pay his insurance premiums. Indeed, the notion that doctors require relief from perpetually escalating insurance costs has been a significant impetus for the recent effort to implement liability caps in malpractice cases. In a series of talking points about the "medical liability reform," the American Medical Association asserted that "[s]kyrocketing medical liability premiums . . . are forcing physicians to limit services, retire early, or move to a state with reforms

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[81] *Id.*
[82] *Id.*
[83] Nesbit, *supra* n. 78. For additional articles about the effects of the *litigation explosion* on American businesses, *see e.g.* James R. Norman, *Smart Timing*, Forbes 170 (Nov. 25, 1991) (noting that insurance companies are "spending like mad just to tread water"); Jerry Flint, *The Bird Man of Torrance*, Forbes 64 (Apr. 15, 1991) (asserting that because of the "litigation explosion, the light aircraft business collapsed in the early 1980s [and] has never fully recovered").
[84] Benedetto, *supra* n. 78.
[85] Boot, *Robin Hood*, *supra* n. 78.
[86] To be sure, the dichotomy between *society* on the one hand, and *individuals*, on the other, is not a strict one. At their core, they are each concerned with the results of the putative trend for individual citizens: the reason that costs imposed on business are thought to be troubling is that, ultimately, they will be passed onto consumers, either in the form of price increases or lesser availability of innovative products. Nevertheless, the arguments take different perspectives about the costs of litigation, as one observes the systemic consequences of a pattern, while the other instantiates the contention by illustrating its effect on particular individuals.

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where premiums are more stable."[87] As a result, the point follows, doctors are compelled by economic forces they cannot control to abandon activities that are important to them, i.e., the opportunity to engage in a rewarding medical practice. In an article urging the necessity of tort reform, Dr. Donald Palmisano related an anecdote about an obstetrician who had been forced to forego her practice and her regret at having to do so:

> [The doctor] stood hand-in-hand with her pregnant patient. She told the crowd, "Helping a woman deliver her baby is the most extraordinary experience a doctor can have. And I won't be doing that anymore." Her liability premiums tripled. She had no choice but to give up the part of her practice she treasured most. It's a loss beyond calculation--both for her and her patients.[88]

The imposition of greater costs on physicians, in turn, is asserted to bear significant consequences for their individual patients. As Dr. Palmisano further noted:

> In South Texas, a pregnant woman showed up in a physician's office just 10 minutes from delivery. She was trying to drive 80 miles to her doctor in San Antonio because her original physician had stopped delivering babies.
>
> In Arizona, a nurse from a hospital that had closed its maternity ward gave birth by the side of the road before she could reach the region's only remaining maternity ward 40 miles away.[89]

Anecdotes such as those offered by Dr. Palmisano extend the argument about the negative effects of rising insurance costs by presenting them from a more immediately *human* perspective.

This reorientation in argumentative perspective complements the broader contention about the implications of the higher costs in insurance by suggesting an additional effect it generates: preventing the exercise of *individual choice* and the satisfaction of personal preferences. In this sense, it extends the discussion of the toll imposed on American business by positing a separate and distinct normative reason why it is undesirable. While the broad argument about the effects of litigation costs for business

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[87] American Medical Association, *Medical Liability Reform*, http://www.ama-assn.org/ama/pub/category/7861.html (accessed Jan. 12, 2003).
[88] Donald Palmisano, *Why Your Doctor Might Quit*, 276 Saturday Evening Post 50, 50 (2004) (available at http://findarticles.com/p/articles/mi_m1189/is_6_276/ai_n6276479).
[89] *Id.*

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are most immediately about *efficiency*, the microcosmic point about individuals takes on the additional question of *fairness*. That this is true of the anecdote about the doctors is relatively intuitive. Dr. Palmisano's story of the unfortunate obstetrician is undergirded by the intuition that individuals who have worked to become doctors *deserve* the opportunity to practice their chosen profession (and to practice it in the way they want to). Though perhaps more delicately, his anecdote about patients also poses an issue of equity; it trades on an underlying value—that is, that people *deserve* to be able to readily obtain particular services. In addition to being inefficient and unsafe for pregnant women to be traversing large portions of South Texas in search of an obstetrician, it is also unfair to them. Why, Dr. Palmisano would presumably query, should a pregnant woman have to drive significant distances to obtain services she desperately needs?[90]

3. Costs of Fear

Finally, the litigation explosion has been alleged to impose costs on society by deterring individuals from engaging in even innocuous conduct for fear of being sued.[91] An article that graced the cover of Newsweek both illustrates the mechanics of this argument and provides evidence of the extent to which it has gained popularity. The front of the magazine depicted three individuals: a reverend, a doctor, and a sheriff.[92] Written across the three of them was the headline: "Lawsuit Hell: How Fear of Litigation is Paralyzing Our Professions."[93] The article then discussed, among other

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[90] Outside the health care field, the context into which this point has been imported most frequently has been the administration of schools. Commenting on a survey his organization had taken regarding teacher attitudes, Philip K. Howard wrote, "This remarkable survey reveals that legal fear is taking hold in our schools, creating 'defensive teaching' and undermining the ability of educators to use their best judgment in day-to-day decisions." Common Good, *Defensive Teaching in Our Public Schools*, http://cgood.org/schools-reading-cgpubs-polls-4.html (Mar. 24, 2004). For additional citations concerning the purported costs imposed by lawsuits in public schools, *see infra* n. 91.

[91] *See e.g.* George F. Will, *Lawsuit Culture*, Wash. Post B7 (June 2, 2002) ("Americans are not losing their minds, but they are afraid of using their minds. They are afraid to exercise judgment – afraid of being sued."); George S. McGovern & Alan K. Simpson, *We're Reaping What We Sue*, Wall St. J. A20 (Apr. 17, 2002) ("Legal fear drives [doctors] to prescribe medicines and order tests, even invasive procedures, that they feel are unnecessary. . . . There is a culprit here: our legal system."); Steve Forbes, *Fact and Comment*, http://www.forbes.com/global/2003/0331/ 009.html (Mar. 31, 2003) ("Caps won't allay the fear that now grips medical practitioners."); Stuart Taylor, Jr., *How More Rights Have Made Us Less Free*, 34 Natl. J. No. 6 (Feb. 9, 2002) (discussing Philip K. Howard's work).

For citations concerning public schools in particular, *see e.g.* Mortimer B. Zuckerman, *Welcome to Sue City U.S.A.*, 134 U.S. News & World Rpt. 64 (June 16, 2003) ("Teachers who are firm with badly behaved students know all too well that they run the risk of being sued by parents who smell money more than they seek justice."); Andrew Mollison, *Miller: Limit Suits Against Schools*, Atlanta J.-Const. 4A (May 12, 2004) (reporting that Sen. Zell Miller intended to introduce "legislation designed to diminish fears among school officials of 'being blindsided by a lawsuit'"); Sid Langley, *Perspective: To the Manners Born; Think Your're a Modern Man*, Birmingham Post A10 (Apr. 26, 2004) ("Teachers virtually have to consult a lawyer before they speak to an errant child, trips are cancelled for fear of lawsuits by disgruntled parents should anything go wrong.")

[92] Newsweek, cover, (Dec. 15, 2004).

[93] *Id.*

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things, the extent to which individuals and organizations are reluctant to engage in courses of conduct that could expose them to suit. For example, it noted, "Playgrounds all over the country have been stripped of monkey bars, jungle gyms, high slides and swings . . . . The reason: thousands of lawsuits by people who hurt themselves at playgrounds."[94] The article proceeded to recount a series of anecdotes from such community-minded individuals as a little league organizer afraid of being sued if somebody fractured a limb during a game,[95] several school board members who "fear that parents will sue for anything,"[96] and a Methodist minister who refrains from hugging parishioners in order to ensure that he will not be accused of inappropriate sexual contact.[97] The Newsweek article quoted liberally from Howard, in whose books and editorials this argument has been especially prevalent.[98]

The argument is predicated upon the notion that whatever apprehensiveness is harbored by professionals is not irrational or unfounded, but rather, is the product of the "pervasive distrust" between them and their clients or customers that is engendered by a societal embrace of the legal system as a mechanism for resolving grievances.[99] As a result, the argument follows, the quality of services that are provided even to people who would not entertain the idea of filing a lawsuit is precipitously diminished.

Howard's organization, Common Good, ventures that, in the medical profession excessive litigation has resulted in the practice of "unnecessary defensive medicine" and caused "[h]onesty and candor, vital to improving health care systems [to be] supplanted by a culture of legal fear."[100] Analogously, in the educational context, Common Good contends that "education is a human enterprise and [is] bound to fail if the humans involved, fearful of legal proceedings or constraints, do not feel comfortable drawing on their personality and emotions to inspire, console and cajole students."[101]

D. *Criticisms of the System*

The final overarching category of argument advanced by proponents of tort reform is that the legal system resolves particular cases in counterintuitive ways. While the arguments that have been examined in the previous sections have pertained primarily to the actors who *use* the legal

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[94] Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, Newsweek 42, 44 (Dec. 15, 2004).
[95] *Id.* at 44.
[96] *Id.* at 47.
[97] *Id.* at 43.
[98] *Id.* at 46-48.
[99] Philip K. Howard, *Legal Malpractice*, Wall St. J. A16 (Jan. 27, 2003).
[100] Common Good, *Sign Our Petition for A New System of Medical Justice*, http://cgood.org/healthcare-52.html (accessed Jan. 1, 2006).
[101] Common Good, *Is Law Undermining Public Education?*, http://cgood.org/schools-events-5.html (accessed Jan. 1, 2006).

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system and the effects of their conduct on society, this species of contention impugns the credibility of the system itself. The upshot of the argument is that, even to the extent that the legal system could *in theory* perform legitimate functions, it is not practically exercising the authority allocated to it. As a general matter, this critique is premised on the assertion that the legal system does not, at the end of the day, reach sensible results—that is, intuitively frivolous claims are translated into legally meritorious, even lucrative, ones.

In propounding this argument, many proponents of reform call the tort system a "litigation lottery." By this, they mean to suggest both that those who choose to take part in the process as plaintiffs are seeking financial gain and that a case's chances of success are not entirely bound up in the merits of the predicate claim.[102] In this vein, a paper published by the Department of Health and Human Services noted, "The system permits a few plaintiffs and their lawyers to impose what is in effect a tax on the rest of the country to reward a very small number of patients who happen to win the litigation lottery."[103] While the lottery metaphor aptly captures the essence of the critique, the point about the arbitrariness of the legal system is advanced in other, more general, terms as well. Advocating caps on medical malpractice damages, President Bush contended that "[t]he unpredictability of our liability system means that even frivolous cases—people call them junk lawsuits—carry the risk of enormous burdens."[104] Still more frequently, the point is put as an observation as to the prevalence of *out of control* damage awards.[105]

Underlying the assertion that the legal system is random are several subsidiary contentions as to why that might be the case. The most prominent of these contentions is the suggestion that *juries* are easily misled, both by adept trial lawyers and their own emotions, and as such, tend to dispense excessive verdicts incommensurate with the severity of the

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[102] *See e.g.* Dan Quayle, *Clinton is Right on Tort Problem, Wrong on Solution*, Wall St. J. A12 (May 27, 1993) ("All consumers and companies are funding the litigation lottery. Americans are encouraged to play this game of chance by the plaintiffs' bar, perhaps the only group that benefits from excess litigati on."). At times, it is used only in the former of these senses. *See e.g.* Victor E. Schwartz, Mark A. Behrens & Cary Silverman, *I'll Take That: Legal and Public Policy Problems Raised by Statutes That Require Punitive Damages Awards to be Shared with the State*, 68 Mo. L. Rev. 525, 534 (2003) (noting that reports "of individuals receiving enormous sums of money in lawsuits are one reason why many in the public have come to view the civil justice system as a 'litigation lottery'").

[103] Symposium, *Medical Malpractice: Innovative Practice Applications*, 6 DePaul J. Health Care L. 309, 311 (2003).

[104] Joseph Curl, *Bush Says "Junk" Lawsuits Hurting Health Industry*, Wash. Times A4 (July 26, 2002).

[105] *See e.g.* Ashlea Ebeling, *Protect Your Assets: How to Keep Your Money out of Trial Lawyers' Pockets*, Forbes 142 (May 12, 2003); Ira Carnahan, *Deliverance: Two physicians help obstetricians avoid errors—and malpractice suits. So where are the profits?*, Forbes 311 (Sept. 20, 2002) (noting "with jury awards in medical malpractice cases averaging $3.5 million, doctors and insurers are running scared").

