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Dispatches from the Tort Wars

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Book Review Essay

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DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS. By William Haltom & Michael McCann. Chicago: University of Chicago Press, 2004. Pp. 347. $55.00.

RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES. By Herbert M. Kritzer. Stanford: Stanford University Press, 2004. Pp. 334. $45.00.

THE MEDICAL MALPRACTICE MYTH. By Tom Baker. Chicago: University of Chicago Press, 2005. Pp. 214. $22.50.

Reviewed by Anthony J. Sebok*

Everybody knows that the war is over

Everybody knows the good guys lost[1]

1. Introduction

Robert Kagan introduced the concept of "adversarial legalism" into academic discourse in 1991, and the concept gained currency in 2001 with his publication of a book of the same name.[2] The book's subtitle—*The American Way of Law*—captures Kagan's fundamental point, namely that American exceptionalism extends to its "unique legal 'style.'"[3] According to Kagan, adversarial legalism is defined by two features. The first is "formal legal contestation," which refers to the invocation by disputants of "rights,

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1. LEONARD COHEN, *Everybody Knows*, *on* THE ESSENTIAL LEONARD COHEN (Sony Music 2002) (1988).

2. ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2001) [hereinafter KAGAN, ADVERSARIAL LEGALISM]; Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991).

3. KAGAN, ADVERSARIAL LEGALISM, *supra* note 2, at 7.

duties, and procedural requirements, backed by recourse to formal law enforcement."[4] The second is "litigant activism," which refers to "a style of legal contestation . . . dominated not by judges or government officials but by disputing parties or interests, acting primarily through lawyers."[5]

Whether adversarial legalism should be celebrated or regretted is often determined by how one feels about America's current legal system.[6] I would like to focus on the definition itself and suggest that Kagan missed one feature about adversarial legalism, at least as it manifests itself in contemporary debate over civil litigation. While Kagan's "disputants" may enter and leave the world of litigation depending on their personal circumstances, it is clear that there is a set of institutional interests and players who have developed a permanent adversarial relationship, much like political parties in an electoral system or economic actors in a competitive market.

Although the membership of these permanent adversaries may evolve over time, the rough outline of each side or alliance is not difficult to identify. On the one hand, there are those institutions and individuals who see the civil liability system as dangerous and in need of control (the "tort reformers"), and on the other side are those institutions and individuals who see the civil liability system as benign and who see in it the potential for social improvement (the "status quo defenders").

Each side portrays the other in very harsh language and portrays the other side's position as disastrous for society. The Manhattan Institute has published a series of reports that portray the plaintiffs' bar as a rogue corporation in need of regulation: "While this new and predatory style of law has been a bonanza for Trial Lawyers, Inc., it has been a drain on the American economy and a serious threat to the livelihood and lifestyle of many Americans."[7] The Secretary of the Treasury for the Bush Administration recently stated that the "broken tort system is an Achilles heel for our economy."[8] On the other hand, the American Trial Lawyers Association,

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4. *Id.* at 9.

5. *Id.*

6. *Compare* Frank B. Cross, *America the Adversarial*, 89 VA. L. REV. 189 (2003) (reviewing ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2001)) ("While the adversary system in America may seem inefficient and unwise at the micro level of a particular case, its broader effects on governmental quality and economic performance appear to be positive ones."), *and* Charles Silver & Frank B. Cross, *What's Not To Like About Being a Lawyer?*, 109 YALE L.J. 1443 (2000) (reviewing ARTHUR L. LIMAN, LAWYER (1998)) (arguing that lawyers across the legal profession make valuable contributions to economic and political life), *with* Common Good, Society: Recommended Reading, http://cgood.org/society-reading-other-booklist-8.html (recommending ROBERT A. KAGAN, ADVERSARIAL LEGALISM (2001)) ("Kagan notes that while adversarial legalism has many virtues, its costs and unpredictability often alienate citizens from the law and frustrate the quest for justice."). Common Good is a tort reform organization.

7. CTR. FOR LEGAL POLICY, MANHATTAN INST., TRIAL LAWYERS, INC. 5 (2003), *available at* http://www.manhattan-institute.org/pdf/triallawyersinc.pdf.

8. Henry M. Paulson, U.S. Sec'y of the Treasury, Remarks to the Economic Club of New York: The Competitiveness of U.S. Capital Markets (Nov. 20, 2006), *available at* http://www.ustreas.gov/press/releases/hp174.htm.

which recently changed its name to the American Alliance for Justice, states that "[o]ur opponents—the drug and oil industries, big insurance companies and other large corporations—have spent billions of dollars over the past decades . . . to eliminate the only thing left holding them accountable—the civil justice system."[9] Two academic defenders of the status quo state that the tort reformers "undermine the greatest social benefit of tort law: its ability to evolve in order to constrain new forms of [corporate] oppression."[10]

The participants are not the only ones who see themselves locked in a struggle over the direction of American civil litigation; outside observers have adopted this perspective as well.[11] The idea that a civil society institution such as law might be characterized by such a deep and strong divide between two communities of practitioners is not inevitable—it is not clear that American law reflected this kind of division before the Second World War, and I would suggest that many European lawyers would deny that their own legal communities contain factions polarized over issues of doctrine like in the United States today. Furthermore, it is not inevitable that the struggle between the tort reformers and the defenders of the status quo will be permanent in the sense that neither side will win an advantage. There are many signs that the tort reformers have pulled ahead. The best evidence is the large number of tort reforms that have been passed at both the state and federal level; the number of judicial elections they have influenced; and the way in which tort reform was, until the 2006 election, part of the Republican Party's arsenal of issues raised in contested elections. Two recent articles seem to sum up how the two sides currently stand. *The American Lawyer* published a cover story titled *It's Over*, which concluded that "[t]he power of the plaintiffs bar is on the wane."[12] *Business Week*'s cover story was titled *How Business Trounced the Trial Lawyers*.[13]

In this Essay I review three books that tell the story from the "losing" side—the defenders of the status quo. The story revealed by these three books can be told