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plaintiff's actual injury.[106] Caps on pain and suffering damages are often advocated quite explicitly as a mechanism by which to ensure that "overly sympathetic juries" will not order excessive damages.[107] This portrayal of juries tends to rest on the imputation of several characteristics to jurors as a whole. First, they are exceptionally susceptible to the persuasive abilities of trial lawyers and, relatedly, to the influence of their own emotions.[108] Second, they are vindictive and parochial when confronted with cases involving non-local parties. As Walter Olson contends, "When [international businessmen] get together, they swap the latest stories about seemingly routine disputes in the South that suddenly ignited . . . into massive damage awards."[109]

These contentions imply two broader points about the jury system itself. First, the awards juries deliver are not, as a general matter, commensurate with the value or merit of the claim that is put before them. Whether due to their exaggerated emotions or their distaste for out-of-state defendants, juries determine the resolution of particular cases with reference to concerns unrelated to the facts or legal standards before them. Second, as an institution, the jury system is easily manipulated by trial lawyers. This is most evident in the line of contention concerning their manipulability. But it is also implicit in the contention that certain juries, particularly those drawn from Southern states, are eager to deliver punitively large awards against foreign defendants; for if a lawyer is aware that jurors from a particular locale will be conducive to his case, he will be likely to venue his case there when presented, by legal rules, the opportunity to do so.[110]

III. REASSEMBLING THE CASE FOR TORT REFORM

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[106] *See e.g. Bush Challenges Congress on Liability Reform*, Wash. Times A18 (Jan. 23, 2003) (quoting President Bush as stating, "Excessive jury awards will continue to drive up insurance costs, put good doctors out of business or run them out of your community").

[107] *Legal Reform, Our View: Citizens, plaintiffs, and defendants alike deserve justice that's consistent, not lawsuit roulette*, U.S.A. Today A12 (Dec. 18, 1996).

[108] *See Louisiana Jackpot*, Wall St. J. A14 (Sept. 18, 1997) ("None of this reality mattered to the jury, which was looking for someone with deep pockets. Stymied because it couldn't go after [an exempt party], it settled on [a different one]. The jury, of course, was encouraged to reach this decision by the plaintiff's lawyers, whose notion of justice has more to do with how much money they can siphon off for themselves than how much they can help their clients."); *Smelly Verdict*, Wall St. J. A18 (Mar. 18, 1996) (advocating "more comprehensive limits on punitive damages [awarded] at the whim of juries"); Robert H. Bork & Theodore B. Olson, *Trial Lawyers and Other Closet Federalists*, Wash. Times A21 (Mar. 9, 1995) ("Juries dispense lottery-like windfalls, attracting and rewarding imaginative claims and far-fetched legal theories.")

[109] Olson, *supra* n. 31, at 209-10. *See also Dr. Gore and Mr. Slick*, Wall St. J. A14 (Oct. 11, 1995) ("Alabama juries seem to view the civil justice system like a speed trap–a way to shake down unsuspecting out-of-staters.").

[110] *See* Olson, *supra* n. 31, at 210-36. In a chapter called "The Jackpot Belt," he argues that lawyers avail themselves of this tendency on the part of juries, arguing, "When the confused, demagogue-led, or corrupt rural county hands down its ruling in one of these cases, it not only makes law that the rest of the country is the obliged to live with but effectively engages in interstate commerce itself." *Id.* at 236.

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The previous section of this article was primarily concerned with dissecting the case for tort reform into its component arguments. This section attempts to put it back together in an ordered fashion that accounts for the symbiotic relationship that the discrete arguments have with one another. It proceeds on two levels. First, it briefly diverts to consider a set of preliminary objections that one might have to the idea that the various arguments advanced by proponents of tort reform should be understood as operating in a coherent way. Second, hopefully having dispatched these objections to the endeavor itself, this section will attempt to develop an informed understanding of the manner in which the case for tort reform, as a comprehensive whole, functions.

A. *Addressing Preliminary Objections*

The argument that has been tentatively advanced herein is predicated upon the supposition that there *is* a composite *case for tort reform* and that, by careful analysis, the relationship between its disparate parts are reconcilable to a composite model. However, one could potentially contend that the case for tort reform, as I have characterized it, is merely a collection of divergent arguments and observations that have a common implication—that is, that there should be a retrenchment of liability rules in the tort system. As such, the objection would follow, any order that can be identified amidst the chaos is accidental at best, and artificial at worst. And certainly, by this token, whatever common currents can be identified as running through variant arguments were not intended by their proponents.

Before addressing the substance of this objection, it may be valuable first to offer a caveat to my argument: I do not mean to suggest that the various proponents have devised, fully formed, a composite battle plan for an attack on the tort system. My contention, instead, is that the myriad arguments for tort reform are predicated upon a generally consistent understanding about the reliability of the legal system, its effects on the country's economy and culture, and the role it appropriately should play in American society. While there is not necessarily perfect uniformity among these arguments, they originate in common impulses and are advanced in pursuit of a common end. My analysis is intended to illuminate the objective characteristics of the arguments that have been injected into the public sphere and not the subjective intentions of their proponents.

This qualification aside, this potential objection to my argument should fail for several reasons. First, whether or not proponents of tort reform have intended for their arguments to cohere, the public, as consumers of these contentions, so experiences them. As a set of arguments in favor of a common proposal exist in the public sphere, it is unlikely that they would be digested as discrete, temporally confined events, rather than assimilated into a more comprehensive understanding of the purported problem. Second,

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the previous section of this article notwithstanding, the arguments in favor of tort reform are not typically advanced in topical pigeonholes. To the contrary, they are presented alongside one another with substantial coherence. For instance, the following statements are drawn from prefaces of two prominent indictments of the tort system, Walter Olson's website and Catherine Crier's book:

> Overlawyered.com explores an American legal system that too often turns litigation into a weapon against guilty and innocent alike, erodes individual responsibility, rewards sharp practice, enriches its participants at the public's expense, and resists even modest efforts at reform and accountability.[111]
>
> *The Case Against Lawyers* is both an angry indictment and an eloquent plea for a return to common sense. It decries a system of laws so complex even the enforcers – such as the IRS – cannot understand them. It unmasks a litigation-crazed society where billion-dollar judgments mostly line the pockets of personal injury lawyers. It deplores the stupidity of a system of liability that leads to such results as a label on a stroller that warns, "Remove child before folding." It indicts a criminal justice system that puts minor drug offenders away for life yet allows celebrity murderers to walk free. And it excoriates the sheer corruption of the iron triangle of lawyers, bureaucrats, and politicians who profit mightily from all this inefficiency, injustice, and abuse . . .[112]

B. *The Anatomy of the Case for Tort Reform*

1. A Note on Organization and Methodology

In this section, I discuss the various facets of the case for tort reform preliminarily discussed in Section II, *supra*. I suggest how the arguments, and the assumptions that underlie them, complement one another in advancing the case for tort reform. What I have posited to be the *case for tort reform* is more than a collection of proactive arguments—to the contrary, it rests on normative and descriptive assumptions and contentions about societal values and the appropriate role of the legal system itself. If arguments about the various moral deficiencies of lawyers and the legal system are the *meat* of the case for tort reform, it is likewise important to note that a set of underlying assumptions can be seen to constitute its

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[111] *See* Overlawyered, *Home Page*, http://www.overlawyered.com (accessed Jan. 1, 2006).
[112] *See* Crier, *supra* n. 45 (quoting from the book's jacket).

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infrastructure.

My burden in discussing this topic is twofold. First, and quite obviously, the analysis developed in this section must make logical sense—that is, it must draw appropriate inferences about different arguments that have been advanced and explain them in a convincing way. Second, and perhaps more difficult, my analysis must meet an empirical burden. There is a great variety of material floating about the public sphere concerning the tort system. This article purports to explain not individual accounts by individual authors on their own terms, but rather, the comprehensive case for tort reform. I must demonstrate that my analysis is broadly applicable to arguments emanating from a variety of persons and sources, rather than confined to the set I have chosen to discuss.

In order to meet this empirical burden, each section of the analysis that follows will operate on both a general and specific level. On the general level, this article will draw material from books and articles authored by proponents of tort reform. By characterizing this component of the analysis as "general," I mean to suggest that the common thread running through the materials treated is a shared perspective regarding the appropriate nature and scope of tort law, and not necessarily a particularized policy objective. On the "specific" level, I will concentrate on a recent Senate debate regarding medical practice liability reform, the specific parameters of which will be set forth more fully shortly. This component of the discussion will demonstrate that the aspects of the more general literature I identify are imported into a specific debate in a real and prominent way. It should, I hope, preemptively refute any suggestion that I am merely "cherry picking" phrases or arguments from available accounts and drawing unwarranted or inordinately sweeping generalizations from them. Moreover, consideration of the structure of a narrow segment of the broader tort debate will provide some sense of the manner in which general arguments subtly vary or expand in form when brought to bear on a particular issue.

The specific level component of the discussion that follows in this section will be concerned with the debate that took place with respect to President Bush's proposal in early 2003 to implement caps on non-pecuniary damages in medical malpractice cases.

In early 2003, President Bush and House Republicans advanced a proposal to "place strict limits on jury awards in medical malpractice lawsuits."[113] Though the proposal was hardly unprecedented—similar

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[113] Sheryl Gay Stolberg, *Bush Plan to Curb Malpractice Awards Advances to Full House*, N.Y. Times A17 (Mar. 6, 2003).

legislation had passed the House of Representatives the year before[114]—the president prominently and forcefully advocated it during a speech to a conference of members of the American Medical Association, and it received considerable media coverage.[115] During his speech, Bush intoned, "There are too many frivolous lawsuits against good doctors, and the patients are paying the price . . . . [S]omething which affects our budget so significantly requires a national solution."[116] An article published by the New York Times News Service later noted that Bush had made "overhauling the nation's medical liability laws a centerpiece of his domestic agenda."[117]

The bill was introduced in the House of Representatives shortly thereafter, sponsored by Representative James C. Greenwood, and on March 13, 2003 it passed in that chamber on a vote of 229-196, largely upon party lines.[118] At the time, Bush hailed the House vote as "an important step towards creating a liability system that fairly compensates those who are truly harmed, punishes egregious misconduct without driving good doctors out of medicine and improves access to quality affordable health care by reducing health-care costs."[119] However, the legislation stalled in the Senate and was eventually defeated on a procedural resolution by a vote of 49-48, also cast predominantly along party lines.[120]

The House and Senate bills were substantially similar to one another, especially in their most publicly discussed provisions. The Senate bill was titled the "Patients First Act of 2003," and was introduced by eleven Republican senators, including Majority Leader Bill Frist (R-TN), a former surgeon.[121] The stated purpose of the provision was "[t]o protect patients' access to quality and affordable health care by reducing the effects of excessive liability costs."[122] In order to carry out this objective, the bill proposed a litany of measures, including: a statute of limitations on injuries of three years after the "date of the manifestation of injury or 1 year after the claimant discovers, or . . . should have discovered, the injury, whichever occurs first;"[123] a cap of $250,000 on "noneconomic damages;"[124] ceilings

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[114] *Id.*
[115] Pres. George W. Bush, *supra* n. 16.
[116] *Id.* at ¶¶ 20, 30.
[117] Sheryl Gay Stolberg, *House Votes to Cap Malpractice Awards*, Chi. Trib. A13 (Mar. 14, 2003).
[118] David Rogers, *House Passes Medical-Malpractice Litigation Bill*, Wall St. J. A3 (Mar. 14, 2003).
[119] Stolberg, *supra* n. 117, at A13.
[120] Vicki Kemper, *The Nation: Senate Medical Malpractice Bill Fails; Democrats block its consideration, even as they concede Congress needs to act*, L.A. Times A17 (July 10, 2003).
[121] Sen. 11, 108th Cong. (June 26, 2003).
[122] *Id.*
[123] *Id.* at § 3.
[124] *Id.* at § 4(b).

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on contingency fees that could be paid to lawyers;[125] and stringent limits on when punitive damages could be awarded.[126]

2. Unpacking the Case for Tort Reform

With this contextual background established, this section turns to consider the structure of the case for tort reform. In advancing its analysis, it will operate upon three overarching levels: (1) the role proponents of tort reform believe the legal system properly should play; (2) the way the legal system presently functions—i.e., the factors that drive its decisions—and how it fits into the critique; and (3) tort reformers' conception of society itself and their ultimate understanding of why tort reform is necessary. As will be demonstrated, these categories are conceptually related to one another, and the arguments discussed therein intersect in important ways.

a. The Assertedly Proper Role of the Legal System

This section discusses the role proponents of tort reform believe should be allocated to the legal system—in essence, that is, why they believe American courts should hear tort cases at all. It should be altogether unsurprising that proponents of reform generally advocate an exceedingly circumspect role for the tort system, and there is little remarkable about this fact. Nevertheless, the manner in which they *justify* this understanding is significant and bears important consequences for the nature of the challenge they pose to the existing legal order.

First, this section will examine, on a general level, the role that tort reform advocates have argued that the legal system should perform. Second, it considers how this understanding—not so much an argument in favor of tort reform as a logical assumption that undergirds it—is assimilated into the broader context of the case they make for change. On this level, it will explore the manner in which it provides a foundation for the panoply of proactive arguments examined in Section I and the consequences of this interaction.

b. The Role of the System

While there is not complete uniformity on this point among different proponents of tort reform, they can perhaps be seen as embracing

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[125] *Id.* at § 5. The scale included in the bill provided that attorneys could collect 40% of the first $50,000 recovered by the claimant, 33.3 % of the next $50,000, 25% of the next $500,000, and 15% of any amount in excess of $600,000. *Id.*

[126] *Id.* at § 7. The bill provided as follows: "Punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer." *Id.* The standard would appear to preclude the recovery of punitive damages in instances of reckless conduct.

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one of two slightly variant paradigms. The first of these is that the system exists for some limited purpose, most typically to compensate economic loss. The second assesses no particular role to the legal system whatsoever; instead, it is either asserted to be a historical creature with indeterminate purposes or, in the alternative, simply taken for granted as existent, but unnecessary to explain. In any event, regardless of which of these models a particular argument accepts as its underpinning, the choice bears very little, if any, consequence for the manner in which the broader indictment of the system is thereafter deployed. In either instance the case for tort reform, as we receive it, is predicated upon the idea that the civil liability system should have an exceptionally limited role with no broader social or political end to serve or pursue. This belief, however presented, lies at the core of the tort reform model.

Tort reform proponents who contend that the system exists to compensate economic loss or perform some other limited function typically do so in perfunctory terms, oftentimes by way of brief excursions deeply embedded within sweeping critiques. For instance, in one of his lengthy screeds on the tort system, Howard writes:

> Lying dormant on along the side of society is another important legal principle: that a person injured should be "made whole" by damages. Traditionally, this meant out-of-pocket losses, like lost wages or medical bills. In an unusual case, like a homemaker with no wages, claims were permitted in categories not actually calculable, like "pain and suffering." In cases of genuine evil, punitive damages were possible. Today the exceptions have engulfed the rule . . .[127]

In short, he is suggesting, damages should be available only as compensation for economic loss; in doing so, he conflates *wholeness* with *economic wholeness*.

In a related vein, former Attorney General Griffin Bell and former Senator Alan Simpson assert that the role of the law is to define clear duties that citizens owe to one another, and that in doing so, it should not provide remedies with respect to controversial social issues. They contend:

> What's missing in American justice today is precisely what law is supposed to provide — deliberate choices of who can sue for what. Only when legislatures and judges make these deliberate choices will people know where they stand. Law is the foundation of freedom because by providing

[127] Philip K. Howard, *The Lost Art of Drawing the Line* 60 (Random House 2001).

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> guideposts of right or wrong, it defines the boundaries of free action and movement. . . . When legal disputes rise to a level of national importance, such as how to compensate the victims of asbestos or restoring order to healthcare, it is precisely the responsibility of Congress to make the judgments of who can sue for what.[128]

Similar arguments recur throughout various works advocating tort retrenchment.[129]

The arguments reproduced above (and others like them) posit an exceptionally limited role for the tort system. In each instance, the tort system, it is contended, should provide resolution to *individual* disputes. Howard, for instance, sees little fault with a victim being *made whole* by the court, at least so long as the process of doing so only entails compensation for economic loss.[130] A legal system defined on such a basis should, as a normative matter, have very little, if any, effect on the society more broadly.[131] By this token, he appears to conceive of the legal system as

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[128] Griffin Bell & Alan Simpson, *Civil Justice Problems Undermine Freedom*, The Hill (Mar. 2, 2004) (available at http://www.hillnews.com/news/030204/ss_simpson.aspx (accessed Jan. 1, 2006)).

[129] *See e.g. Treasury Secretary Addresses American Tort Reform Association's Annual Meeting*, States News Serv. (Mar. 16, 2004) (quoting Treasury Secretary John Snow as saying, "To make the situation even less fair, less than 50 cents of each dollar of those tort costs go to victims . . . and, of that, only 22 cents goes to compensate them for actual economic losses they have suffered . . . meanwhile the personal injury lawyers profit enormously." He later added, "The civil justice system was meant to help people, to ensure fair compensation for injuries and losses. Not to make personal injury lawyers wealthy."); *see also* Editorial, *Pennsylvania Tort Song*, Wall St. J. A10 (Jan. 17, 2003) ("What Pennsylvania desperately needs is tort reform that would cap pain-and-suffering awards and put reasonable limits on contingency fees. California passed such a reform in the late 1970s and that state's malpractice system has run smoothly ever since. Patients who are genuinely harmed by malpractice still get their day in court, but the settlements compensate for actual harm and don't drive doctors from the state."); Editorial, *Bush Challenges Congress on Liability Reform*, Wash. Times A18 (Jan. 23, 2003) (quoting, with approval, President Bush's contention that, "If [plaintiffs] can prove in court that they deserve to collect damages, 'they should be able to recover the cost of their care and recovery and lost wages and economic losses for the rest of their life.'").

A paradigmatic example of this contention is available on the American Association for Tort Reform website. With respect to non-pecuniary damages, it asserts that they "include such things as pain and suffering, emotional distress and loss of consortium or companionship, which do not involve cash loss and have, therefore, no precise cash value. It is very difficult for juries to assign a dollar value to these losses, particularly with the minimal guidance they are normally given. As a result, these awards tend to be erratic and, because of the highly charged environment of personal injury trials, excessive." It proceeds to recommend that "[s]tates should establish dollar limits on recoveries of non-economic loss in all cases. This is a direct and effective way to address the problem." *See* Am. Tort Reform Assn., *ATRA Issues: Noneconomic Damages Reform*, http://www.atra.org/show/7340 (accessed Jan. 1, 2006).

On a separate page, the site notes, "On Tuesday November 2, ATRA General Counsel Victor Schwartz testified before the Senate Committee on The Judiciary about the trend of 'Regulation through litigation'. Resisting this trend, and reasserting the prerogative of the legislature to establish public policy is an ATRA priority." *See* Am. Tort Reform Assn., *ATRA Issues: Regulation through Litigation*, http://www.atra.org/show/7351 (accessed Jan. 1, 2006).

[130] *See* Howard, *supra* n. 127.

[131] To be sure, one who believes that the primary role of the tort system is to compensate loss may simultaneously believe that it should deter potentially dangerous conduct. However, what sets Howard's

much by what it should *not* do as what it should: the role of a court is to bring resolution to a particular, otherwise irreconcilable dispute, and then to get out of the way.

This conception of the proper role of the system is intended to paint its defenders into a corner, for virtually *any* effect a legal judgment might have extrinsic to the consequences it bears for the individual dispute adjudicated is deemed to exceed its theoretical mandate. Take for instance, the analysis advanced in Howard's book. The predominant portion of its discussion decries the fact that citizens are, in pursuit of their everyday activities, stricken with *fear* of the possibility that they might be sued. His introductory chapter, for example, laments the fact that people are altering their conduct to "avoid[ ] legal risk."[132] It is problematic, to his mind, that a municipality has replaced its "playground equipment with new, safer alternatives, including transparent tubes to crawl through and a one-person seesaw that works on a spring."[133] "Can you wait?" he derisively queries, proceeding to suggest that the new equipment is undesirable because it will be "boring."[134]

This notion that the administrator of a playground would remove equipment is not, by his understanding, problematic because it over-deters socially beneficial conduct; rather, it is problematic merely because it deters people in acting.[135] It omits the step of determining whether some measure of deterrence might, at the end of the day, be beneficial and eschews any consideration of the importance of the activity in question. In so contending, his argument ranges far beyond what might be found in, for instance, a law review article premised upon the assumptions of law and economics. Instead, he relies on mechanisms wholly divorced from the context of the legal system to enforce, where necessary, appropriate norms of safe conduct.

As adverted to above, the second prevalent approach adopted by proponents of tort reform who must, in the course of argument, confront the role of the legal system is simply to refrain from discussing it at all. Walter Olson has employed such a rhetorical stratagem in several of his works,

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conception of the tort system apart is that he does not appear to embrace such a view. If one is to rely upon his book to explain his underlying vision of the tort system, it would appear that he seeks only compensation for its own sake, and little more.

[132] Howard, *supra* n. 127, at 5.

[133] *Id.* at 4.

[134] *Id.* Crier carries her understanding of the legal system as a compensatory mechanism to a similar end. She writes that "[t]he rule of law was never meant to be a substitute for community standards." Crier, *supra* n. 45, at 2. The point, she suggests, is that there are alternative means for the regulation or modulation of dangerous conduct, and that the courts were never meant to assert primacy in this sphere. *Id.*

[135] The case for tort reform thus deviates from the conception of the legal system embraced by law and economics scholars, who, of course, advocate a regulatory role for the courts so long as it is reduced to appropriate conceptual boundaries.

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including *The Litigation Explosion*.[136] There, he writes:

> America's common law tradition, like the legal tradition of every great nation, formerly viewed a lawsuit as an evil, at best a necessary evil. . . . It was acrimonious, furthering resentments between people who might otherwise find occasion to cooperate. It tended to paralyze productive enterprise and the getting on of life in general by keeping rights in a state of suspense. . . . [However,] it was sometimes the least bad of the extremities to which someone might be reduced; but society could at a minimum discourage it where it was not absolutely necessary.[137]

Rather than supplementing the argument contained in this paragraph with a theoretical excursion into the appropriate proactive role of the legal system—which would seem to follow logically from his assertion that a lawsuit was, in some instances, a *necessary evil*—Olson proceeds to discuss the various legal devices that, he contends, had historically been implemented to effectuate this societal ambivalence towards legal remedies. The reader is never, in his account, informed why the purported *evil* would ever be *necessary*. Thereafter, he discusses what he believes to have been society's recent decision to forsake this restrained perspective on the advisability of litigation. Most tellingly, Olson proceeds to criticize the prevalent modern theoretical justifications for tort law:

> The overthrow of the old barriers began with a simple idea. Squinted at from a distance, litigation would appear to have a brighter side. When successful, it brings some benefit . . . to the instigator . . . . The idea of treating lawsuits as vessels for "compensation" and "deterrence" is seductive. In no time at all you get to thinking of them less as a personal tragedy and more as a policy opportunity.[138]

These two passages, separated in the book by less than a page, operate to much the same effect as Howard's analysis: they restrict the role of the legal system to the resolution of individual disputes, and assert that any broader effects it may have are undesirable, not to mention wholly unnecessary.

As a supplemental matter, it bears mention that proponents of tort reform commonly employ two devices, complementary of one another, that rhetorically minimize the role of the legal system still further. First, when

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[136] Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (Truman Talley Books-Dutton 1991).
[137] *Id.* at 2-3.
[138] *Id.* at 4.

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they suggest a particular reason for which the tort system exists, they tend not to develop it with any conceptual depth. Howard and Crier contend that the legal system ought, at least as a general matter, to compensate plaintiffs for economic loss. But they do so only by way of assertion, and little more. This is by no means a logical imperative of the argument they are advancing. Insomuch as they each endeavor to explain to a general audience why the legal system must be restricted, an explanation of what it must be restricted *to* would scarcely be unnecessary verbiage. In a related vein, neither devotes so much as minimal effort to explaining why non-pecuniary damages do not advance the objective of making a plaintiff whole. In fine, whatever purpose the legal system is assessed in these accounts is divorced from any theoretical mooring. There is no transcendent principle at stake, no baby that must be protected when the bathwater is discarded. In failing to derive or justify a principle that should underlie and animate the legal system, proponents of tort reform subtly relax the burden of persuasion they must satisfy. Second, the discussions of the tort system's proper role are momentary diversions; little space, if any, is devoted to them. As the justification is set forth in summary terms in context of a lengthy indictment of the system, it is minimized perhaps even more rhetorically than it is logically.[139]

c. Patients First and the Role of the Legal System

Throughout the debate on the Patients First Act, the bill's proponents advocated a conception of the appropriate role of the legal system consonant with that urged by supporters of tort reform.[140] First, they contended that the *core* purpose of tort law was to provide redress for economic losses suffered as a result of negligence. While they acknowledged that non-pecuniary loss should be compensable, they treated it as a secondary purpose of tort law, and therefore, the permissible subject of regulation or substantial retrenchment, rather than an entitlement of a higher order. Second, they contended that whatever compensatory functions the legal system was intended to serve, it should not serve a broader deterrent function.

The notion that economic loss is the foundational concern of the tort system was advocated first by President Bush in his speech to the American Medical Association.[141] There, he stated:

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[139] Certainly, the terms in which proponents of tort reform discuss the system itself reflects as much a mindset about the system, manifested in the written discussions, as a deliberate rhetorical stratagem. However, the primary concern of this article is to understand the manner in which we, as consumers of ideas, receive the case for tort reform, rather than the motivations of its proponents for their own sake.
[140] *See* 149 Cong. Rec. S9007 (daily ed. July 8, 2003); 149 Cong. Rec. S9013 (daily ed. July 8, 2003); 149 Cong. Rec. S9063 (daily ed. July 9, 2003).
[141] Pres. George W. Bush, *supra* n. 16, at ¶ 31.

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> We want our legal system to work for our patients. We want people to have a day in court. Anyone who is harmed at the hands of a doctor should have a hearing. That's what we want for the justice system. They should be able to recover the full cost of their care and other economic losses. If harmed by a doc, they ought to be able to recover their economic costs, economic losses. They should be able to recover non-economic damages, as well. But for the sake of the system, noneconomic damages should be capped at $250,000.[142]

By this understanding, insomuch as the tort system compensates victims of medical malpractice for economic loss, it is effectuating a principled mandate; but where the consideration of non-economic damages is required, it is permissible, even imperative, to impose regulatory limitations "for the sake of the system."[143]

This conception of the tort system was urged on myriad occasions, in various forms, throughout the course of the Senate debate. For instance, while discussing what he contended were the deleterious effects of the legal system, Senator Michael Enzi stated, "It all comes back to our legal system. It is simply out of control. People who are truly injured by health care errors ought to receive fair compensation."[144] Later, he added:

> "The statistics show that insurance premiums are lower in States with such limits, but I have heard Members on the other side of the aisle argue that the limit in this bill is too low, that it is unfair to someone who is severely injured, despite the fact that the bill does not limit in any way that person's right to recover every cent of the economic damages that result from that injury."[145]

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[142] *Id.*
[143] *Id.*
[144] 149 Cong. Rec. at S9063.
[145] *Id.* *See also* 149 Cong. Rec. at S9013 ("It basically sets sensible limits on the noneconomic damages that can be obtained in these lawsuits. The noneconomic damages are those damages that go above and beyond the bills that have to be paid. When you get sick and the physician allegedly committed malpractice, you had to go to another doctor to get the problem resolved. Those are economic damages as you lost wages, and any other expenses that you have. And those economic losses are fully compensated. But above and beyond that, you are entitled and juries will award substantial damages for noneconomic losses, mostly called pain and suffering because of what you had to go through. Certainly people recover something for their pain and suffering. The question is how much.") (statement of Sen. Ensign); *Id.* at S9024 ("The fact is, this legislation provides a commonsense approach to our litigation problems that will help keep consumers from bearing the cost of costly and unnecessary litigation, while making sure those with legitimate grievances have recourse to the courts. That is what we want to do. We want to make sure those who are legitimately harmed have recourse to the courts and are compensated. The bill sets sensible limits on noneconomic damages to help restrain medical liability

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The animating purpose of providing such a remedy—that is economic damages, together with some allowance for non-pecuniary loss—was contended to be the compensation of individual victims, and not broader regulation of conduct. "[W]e can all agree that a patient should be compensated fairly," noted Sen. John Cornyn.[146] Echoed Sen. Mitch McConnell, "This is a bill that does provide for victims."[147] However, it was, for supporters of the bill, problematic when the legal climate caused doctors to alter their conduct in the course of treating patients. Such decisions on the part of physicians were couched as having been made due to fear. Sen. Enzi, for example, suggested, "Doctors and hospitals live in constant fear of litigation. They order unnecessary tests out of legal fear."[148] Neither his position nor his rhetoric admitted of the possibility that, in certain circumstances, it could be beneficial for the legal system to have such an effect. Where such external effects of the legal system are set in terms of *fear*, their legitimacy is, in all instances, denied. (Additionally, as discussed below, proponents of the bill proposed that the most efficient way to improve medical care would be to institute measures that facilitated self-regulation *within* the profession.)

d. How this Grounds the Model

The argumentative posture that proponents of tort reform adopt concerning the theoretical justification for the existence of the legal system provides the foundation for the broader critique they advance. In confining the role of the legal system to the resolution of individual disputes and the provision of economic damages, proponents of tort reform may claim that any broader affects of lawsuits are inconsonant with that role. If one adheres to a very narrow view of what the legal system *should* be doing, more of what it actually *is* doing can be characterized as inappropriate. This, in turn, renders a vast array of consequences the legal system unquestionably brings about subject to criticism.

More importantly, the actual, practical consequences of legal decision-making do not thereby merely become subject to criticism; they also become subject to *explanation* and *definition*. Typically, proponents of tort reform do not argue that the legal system has, for time immemorial,

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premium increases, while ensuring unlimited economic compensation for patients injured by negligence.") (statement of Sen. Voinovich).

[146] *Id.* at S9016. Interestingly, Sen. Cornyn stated, at the beginning of the same sentence, "When patients get sick, we all want to prevent medical errors." *Id.* However, he continued, "But if you can find some goal hidden somewhere within the current dysfunctional medical liability system, that goal would not be either the prevention of errors or the fair compensation for injury." *Id.*

[147] *Id.* at S9025.

[148] 149 Cong. Rec. at S9063. He proceed to read, at length, from Philip K. Howard's book, *The Collapse of the Common Good*. *Id.*; *see also* 149 Cong. Rec. at S9007 ("Comprehensive reform is critical on a national level because every American patient should have access to affordable and high quality health care. Likewise, every responsible, meritorious member of the health care community should not be afraid to provide such care because of the fear of litigation.") (statement of Sen. Ensign).

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exceeded its appropriate role in a democratic society. Howard, for instance, casts himself as an exponent of the views espoused by Aristotle, Cardozo, and Justice Lewis Powell, among others.[149] To the contrary, they conceive of themselves as defending society's traditional conceptualization of the legal system against encroachments by trial lawyers, legal theorists, and proponents of sociocultural change. In arguing for what they believe to be reform, that is, they are calling attention to a putative transition from the old to the new, and trying to reverse it. By this understanding, the tort system is, in its present incarnation, historically aberrant, and its present effects are neither conventional nor preordained.

If this is the case—that is, that our society has deviated from a well-established historical understanding of the legal system—then it is necessary to account for our decision, made either by conscious choice or passive acquiescence, to do so. This implies two related questions: first, in what ways have we departed from this historical understanding; and second, who or what is responsible for these departures? The manner in which proponents of tort reform take up the questions they impliedly pose for themselves will be addressed in the next subsection.

3. Suffusion

As discussed *supra*, because proponents of tort reform restrict the appropriate role of the legal system to narrow conceptual confines, they are able to define the lion's share of the work the legal system *actually does* as inappropriate. Moreover, as noted above, in framing the issue in such a manner, the question of how we, as a society, came to this juncture is simultaneously, if impliedly, posed.

Tort reformers capitalize upon this opportunity in a strikingly uniform manner: they depict the legal system as a vessel into which the values of particular actors can be poured and proceed to argue that the activities of the legal system must be understood as *suffused* with these values. By this token, the legal system itself is a passive institution. It does not exert meaningful constraints upon their actions or choices, but merely provides the occasion for their effectuation. For the sake of clarity, I refer to this component of the case for tort reform as *suffusion*. For example, it is often argued that the apparatus of the legal system has been commandeered by trial lawyers, whose primary interest is, we are told, the acquisition of wealth. They proceed, then, to contend that the legal system is merely a conduit for such unrestrained greed and that the judgments it reaches

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[149] Howard, *supra* n. 127, at 61. He indicates that these individuals, unlike his contemporaries, understood that the value of the law lies in its clarity. *Id.* Interestingly, he cites them for their negative views on the legal system—what it should not be doing—but not their positive conceptions of where courts *ought* to tread. *Id.*

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(typically in tort cases) must be understood in these terms.

This subsection seeks to understand the manner in which suffusion functions. It proceeds on two levels. First, it devotes sustained attention to the manner in which it is deployed. The purpose of this portion of the discussion is to consider suffusion microcosmically—i.e., how it manifests itself in specific works or with respect to particular debates. Second, it adopts a macrocosmic perspective demonstrating how the arguments for tort reform, analyzed in the first section of this article, should be understood with reference to suffusion.

a. An Introduction to Suffusion

Walter Olson's book, *The Litigation Explosion*, is as good a place as any to begin an inquiry into the manner in which suffusion is employed to portray and explain the operations of the legal system.[150] It advances the fairly conventional view among tort reform proponents that the safeguards the legal system employs are easily skirted by clever lawyers, and that as a result, judgments emanating from courts tend to advance little more than the lawyers' (taken in concert as a monolithic entity) agenda.[151]

As noted, it is Olson's contention that, as a historical matter, the legal system was confined to an exceedingly narrow scope of operation.[152] As such, the law typically, by design, employed bright line rules and presumptions in order to lend efficient resolution to disputes that arose between parties.[153] However, he contends, in recent years, the law has been beset by ambiguity, as presumptions have been discarded in lieu of a sweeping normative understanding of the courts' proper role.[154] As a result of the purported evolution of the legal system, Olson argues, it became easier to file lawsuits, since "[w]hen the law takes the form of clear, comprehensive, objective and preannounced rules, litigation is mostly a waste of time."[155] And conversely, of ambiguity is born "let-'em-sue' logic," as the jury, the dispositor of facts, becomes necessary to resolve disputes that cannot be decided on summary judgment simply as a matter of law.[156]

By his understanding, the legal system in accepting ambiguous standards in the stead of definitive rules became a venue for the opportunistic plaintiffs' lawyers. In the introduction of the book, Olson

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[150] Olson, *supra* n. 137.
[151] *Id.*
[152] *Id.*
[153] Olson, *supra* n. 137, at 135-139.
[154] *See id.* at 4.
[155] *Id.* at 138.
[156] *Id.* at 104.

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summarizes his argument as follows:

> Step by step the old procedural barriers to the litigious instinct had been dismantled. The controls on running litigation as a no-apologies, profit-making industry soon came off as well. . . . America's lawyers began breaking free of the humdrum role of hired middlemen . . . to become "players" who thought up the deals, or in this case [sic] the fights. They began identifying likely grievances and approaching potential clients with the happy news of their lucrative right to accuse someone of wrongdoing. . . . As time went on, many of the increasingly passive clients were reduced to little more than figureheads, as lawyers found ways to litigate more or less openly on their own account.[157]

The remainder of the book is, in significant part, devoted to the development of this narrative. As is evident from this excerpt, his argument diminishes—even, at times, renders altogether nugatory—the role of plaintiffs in lawsuits, depicting them as quiescent accomplices of lawyers, rather than as involved and interested parties. As a consequence, the natural implication of his argument is that the primary role of the legal system has become the satisfaction of lawyers. Put another way, the legal system is run of, by, and for these attorneys.

Olson's portrait of lawyers therefore has broad consequences for the image of the legal system he cultivates. If lawyers conceived of themselves merely as dedicated public servants seeking social justice, then, while the system might be effectuating their values, it would at least be necessary for him to discuss whether these particular values should be our own. However, Olson believes lawyers to be motivated to act by self-interest, primarily a desire for enrichment, and it is this value that he believes they inject into the system itself.[158]

He traces the origins of the putative litigation explosion to an increasing tendency on the part of the trial bar to solicit business. In significant part, Olson lays blame for this development at the feet of the Supreme Court, which removed what he considers to have been justified constraints upon the right of attorneys to advertise their services.[159] Additionally, he believes that the norms of conduct within the legal community became more permissive with respect to the solicitation of business.[160] Due to these developments, "[f]rom every ferryboat sinking to

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[157] *Id.* at 5.
[158] *Id.*
[159] *Id.* at 22.
[160] *Id.* at 23-24.

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mine cave-ins, every disaster around the country and indeed the world seemed to be followed within hours by a raven-like descent of American tort lawyers boldly stalking the airport lounges and hotel lobbies where flown-in relatives waited for news of survivors."[161] Quite evidently, he considers the typical lawsuit to be lawyer generated, rather than the product of a decision on the part of the would-be plaintiff to seek legal recourse for some alleged wrong he or she has suffered.

Moreover, Olson contends, the economics of the legal system encourage lawyers to seek profit by *volume*, rather than merit.[162] He suggests that this is the case because of the contingency-fee structure upon which most tort lawyers operate.[163] First, if a lawyer has a financial stake in the outcome of litigation, he is likely to pursue the matter to satisfy his own interest in obtaining the greatest recovery possible.[164] Second, with the adoption of the contingency fee, it befit lawyers to solicit as much business as possible, ostensibly without significant regard for the merits of the suit in question.[165]

Due to this fee structure, which, he surmises, provides the lawyer a financial incentive to pursue the matter to as lucrative a resolution as possible, the litigation process becomes more adversarial.[166] The lawyer's involvement diminishes, even eliminates, the possibility of a settlement that incorporates significant non-pecuniary terms.[167] For example, he suggests, a libel suit cannot, once a lawyer has insinuated himself into the settlement process, be resolved by allowing the plaintiff the opportunity to have the publication print his "side of the story."[168] Addressing the potential plaintiff, Olson solemnly cautions, "[T]he action is no longer yours alone. You have a new partner in your lawsuit . . . to whom words of forgiveness butter no parsnips and gestures of mercy pay for no beachfront condos. You may be pushed towards high-ticket strategies, though they end in hatred and self-reproach."[169] The plain upshot of Olson's argument is that the litigation process is a mechanism for the fulfillment of the *lawyer's* financial interest. The lawsuits that result from the lawyer's desire to satiate his thirst for

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[161] *Id.* at 24.
[162] *See id.* at 32-50.
[163] *Id.*
[164] *See e.g. id.* at 39 (noting that, with the legalization of contingency fees, the system "was asked to run on a new kind of altruism, the self-restraint of lawyers with fortunes at stake").
[165] *See id.* at 39-40. Olson cites, with approval, a quotation by a 1920's federal prosecutor to the effect that contingency fees were the "'arch tempter to the ambulance chaser' (as well as the fount of 'false claims, witness fixing, and perjury')." *Id.* at 39. He further notes that it provided an "incentive to go for volume, volume, and more volume." *Id.*
[166] *Id.* at 40-45.
[167] *Id.* at 41.
[168] *Id.*
[169] *Id.* at 42.

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money—and we are led to believe that this category encompasses much of the litigation that actually takes place—serve no broader social benefit or end. Lawsuits are about money, and nothing more.

Having suggested that legal claims by plaintiffs are little more than vehicles for financial gain, Olson sets about explaining why the courts are ill-equipped to stem the tide of such suits once they have been allowed to progress past the summary judgment phase.[170] First, as noted above, he argues that the increasing prevalence of ambiguous legal rules allows lawyers the latitude they require to spin claims of straw into gold.[171] At various points in the process lawyers can: (1) craft "cunningly phrased" pleadings;[172] (2) "change the subject; to play on emotion, prejudice, and awe of the fine-sounding; to sow doubt where there should be certainty, or the reverse;"[173] (3) create a sense of drama at trial, as by inviting large audiences, in order to create the impression among jurors that a large verdict is warranted;[174] (4) find "hired gun" experts;[175] and (5) find ways to create, extend, or exploit causes of action.[176] In short, the lawyers adeptly use the system in pursuit of their ends.

It follows naturally from this understanding of the functioning of the legal process that judgments are mere embodiments of the ideals that caused the suits to be filed in the first instance. Olson opines, "One thinks of trials as places where right and wrong are decided, but nowadays blame is often a side issue and the grand-scale fighting goes on over the damages figures."[177] The damage award bears no direct correlation to the blameworthiness of the defendant's conduct, the actual damages suffered by the plaintiff, or even the economic value of the activity at issue. It is merely a product of the trial lawyer's financial speculation, devised without any evident rhyme, reason, or conceptual core. There is no distinction drawn between the lawyers, their motivations, and the results of the system; the courts are a mere implement

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[170] *Id.*
[171] *Id.*
[172] *Id.* at 91.
[173] *Id.* at 153.
[174] *Id.* at 161.
[175] *Id.*
[176] *Id.* at 170.
[177] *Id.* at 171. Elsewhere, sounding a similar note, Olson writes:

> With the twin weaponry of RICO and punitive damages, America's trial lawyers have set themselves up as 'private attorneys general' of a uniquely privileged kind. They can charge opponents with shocking-sounding wrongdoing under the vague, shifting, and retroactive legal standards that typify life after the triumph of Legal Realism. They can build cases on a scaffolding of the merest guesswork and supposition, junk science, and prejudicial tidbits. . . . They can bring a long line of plaintiffs to court to challenge the same underlying act of a defendant, and if ten juries find no guilt they can call on an eleventh. At the end of it all they can pocket for themselves and their clients fines of a magnitude with not much limit outside the indignant imagination. *Id.* at 289.

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wielded in their endeavor.

The method by which Olson frames his indictment of the legal system is, as indicated above, fairly common in the works of tort reform proponents. For his part, Philip K. Howard does not appear to share Olson's belief that lawyers are chiefly responsible for the socially deleterious changes to our legal culture. Nevertheless, he likewise deploys suffusion to press his point as to why reform of the courts is necessary. As noted above, Howard contends that the legal system should set down clearly defined duties to apprise society of the appropriate bounds of conduct and bring resolution to disputes, but that it should rarely, if ever, bring about broader social consequences.[178]

In *The Lost Art of Drawing the Line*, Howard argues that our society has embarked upon a "quest to achieve individual fairness through neutrality," and that as a result, have "lost the ability to distinguish between what's reasonable and what's not."[179] Elaborating upon this suggestion, he argues that Americans as a society give rights an "almost theological power."[180] Consequently, judgments emanating from courts of law acquire a legitimacy to which he believes they are not entitled. "Fairness is guaranteed, whatever the result, we believe, because each party to the dispute had an equal right to make his arguments."[181]

For Howard, the legal system is suffused with "[o]ur modern consciousness" and its attendant obsession with individual rights.[182] While it is problematic for him that society seems to assess talismanic importance to individual rights, he is especially concerned with people who make what appear to be unreasonable decisions *based* on that perspective. Howard notes:

> A young couple in our neighborhood . . . visited his parents on New Year's Eve. The sidewalk was icy [and] she slipped and broke her ankle. Her response came out of the new American playbook: She sued his parents. The goal was not to recover medical costs. . . . The idea was to go after a windfall from the parents' insurance company. . . . She got a huge settlement from suing his parents. Now that's certainly ingenious. But isn't insurance supposed to be for real lawsuits? Doesn't that attitude just raise the costs of everyone else's insurance? Never mind. Accidents

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[178] *Supra* § III(B)(2)(b).
[179] Howard, *supra* n. 127, at 13.
[180] *Id.* at 18.
[181] *Id.* at 19.
[182] *Id.* at 23; s*ee also id.* at 15-16.

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> are almost assumed to be an occasion to make money. You almost feel like a chump if you don't at least threaten to sue.[183]

While this could appear to narrow his attack, in fact, it broadens it. He conflates his criticism of society for its acceptance of the individual rights paradigm with what he posits to be an exemplar of that model taken to its logical extreme.[184] As a matter of argumentation, this essentially obviates the need for him to discuss cases that sound, as an intuitive matter, to be more severe—virtually all cases are cut of the same cloth and can be conceptually grouped with one another.[185] Though he presents the point with less emphasis, Howard, like Olson, considers most legal claims to originate in a desire for monetary compensation. "Courts are not supposed to be commercial establishments where, for the price of a lawyer, anyone can buy a chance at a raffle," he contends.[186] This is ultimately especially problematic because "[t]he standard operating procedure for any aspiring litigant is to sue to the moon," and as such, it is "easy to threaten the adversary's entire livelihood."[187]

Though Howard's argument differs in its details from that advanced by Olson's, it likewise represents a use of suffusion as a rhetorical tact. The legal system is shot through with the selfish opportunism of tenuous individual rights claims for monetary damages; lawsuits are vehicles for the vindication of these principles.[188] Howard further argues that the courts pose no reliable bulwark against the tide of baseless, or at the least, harmful, lawsuits.[189] He asserts that "legal principles are just words" and that, as a result, "[a]s often as not, the law is turned upside down."[190] In a manner similar to Olson, he locates the purported impotence of legal institutions in the nature of the law itself. Again, no line is drawn between the problem—an obsession with individual rights—and the courts; the legal system is merely a venue for the effectuation of the paradigm.

At this point, several general observations about the argumentative

[183] *Id.* at 17.
[184] It is also of some interest that Howard takes this case to be something other than a *real lawsuit*, insomuch as it instantiates his belief that, so long as medical costs have been addressed, the legal system need provide no other recourse.
[185] *See also id.* at 31 ("Does it seem to you that anyone can bring a claim for practically anything? They can. When justice turns on a value judgment, all anyone has to do is make up a theory.").
[186] *Id.* at 23.
[187] *Id.* at 58-59.
[188] Some of the best evidence that this is the case comes from the fact that, despite the fact that Howard discusses individual rights, he does not take up consideration of one of the many possible such claims that have intuitive merit.
[189] *Id.* at 58-60.
[190] *Id.* at 43.

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implications of suffusion, as a rhetorical device, may be warranted.[191] First, as noted above, by employing this tactic, tort reform proponents deftly enable themselves to cast frivolous or counterintuitive lawsuits as typical ones. Most significantly, this is due to the fact that suffusion defines the system by the extrapolation of a particular set of values across the broad spectrum of the docket. Olson, for instance, repeatedly asserts that the tort system is, in actuality, a vehicle for the fulfillment of the objectives of trial lawyers.[192] He complements this account with anecdotes that, he contends, illustrate his point. For instance, he begins his tenth chapter by recounting a story of a lawsuit in which a retailer that developed film was held liable for failing to process a particular roll successfully, notwithstanding the fact that the customer had received a disclaimer that should have covered such a situation.[193] He proceeds to contend that the tort system is steadily eroding the importance of contractual provisions, insinuating that the prefatory anecdote is, in actuality, the norm as to how disclaimers are treated.[194] In employing suffusion, proponents of tort reform define the system with reference to the outer boundary of what happens in the tort system and then

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[191] For three other specific examples of suffusion, *see* Crier, *supra* n. 45; Patrick M. Garry, *A Nation of Adversaries: How the Litigation Explosion is Reshaping America* (Plenum Press 1997); Center for Legal Policy at the Manhattan Institute, *Trial Lawyers Inc.: A Report on the Lawsuit Industry in America 2003* (2003) (available at http://www.triallawyersinc.com; select TLI Original Report, click on Downlaod PDF (3.4mb)) [hereinafter *Trial Lawyers Inc.*].

Crier suggests that lawyers and plaintiffs cooperate in utilizing the legal system. In her introduction, for instance, she assesses responsibility to plaintiffs, writing "Litigation is no longer a crapshoot, [sic] it is becoming a sure thing. If you can't get a satisfactory nuisance settlement, then try your case; the awards are phenomenal!" Crier, *supra* n. 45, at 9. Her primary concern, however, is lawyers—hence the title of her book, "The Case Against Lawyers." Crier, *supra* n. 45.

Garry's argument operates to similar effect, albeit with a greater emphasis on the actions of plaintiffs than Crier and Olson. He contends that litigation is the "new frontier," and "promises wealth to its successful pioneers, just as the gold fields of California once did." Garry, *supra* n. 191, at 2-3. He continues, "Personal injury claims offer anyone with an ability to voice believable complaints about pain and suffering the opportunity to collect a quick settlement." *Id.* at 3. He believes that most people consider the decision to enter into legal proceedings to be purely economic in nature, "like investing in a high-risk business venture or gambling on a bet." *Id.* at 27. By Garry's argument, lawsuits are thus imbued with the economic character that creates them.

The last example referenced, *Trial Lawyers Inc*., is a mock "annual report" for the "lawsuit industry" published by the Manhattan Institute. It is tied in to a related website. *See* http://www.triallawyersinc.com. The thirty page pamphlet adopts a lawyer-centered model of the legal system, asserting that "[m]ore and more, the industry resembles a racket designed to do little more than advance the incomes and interests of its members – everyone else be damned." *Trial Lawyers Inc.*, *supra* n. 191, at 5. It proceeds to discuss a laundry list of areas in which the "industry" operates, including: "mature product lines" (class actions, asbestos, and medical malpractice); "high-growth products" (mold, regulated industries); and "new product development" (fast food). *See id.* at 8-19. In its conclusion, entitled "Is Reform Possible," the pamphlet asks, "Will the public come to acknowledge the threat posed by the litigation industry's size, influence, and lack of transparency? Will policymakers and judges have the foresight and will to act in the public interest?" *Id.* at 24. It concludes, "One thing is certain: our nation's future economic health depends on affirmative answers to these questions – on Americans standing up to the rapacious behemoth that is Trial Lawyers, Inc." *Id.*

[192] Olson, *supra* n. 136, at 197.

[193] *Id.*

[194] *Id.*

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work their way inward. The typical case, then, the one with respect to which rules should be devised, is the frivolous case, not the meritorious one.

Second, suffusion is an *actor centric* critique; by its very terms, it identifies culprits and assesses blame. In doing so, it posits a dynamic of us—that is, society—against them, whoever *they* might be. Olson, for instance, suggests that lawyers are employing the system to their own ends, and that, in doing so, they are imposing harms on the broader society. Howard, for his part, makes a similar suggestion with regard to people who, he believes fetishize individual rights. In either instance, the upshot of the argument is that there are particular actors taking actions to the detriment of the community. Put another way, the consequences of the legal system are *done* to society *by* certain people.

b. Patients First and Suffusion

In the Senate debate regarding the Patients First Act, its proponents consistently characterized the health care system as having been placed in a state of *crisis* by the courts.[195] In explaining the causes of this crisis, they portrayed the legal system as deluged with frivolous claims and indicated that it was such meritless lawsuits that dictated the necessity for reform.[196] For some of the speakers, the apparent proliferation of baseless actions was taken for granted, and no impetus for the development was isolated or suggested. The pregnant implication was that both lawyers and plaintiffs, both of whom were necessary to file a frivolous lawsuit, were to blame. However, that notwithstanding, both plaintiff and trial lawyers were assessed primary responsibility on some occasions. As for the latter, Senator Orin Hatch proclaimed their culpability most prominently, stating, "In all honesty, it doesn't take a rocket scientist to figure out what the problem is. I hate to say it, being a lawyer and having been a trial lawyer. The problem is caused by many in our profession who are bringing these frivolous suits."[197] Plaintiffs, for their part, were identified by Sen. Ensign

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[195] *See e.g.* 149 Cong. Rec. at S9070.

[196] *Id.* ("The cause, quite frankly, is the unrestrained plaintiffs' legal actions asserting all kinds of . . . damages.") (statement of Sen. Bond); *Id.* at S9072 ("[D]octors could no longer afford the premiums because of the frivolous and outrageous lawsuits that are destroying the court system.") (statement of Sen. Ensign); *Id.* at S9073 ("[We] have an obligation to address the explosion in litigation across the county and jackpot-sized awards.") (statement of Sen. Santorum); *Id.* at S9074 ("We can vote with some trial lawyers who file endless lawsuits . . .") (statement of Sen. Dole); 149 Cong. Rec. at S9012 ("[W]e can actually adopt some legislation to deal with this crisis of lawsuit abuse.") (statement of Sen. Kyl); *Id.* at S9017 ("I believe we should end the liability lottery, where select patients and some trial lawyers receive astronomical awards.") (statement of Sen. Cornyn).

[197] 149 Cong. Rec. at S9033. *See also e.g.* 149 Con. Rec. at S9074 (Sen. Dole); 149 Cong. Rec. at S9017 (Sen. Cornyn). President Bush, for his part, was more explicit in laying blame at the feet of the trial lawyers. He stated, "[T]he legal system looks more and more like a lottery. And with the trial lawyers [earning] as much as 40 percent of the awards and settlements, it's pretty clear who is holding the winning ticket." Pres. George W. Bush, *supra* n. 16, at ¶ 32.

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as emblematic of a “litigious society” in which people had become unduly “sue happy.”[198]

The evident emphasis in the debate on the need to stem the tide of frivolous lawsuits, whatever their root cause, is especially notable. By its terms, the bill was not directly focused on baseless claims, instead contemplating a strict cap in the amount of $250,000 on awards of non-pecuniary damages in all actions, together with similarly categorical limits on attorney’s fees.[199] If one takes the arguments advanced by proponents of the bill at face value, then, it must be inferred that they understood such suits to be the basis on which rules should be crafted—that is, the typical case. Otherwise, the proposed measure would result in a marked incongruity between the means pursued and the ends achieved.

The rhetoric employed on the Senate floor supports this interpretation. Indeed, on numerous instances, advocates of the act argued that the apparent harmful effects of the legal system were the result of frivolous claims. Sen. Voinovich asserted:

> And when the quality is not there, when people die or are truly sick due to negligence or other medical error, they should be compensated. But when healthy plaintiffs file meaningless lawsuits to coerce settlements or to shake the money tree to get as much as they can get, there's a snowball effect and all of us pay the price.[200]

Similarly, Sen. Ensign contended:

> Why are insurers raising rates or leaving the market? Because there is no stability in the marketplace for providing medical liability insurance. Why is that the case? Because our health care system is being overrun by frivolous lawsuits and outrageous jury awards. This excessive litigation is leading to higher health care costs to every American and an unstable peace of mind for our health care providers.[201]

In short, the act was, by his argument, justified by the need to address the problem posed by frivolous suits.

Plainly, the rhetoric deployed in favor of the act makes use of suffusion. The legal system is treated as a passive institution, “overrun,” in

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[198] 149 Cong. Rec. at S9039. *See also id.* at S9021 (“[P]laintiffs file meaningless lawsuits to coerce settlements or to shake the money tree to get as much as they can get.”) (statement of Sen. Voinovich).
[199] Sen. 11, 108th Cong. (June 26, 2003).
[200] 149 Cong. Rec. at S9021.
[201] 149 Cong. Rec. at S9007.

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the words of Sen. Ensign, by a virtually inexorable wave of meritless suits, many of which are ultimately, though undeservedly, rewarded by juries.[202] In imposing strict limits on the power of the legal system to grant relief, the act represents an attempt by Congress to save the courts from themselves. The apparent point is that, while the legislation does not directly preclude such suits from succeeding, it does limit the broader damage they can do to society.

c. Analyzing its Contours and Implications

While the arguments discussed in the first section of this article are quite frequently presented as disparate contentions, rather than as part and parcel of coherent critiques of the system such as those advanced by Olson and Howard, we nevertheless receive and consume them, on the whole, as a grand instance of suffusion. In essence, the rhetoric of suffusion is replicated on the comprehensive scale. The arguments concerning lawyers and the tort system are best understood as operating within the argumentative infrastructure provided by suffusion.

In the first section of this article, I noted that one of the most prominent lines of criticism concerning the tort system is that directed at lawyers. As noted, tort reformers advance an unflattering portrait of lawyers that emphasizes certain characteristics that members of the profession have in common. Professor Galanter notes that, prominent among these characteristics, is that attorneys are "fomenters of strife" and "economic predators."[203] Moreover, as observed *supra*, the trial bar is cast as a monolithic entity, its ranks united in pursuit of a common goal, the endeavor unmarred by internal dissent.[204] The portrayal of trial lawyers so prevalent in the public debate concerning the tort system accentuates their ability to *create* lawsuits that would not otherwise have been filed. They, as Professor Galanter notes, are said to be capable of sowing discord and strife within communities and inducing plaintiffs to file suits.[205] This set of arguments tends to emphasize the power of trial lawyers over the machinery of the legal system. They are able to sway juries with silver-tongued ease,[206] press potential plaintiffs into service as their clients,[207] and, at times, even thwart legislative efforts at systemic reform.[208] The legal system is, by the substance and tenor of these arguments, a mere passive instrument utilized by lawyers (and lawyers alone).

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[202] *Id.*
[203] Galanter, *Predators*, *supra* n. 1, at 635-36.
[204] *See supra* n. 52 and accompanying text.
[205] *Id.*
[206] *See supra* n. 48 and accompanying text.
[207] *Supra* § II(A)(2)(a).
[208] *See supra* n. 39 and accompanying text.

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The most common portrayals of plaintiffs complement this perception of lawyers. Oftentimes, proponents of tort reform assess plaintiffs a predominantly passive role—that is, as the lawyer's accomplice.[209] But more frequently, the potential plaintiff is cast a proactive participant in the process of filing a lawsuit. He is either unwilling to accept personal responsibility for his actions or willing to file suit without having sustained a serious injury.[210] In either event, the plaintiff is, by this reckoning, an eager participant in the endeavor. And he is moved to do so, quite often, by a particular, perhaps perverse, moral paradigm. Commonly, it is contended, the plaintiff elects to initiate a lawsuit due to nothing more than a desire to derive financial benefit from doing so.[211] The rhetoric of personal responsibility—i.e., the failure to accept it—engrafts a principle (of sorts) upon the decision to initiate a cause of action. While the plaintiff seeks a financial recovery, he is doing so because he *believes*, earnestly it seems, that the accident or event in question was not his own fault. More frequently, though, the plaintiff is, like the stereotypical ambulance chasing lawyer, merely hoping to benefit financially from a dubious injury he has suffered.

These arguments concerning plaintiffs lend greater potency to the indictment of the legal system. In attributing to plaintiffs an independent motivation, the explanation for the excesses of the legal system is deepened; both participants in the filing of the suit are, for their own reasons, responsible and, by that token, exert a pernicious influence on society. Moreover, it introduces a different failing of values into the critique, for rather than a moral shortcoming on the part of a professional community, it is one of ordinary members of society. For the most part, these arguments congeal to form a bleak picture as to why lawsuits are filed. Cases are brought about predominantly by greed and, otherwise, by a desire to place blame where it is not deserved.

These arguments concerning the morally dubious motivations of plaintiffs and lawyers operate alongside the most prevalent critical points about the legal system. Primarily, the arguments about the legal system go towards establishing its *pliability*. Much of the weight of this argument is directed at juries,[212] which, it is posited, are thoroughly unreliable and easily misled. Implicit in the contention that attorneys can manipulate emotion is the notion that jurors are susceptible to such tactics. The law, as a network of rules, is portrayed as exceptionally permissive.[213] In fact, as noted *supra*,

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[209] *See supra* n. 45 and accompanying text.
[210] *Supra* § II(B).
[211] *Id.*
[212] *Supra* nn. 109-110 (discussing juries in tort suits).
[213] *See supra* nn. 62-63 and accompanying text.

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the legal system is portrayed as an institution that translates counterintuitive claims into meritorious ones;[214] in essence, it provides the opportunity to spin straw into gold. One rarely hears of instances in which an applicable legal rule operated to require the dismissal of a frivolous claim.

In fact, within the rhetorical context of tort reform, one hears little regarding the law, as an institution, at all. It is, to be sure, utilized, but it appears to lack any undergirding values or objectives of its own. The popular contention that the legal system is a litigation lottery[215] plays into this contention, at least in an indirect way. Insofar as, it is alleged, the system does not mete out reliable judgments, the notion that courts can be entrusted with a meaningful regulatory role is undermined. More importantly, as noted, the metaphor embodies the purported commodification of legal claims.[216]

In this sense, the entirety of the actions of the legal system is defined by the uses to which it is put by lawyers and plaintiffs. These arguments respecting the legal system interact with one another to create a sense that it is suffused with the values of greedy lawyers and morally agnostic plaintiffs. The legal system, it is made to appear, is not moored in any cogent set of worthy principles, nor, it seems, even employed to productive end. It merely exists and is used, and insofar as this is the case, it is merely a weapon in the hands of actors who ought not to be trusted.

To the extent that this is the case, the judgments that are produced by the legal system are, taken in concert, simply embodiments of the motivations of the actors who have chosen to avail themselves of its machinery. As the litigation explosion is the conceptual aggregation of these lawsuits,[217] two essential things may be said of it. First, it is caused by, and therefore, reflects, the motivations of trial lawyers and their clients. This includes, most pervasively, a naked desire for profit, but also embraces a failure to assume personal responsibility for actions. It is, thus considered, caused by motivations at odds with proper social norms and the traditional role of the legal system. Second, if it is *caused* by certain people, it is *enabled* by the permissive legal framework American courts have come to embrace.[218]

This casts the argument for tort reform in an important light: it is a means through to limit the power of certain ill-intentioned *actors* to see their plans to fruition. In this sense, it is not framed, in an immediate way, as

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[214] *Id.*
[215] *Supra* § II(D).
[216] *See supra* nn. 103-104 and accompanying text.
[217] *Supra* § II(C).
[218] *See supra* nn. 60-62 and accompanying text.

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taking power from the courts to grant judgments.

4. The Role of Individual Choice and the Disempowerment Critique

The previous subsection discussed the infrastructure of the case for tort reform, arguing that it is, in essence, an actor-centered model that casts the legal system as having been commandeered by lawyers and plaintiffs in pursuit of their own ends. It suggested that, as a result, the actions of the legal systems are seen within this conceptual framework and that this understanding of the forces animating the system operates to define it. In this subsection, I discuss the effects that tort reformers argue flow from this apparent state of the legal system.

In summary, this section will argue that tort reformers conceive of the legal system, in its present form, as an instrument of societal disempowerment. This claim on their part has two dimensions—one explicit, the other implied. Most directly, the argument that the tort system disempowers society concentrates on the effects of decisions delivered in the legal context for individuals, companies, and social institutions. But impliedly, the contention relies, perhaps with equal force, on the assumption that society has alternative vehicles at its disposal through which individuals express and effectuate choices and resolve disputes that might arise. Put another way, any claim that the legal system disempowers society is, in significant part, predicated upon the presumption that in its operation it supersedes an alternative, more desirable, apparatus.

This section proceeds on two overarching levels. First, it examines the disempowerment aspect of the generalized case for tort reform, comprising both an empirical survey and a consideration of its discursive dimensions. It starts by considering the underlying aspirational portrait tort reformers paint of society, and then turns to examine how they believe the courts cause us to depart from that ideal. Second, it applies what insights might be gleaned from this general discussion to the specific context of the recent malpractice liability debate.

a. How Tort Reformers Believe Society Should (and would) Make Decisions

The conviction held by tort reformers that society has institutions for the expression of choice and resolution of grievances that are preferable to courts is perhaps a necessary corollary to their understanding of the appropriate role of the legal system itself.[219] If one believes that the legal system has little role to play in regulation of societal conduct or expression

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[219] *Supra* § III(B)(2)(b).

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of social values, there must then be some alternative conduit through which such preferences may be expressed.

The case for tort reform rests on the notion that, for a variety of reasons, resort to the court system should ordinarily be unnecessary, even when an injury is suffered. In a significant sense, the criticisms directed at plaintiffs who elect to file lawsuits may be seen as operating within this framework. The underlying assumption of this line of arguments is that not all people who suffer injuries should consider filing lawsuits, in light of important aspects of American cultural identity. As discussed in the first portion of this article, plaintiffs are often subjected to two overarching lines of attack: first, that they fail to take personal responsibility for their actions; and second, that they are motivated by greed to file frivolous lawsuits.[220] The most direct effect of this portrayal of plaintiffs is to advance the notion that the lawsuits coursing through the legal system at any particular time are suffused with these values. But in impugning the character of those who file lawsuits, proponents of tort reform are concomitantly positing how we, as a society, should be.

This proactively normative dimension of the critique of plaintiffs is manifest, to offer an example, in Crier's version of the point:

> The omnipotence of the rule of law has altered our very mind-set. The image of ourselves that we export, that of the frontier-minded, self-reliant, and free-spirited American, is all show. . . . Our psyches are so fragile; the mere mention of pain and anguish brings tears to the collective eye and dollar signs to the mind of the attending attorney. . . . Do you really prefer a padded room to the open range? . . . We must understand the false exchange as we seek more protection from unpredictable or dangerous behavior.[221]

By its terms, Crier's passage describes a societal change that already has taken place. However, this focus on its part is semantic, and in any event, unimportant (for one doubts that her book is directed at those who would knowingly and unflinchingly file a frivolous lawsuit). She presents a vision of how society should react to difficult circumstances or challenges: by bravely pressing forward, even in the face of pain, and accepting that life necessarily entails risk.[222] Her argument invokes the *American as frontiersman* trope and deploys it to a normative end—that is, to the extent that we are not that way at this stage in our national history, we certainly should be. By this token, we are degraded by our tendency to rely on the

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[220] *Supra* § II(B)(1)-(2).
[221] Crier, *supra* n. 45, at 21.
[222] *Id.*

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courts when we suffer injuries, for in most cases, we should conceive of ourselves as victims who require remuneration for a loss.[223]

An additional point, made alongside the notion that certain types of physical harm do not merit legal action, is that the ethos of personal responsibility demands otherwise. Consider, on this score, the discussion of this point advanced by Professor Cook taken up above.[224] At the conclusion of an article advocating, in essence, the substantial abolition of the tort system, he suggests, "Eventually society may progress in a direction where the first words uttered after an auto accident or other injury are 'Can I help?' rather than 'Can I sue?'"[225] Like Crier, he deploys the rhetoric of personal responsibility both as a criticism of those who would file lawsuits and as a positivist articulation of how people ought to deal with certain situations.[226]

A further point about appropriate social norms is posed by this brief sentence of Cook's article: that the typical plaintiff is unduly adversarial in his outlook on the world and that, conversely, a society with an appropriate understanding of the importance of community will settle grievances voluntarily.[227] In his book, *A Nation of Adversaries*, Patrick Garry takes up this point at length, arguing, as the volume's title indicates, that we are becoming a "society of adversaries."[228] He contends that "[a]n adversarial culture, bred by the values and lessons of the litigation explosion, is taking hold in the United States. It is a culture that pushes individuals to conflict and confrontation, and to continually challenge community authority and institutions."[229] And, he asserts, this mindset has replaced the preferable one that came before it, an "assimilation model" in which "society was seen as a collection of cooperating individuals who sacrificed their differences for the sake of social cohesion."[230]

The foregoing three points pertain to how individuals should behave

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[223] *See also e.g.* OA online, *Lawsuit Reform Seems Necessary*, http://www.oaoa.com/columns/edit070803.htm (accessed Jan. 11, 2006) ("[B]y moving nationwide class-action suits to the federal courts, cases would be based more on merit and less on staged victimization orchestrated by unscrupulous and greedy lawyers."). Professor John C. P. Goldberg suggests that, as a society, "we cannot really accept that, when it is one of 'us' – instead of one of 'those' whiners who is the victim of a wrongdoing – the state need not provide a means of individualized redress." John C. P. Goldberg, *Unloved: Tort in the Modern Legal Academy*, 55 Vand. L. Rev. 1501, 1503 (2002).

[224] *See supra* nn. 57-58 and accompanying text.

[225] Cook, *supra* n. 56, at 1274.

[226] For additional cites about personal responsibility, *see supra* n. 55.

[227] *See e.g.* James D. McWilliams, *Some Midlands doctors say they may quit delivering babies*, The State (Columbia, S.C.) A1 (Feb. 1, 2004) (quoting doctor who said, "We must change the mindset of citizens that whenever something goes wrong, it must be someone else's fault"); Jeffrey O'Connell, *A Proposed Remedy for Mississippi's Medical Malpractice Miseries*, 22 Miss. C. L. Rev. 1, 6 (2002) (asserting that an "often myopic and counterproductive blame culture . . . permeates current tort law" and that the "current litigation culture" tends to inflame the "animosities of the parties in an accident claim").

[228] Garry, *supra* n. 191, at 4.

[229] *Id.*

[230] *Id.*

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when they suffer harm. As discussed more fully below, taken in concert, their general implication is that we, as a society, are diminished by reliance on the court system. This aspect of the tort reform critique posits that society is changing as resort to the legal system becomes more acceptable. In this sense, we are culturally disempowered by the courts, as we are made less self-reliant, less willing to assume responsibility for our own actions, and less able to cooperate for the common good. In short, we are made *weaker*.

More broadly, tort reformers further posit that society has at its disposal avenues through which decisions should be made. These avenues may be classified on two separate levels: individual and societal. On the individual level, proponents of tort reform place great importance on the value of personal choice. In this sense, the case for tort reform takes on something of a libertarian dimension—as individuals we should have the freedom to make most choices for ourselves, rather than having them dictated to us by some external authority. The tort reform literature tends to give credence to the notion that individuals are eminently capable of assessing risks without the guidance or interference of the tort system. For instance, Howard believes that the "air in America is so thick with legal risk that you can practically cut it and put it on a scale,"[231] but that it need not be so. He asserts:

> In ordinary social interaction, there is no legal duty to others. People are allowed to be rude, children are expected to be unreasonable. Citizens of a free society have to learn to deal with it. . . . Otherwise, we infect ordinary encounters with legal fear.[232]

The upshot of this suggestion on his part is that individuals are capable of choosing whether they want to come into contact with others and to assume the risk of harm in doing so. In purporting to dictate a comprehensive network of rules that apply to these encounters, the legal system places irredeemable burdens on our ability to make these determinations by our own agency. For his part, Howard opines, "For years, litigation anxiety has been casting a darker cloud over ordinary choices."[233]

In making these individual choices, the argument follows, we are not left adrift in a sea of potential choices without a compass. To the contrary, we merely must abide by our notions of common sense and defer to expert judgments when appropriate. Howard posits, "This is the secret to freedom. Each person must be able to freely choose, equal to the scope of

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[231] Howard, *supra* n. 127, at 7.
[232] *Id.* at 24.
[233] *Id.* at 31.

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his responsibility, or else all lose their authority to act on their beliefs."[234] Most significantly, this evidently essential freedom to make choices extends to professionals acting within the scope of their expertise. In a speech, Senator Zell Miller argued, with evident regret, "Doctors . . . teachers . . . ministers . . . even Little League coaches find their daily decisions hamstrung by fear of lawsuits on practically everything."[235]

The most popular incarnation of this argument pertains to doctors, who, tort reformers contend, must be entrusted with the freedom to make essential medical decisions free from the pervasive fear engendered by the prevalence of lawsuits. In advocating tort retrenchment on the op-ed page of the New York Daily News, Richard Schwartz argued that such reform would "relieve obstetricians and all doctors of enormous stress and let them make decisions in the best interests of patients . . . . It would allow doctors to do what they think is right."[236] The argument is not, of course, confined to doctors. Among other professions, it is also advanced with respect to teachers who, it follows, must be afforded latitude to enforce discipline in their classrooms. Argues Howard, "[The lawsuit culture] diverts teachers from doing what they do best, which is to be themselves and focus on the children."[237]

The underpinning idea of this line of argumentation is that individuals are capable of making important decisions and that they must be afforded the freedom to do so. A society that does not resort to litigation, by this token, comfortably entrusts decisions to the realm of discretion that can be exercised by experts. It is not ordinarily appropriate to evaluate these judgments retrospectively, lest their willingness to make difficult, but necessary, choices be impeded.[238] This contention elevates deference to knowledge to the level of a social norm. Doctors, it could be said, are best capable of making medical determinations, and rules propounded by the legal system ought not intrude upon that province.

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[234] *Id.* at 213-214. Similarly, Crier asserts, "The rule of law was never meant to be a substitute for community standards. . . . [Tocqueville] believed that you and I would actively perform as citizens and express our principles and concerns. Communities, not some distant government, would define the rules and laws for society." Crier, *supra* n. 45, at 2.

[235] Sen. Zell Miller, *Senator Zell Miller on Common Good and Legal Fear*, http://www.gppf.org/article.asp?RT=7&p=pub/General/miller_speech.htm (Jan. 12, 2004) (accessed Jan. 11, 2006).

[236] Richard Schwartz, *Malpractice Plague Needs a Rapid Cure*, N.Y. Daily News (Feb. 12, 2004) (available at http://cgood.org/healthcare-newscommentary-inthenews-108.html).

[237] Caroline Hendrie, *Group Says 'Lawsuit Culture' Hampers Schools*, Educ. Week 5 (Nov. 12, 2003).

[238] *See supra* n. 91 and accompanying text. *See also* Charles Krauthammer, *Sick, Tired, and Not Taking It Anymore*, Time 53 (Jan. 13, 2003) ("[T]he malpractice burden – indeed, the malpractice threat – is the final assault on the implicit contract society makes with its healers: you give up the best decade of your youth, your 20s, to treat the sick and learn your craft, and we will allow you to practice it with autonomy [and] dignity . . .").

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Proponents of tort reform complement their arguments regarding the value of individual choice by contending that democratic institutions are well-equipped to allow and implement the expression of the collective will. In essence, they posit, decisions that take on the character of policy determinations should be resolved by elected leaders, who act pursuant to popular mandate. In *The Rule of Lawyers*, Walter Olson concludes with a paean to the value of democracy, writing:

> The new rule of lawyers brings us many evils, but perhaps the greatest is the way it robs the American people of the right to find its own future and pursue its own destiny. No doubt democratic processes often fall far short of perfection . . . . But however uncertain the results of democracy . . . we can feel quite sure that it is a better course than agreeing to turn over our rights of self-government to a new class of unaccountable lawyers.[239]

By this token, democratic institutions facilitate the paramount expression of individual choice. As such, this argument complements, rather than jettisons, the libertarian character of the contention about the merit of individual freedom; it posits that individual freedom implies the right to choose who will have express or implied authority over one's actions. In pressing lawsuits with policy implications, such as those that have been filed against tobacco companies and gun makers, and in pursuing claims that have broad implications because of the magnitude of damage awards involved, lawyers, it is suggested, usurp the role of political institutions. Crier remarks, "[L]awyers have succeeded in expanding control over our lives in the most extraordinary way."[240]

i. Implications

The underlying normative element of the case for tort reform has gone unnoticed by a number of astute commentators who have sought to address the claims that it comprises. This shortcoming is a natural and understandable consequence of the fact that, when addressing the case for tort reform, most observers have devoted the majority of their attention to the direct refutation of erroneous empirical claims. However, in the interstices of these empirical claims, inaccurate though they might be, lies a set of prescriptive contentions about societal institutions and interactions. Proponents of tort reform seek to define, for the consumers of their literature, both the legal system and its purported alternatives. In this sense, they present the two as diametrically opposed. One might illustrate the broad

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[239] Olson, *supra* n. 31, at 313-14.
[240] Crier, *supra* n. 45, at 181.

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contours of the argument thusly:

Lawyers/Plaintiffs → Tort system

We (i.e., society) → Choices (some of which are individual, others of which are societal)

In plain terms, tort reformers contend that there are two competing sets of institutions at work. On one level, lawyers and plaintiffs use the tort system to pursue their own, primarily monetary, motivations. On the other level, individuals make choices with reference to shared social values and then implement these decisions within the complementary frameworks of democracy, community and the marketplace.

This *mirror image* aspect of the case for tort reform is especially significant because it essentially defines the terms of the debate it is intended to establish. In essence, it expresses what is purportedly at stake, what society has to lose by acquiescing in the evident effect lawyers exert on everyday life. As a result, tort reform arguments are, at their core, rooted in a purported desire to protect the power of individual choice. The commonly made argument that tort costs drive up prices is, in actuality, rooted in the notion that such decisions should, as a normative matter, be left to the discretion of the market. It is for this reason that empirical refutation of claims made by proponents of tort reform may ultimately be beside the point. The tort reform literature seeks to address itself not merely to impugning the credibility of the legal system, but to suggesting its natural alternatives.

ii. The Decisions We are Apparently No Longer Able to Make

As noted *supra*, tort reform literature suggests that the legal system imposes overwhelming costs on society, both in terms of crushing damages and the fear of incurring them.[241] What is most notable is the terms that these costs take on in light of the underlying symbolic context established by the mirror image institutions considered above. Simply put, the tort system usurps the role of these institutions, and as a result, denies us the power to make decisions we should be entitled to resolve on our own.

First, the ostensible fear people feel that dissuades them from engaging activities they might otherwise have pursued is set in an important contextual framework. Take, for example, one of the situations discussed in the Newsweek article referenced above: the priest who, because of his understanding of the contemporary American legal climate, is loath to initiate any physical contact at all with his congregants, even an innocuous

[241] *Supra* § II(C)(1)-(3).

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hug.[242] To be sure, the hypothetical is intended to appear troubling on its face, for after all, we are left to think, there is no reason a priest should be intimidated from engaging in such conduct. More broadly, though, his desire to do so takes on the character of a right, or perhaps, several: it is his right, as a priest, to make decisions as to how best to perform his job; and it is *our* right, as a community, to decide when he should not. Accordingly, in addition to losing the benefit of a priest acting to the fullest extent of his capacities, we are also, the argument follows, being denied the right to decide the social boundaries of individual action.

Second, the apparently crushing damages that have been imposed on society by the litigation explosion are likewise set upon a foundation of principle. This might be illustrated by Vice President Quayle's assertion that the "litigation explosion" was placing the nation at a "competitive disadvantage" to foreign businesses.[243] Certainly, the point speaks for itself in suggesting an ill resulting from purportedly excessive court costs. However, the additional dimension it might take on is that it is the *government*, not trial lawyers (via the courts) who should be making decisions that have so broad an impact on the competitiveness of industry. This is a regulatory decision that should be left to government—that is, to be committed to the realm of choice—but has not been because the court system has transgressed its bounds. Moreover, in driving up the cost of goods that individuals purchase, the tort system burdens the exercise of individual choice—that is, it makes it harder for people to obtain the things they want.

Most importantly, taking the continued implications of suffusion into account, these consequences are brought upon society by lawyers and plaintiffs. Proponents of tort reform draw no conceptual distinction between lawyers and the legal system; it is their argument that, whatever limited benefit to society might be secured by the courts, the lawyers have co-opted it for their own ends. That which would happen if the legal system were restored to its putatively narrower historical role is defined with reference to individual choice: if courts only did their job, we'd work everything else out by making choices. In essence, then, the lawyers are usurping society's right to make these choices. Moreover, because attorneys do not act for the betterment of society, the decisions that are eventually imposed on a society powerless to resist them are neither efficient nor fair.

b. Patients First, Choice, and Disempowerment

Throughout the course of the debate concerning the Patients First

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[242] Taylor & Thomas, Newsweek at 44.
[243] Benedetto, *supra* n. 78.

Act, the most prominent theme running through the speeches given on the Senate floor related to the burdens the legal system imposed on society.[244] As discussed, an underlying assumption of much of the tort reform literature is that the legal system is ultimately unnecessary for the regulation of conduct in light of the norms that either are, or should be, prevailing in society. In this instance, proponents of the legislation made a similar such argument, contending that, except for compensation purposes, the courts need not intercede in the health care arena because doctors are willing and able to police themselves. In essence, the argument posits, because doctors are both reasonable and compassionate professionals, they have no desire to inflict harm on their patients; accordingly, where necessary, they will take steps to address and abate potentially harmful risks. Sen. Ensign, the principal sponsor of the bill, contended:

> People talk about decreasing the amount of mistakes by physicians, and we need to do that. It is very difficult and very complex to do. One of the ways we can do that is to enact legislation to encourage voluntary reporting. The current system actually is a protectionist-type system that if somebody voluntarily reports mistakes, they set themselves up for lawsuits. So we have no way to follow where the mistakes are being made and to point out trends so we can correct those mistakes.[245]

Accordingly, he proceeded, it was necessary, after the tort reform bill was passed, to develop measures that would facilitate such self-regulation.[246] By this token, the effect of the legal system's involvement was to thwart doctors' desire to improve their conduct, not to mention divest them of the choice as to how best to do so. In essence, an ineffectual result was imposed upon them, without rationale, from above.

Self-regulation by doctors aside, the remainder of risk could safely be committed to the realm of individual and professional choice. Sen. Cornyn put this point most forcefully in stating, "I believe the proper role of the Government is to protect the freedom of all people to act in their own interests and in the interest of their health. . . . Patients and doctors, rather than lawyers and bureaucrats, should be trusted to decide what treatment is best for themselves and their patients."[247]

Atop the foundational premise provided by the assertion that the tort

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[244] *See generally* 149 Cong. Rec. S9001-S9008; 149 Cong. Rec. S9012-S9043; 149 Cong. Rec. S9061-S9083.
[245] 149 Cong. Rec. at S9008.
[246] *Id.*; *see also* 149 Cong. Rec. at S9040 (Sen. Ensign) (suggesting that professional boards be afforded greater latitude to revoke practitioners' licenses when appropriate).
[247] 149 Cong. Rec. at S9015.

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system is unnecessary where doctors and patients are equipped to make their own decisions, advocates of the legislation suggested two overarching levels on which the courts were burdening or disempowering society. First, they contended that doctors were disempowered. In the advancement of this argument, the doctors were humanized—in essence, treated as members of the society-at-large who happened to have been touched by the tort system. Sen. Ensign established this theme in his opening speech, stating, "Rates are forcing so many physicians and hospitals into a situation they did not want to be in. They went into these practices because of the compassion they felt for patients, and they are not being able to deliver the services because of the out-of-control costs of medical liability insurance."[248] Due to the increases in insurance premiums, some doctors were being forced to "leave[] their practices altogether because they simply can no longer afford to practice because of exorbitant medical malpractice insurance rates."[249] Others, the argument proceeded, were required to relocate to neighboring states.[250]

Second, society itself was disempowered by the tort system. During the debate, those speaking in favor of the bill advanced two primary contentions regarding the harmful effects of the apparent unavailability of medical care. The first was a matter of fairness. Sen. Enzi perhaps put the point most directly in stating, "[I]t is pretty hard for an expectant mother in Wyoming to pursue her happiness when she has to pursue her doctor for one more well-baby check-up before he closes his practice and leaves for a State where insurance premiums are lower."[251] As a matter of principle, by this contention, it is not *fair* for people to be denied convenient access to care.[252] More generally, this contention is rooted in the idea that people should, as a matter of principal, have easy access to health care, and that the tort system prevents such a state of affairs from coming about.[253] The second, and related argument, is that a lack of availability of care can be dangerous. Sen. Ensign, contended, for example, that "[t]he women are now pregnant and their obstetricians no longer can deliver babies because they may be a high

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[248] 149 Cong. Rec. at S9007.

[249] 149 Cong. Rec. at S9070 (statement of Sen. Bond). Embracing this theme, President Bush stated, "I was in Scranton, Pennsylvania, and met Debra DeAngelo, a fine lady. She's got a great safety record in her pain management clinic. She loved living in Scranton because that's where she was raised. She wanted to practice her talents with the people with whom she was raised. Her liability insurance became so expensive that she couldn't practice medicine in Scranton, Pennsylvania anymore, and she shut down her clinic, which employed 10 and served 2,000 patients." Pres. George W. Bush, *supra* n. 16, at ¶ 23.

[250] *See e.g.* 149 Cong. Rec. at S9070 (Sen. Santorum).

[251] *Id.* at S9063.

[252] *See supra* nn. 88-89 and accompanying text.

[253] *See e.g.* 149 Cong. Rec. at S9007-08 ("A friend of mine has Parkinson's disease, lives in Las Vegas, and has to go to Loma Linda where his specialist treats him.") (statement of Sen. Ensign); 149 Cong. Rec. at S9074 ("Patients tell stories of driving miles just to find a doctor to treat an illness.") (statement of Sen. Dole).

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risk delivery and they can no longer afford to provide that type of a service."[254] Similarly, Sen. McConnell argued that emergency trauma centers were closing due to the increases in insurance rates brought about by the tort system.[255]

IV. CONCLUSION

This article has attempted to explain the manner in which the various arguments advanced in favor of tort reform interact with one another. It has argued that the case for tort reform is not a collection of disparate contentions linked by a common underlying policy aim, but rather, a set of mutually reinforcing arguments that congeal with one another. Further, it has contended that the case for tort reform functions not only on a logical level, but on an emotional/psychological one as well; its proponents seek to advance their case not only by arguments, but imagery as well.

In this vein, it has made three principal claims. First, the arguments advanced in favor of tort reform are predicated upon the foundational premise that the legal system exists primarily to bring resolution only to individual disputes. As such, whatever broader consequences its judgments bear for society more broadly are unintended, at least from a normative standpoint, and exceptionally problematic. Second, the case for tort reform largely operates by taking these externalized consequences and defining them with reference to the problematic motivations and values of trial lawyers and plaintiffs. In essence, it draws no distinction between the legal system and the assertedly bad actors who avail themselves of its machinery. Third, and finally, tort reformers argue that these consequences should be seen, all told, to disempower society, by burdening or thwarting individual choice usurping the role of democratic governance. As a subsidiary point, the legal system also culturally disempowers us by encouraging a mindset of victimization and undermining community cohesion.

For those who seek to rebut the case for tort reform, perhaps the most significant message that could be taken from this article is that they have their work cut out for them. Proponents of tort reform have promulgated an incredibly expansive corpus of literature concerning the apparent flaws and transgressions of the legal system. This body of literature is, in one sense, diverse, insomuch as it has been advanced by a variety of sources, some of them surprising (e.g., George McGovern and

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[254] 149 Cong. Rec. at S9008.

[255] 149 Cong. Rec. at S9062 ("Level I trauma centers are staffed with the most talented, specialized people in the medical profession. We have trauma centers specifically staffed by the best because they must save lives that are in jeopardy every day. That trauma center closed because the specialists could not afford the insurance, and they could not afford the liability from the exposure of potential high-risk surgeries to save lives.").

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Griffin Bell) and others less so (e.g., the Heritage Foundation and Wall Street Journal). In another sense, though, the accounts take on a remarkable uniformity, sharing, with virtual unanimity, a belief in an extremely reticent tort system and the value, above all else, of individual choice. In addition to advancing a series of empirical claims, many of them dubious,[256] proponents of tort reform have deployed a portrayal of the legal system that has entered the popular consciousness.

Obviously, none of this is to say that the case for tort reform has been categorically accepted by society. But some of the claims that underlie it have been afforded credence, including the mythology of a legal system run amok. At present, worthy efforts are being made to refute the case for tort reform. One that bears special mention is the Center for Justice and Democracy, which counts as members of its board of advisors, among others, Professor Galanter, filmmaker Michael Moore, and activist Erin Brockovich.[257]

In light of the analysis advanced in this article, a brief assessment of these efforts is warranted. Simply put, from a rhetorical standpoint, proportionally speaking, too much effort has been devoted to dispelling the factual claims that advanced as part and parcel of the case for tort reform and, simultaneously, not enough has been directed to addressing the symbolic contentions that underlie and bind it. This, again, is not to say that no such effort has been undertaken at all. The Center for Justice and Democracy website, for instance, includes a video in which a giant in a corporate suit is felled by a judge with a gavel, after which a caption reading "America's trial lawyers. Our last line of defense in the fight for justice" is emblazoned across the screen.[258] This response has the makings of an effective rebuttal, insomuch as it contains an affirmative conception of the purpose of the legal system and effectively deploys imagery to that end.

In light of this article's analysis, at least two significant points should be borne in mind in responding to the case for tort reform. First, more than many commentators have previously appreciated, arguments for tort reform operate upon the notion that the legal system is a passive institution, lacking both an important underlying purpose and the wherewithal to resist arguments made by trial lawyers. As to the latter, throughout the course of the tort reform debate, the public has remained woefully undereducated about the safeguards in place to reduce excessive damages awards and the reliability of the jury system. And as to the former,

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[256] *Supra* nn. 20-22 and accompanying discussion.
[257] Center for Justice & Democracy, *Board of Advisors*,
http://www.centerjd.org/about/board.htm (accessed Jan. 11, 2006).
[258] *See* Center for Justice & Democracy, *Home Page*, http://www.centerjd.org (accessed Jan. 11, 2006).

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much of the debate regarding the role of the legal system has taken place in a conceptual vacuum, insomuch as little, if any, genuine discussion has taken place as to what the tort system exists to do in the first instance. Senators are able to argue that non-pecuniary damages are relatively unimportant because people are not generally familiar with *why* they are awarded. Similarly, the argument that the legal system should have no effects outside the resolution of individual disputes, in addition to being practically altogether infeasible, also trades on this lack of general knowledge. In meeting arguments for tort reform, it is incumbent upon defenders of the system to articulate a normative justification for why the system has a broader role to play in establishing the boundaries of appropriate conduct. Second, it should now be clear that the discourse taking place is a political one. As such, while logical arguments are important, they are perhaps of lesser value than effective use of symbols, imagery, and rhetoric. Discussing individual, meritorious cases—and making the paradigm—is absolutely essential.

But, in conclusion, the most important point to be made is this: the public remains woefully undereducated about the purposes and operations of the civil justice system. At least in part, this owes to the fact that legal academics have very rarely, if ever, attempted to explain the workings of the system to a general audience. While polemics directed categorically *against* the tort system, such as those by Walter Olson and Philip K. Howard, are widely available, accessible *explanations* of the tort system simply are not. As such, while many of the factual and normative arguments advanced in such screeds receive little credit in law journals, they remain unaddressed, and therefore, un-refuted among their intended audience, the general public. There is, in short, a wide information gap between public literature and academic journals. It would be valuable, indeed, if scholars attempted to bridge that gap.

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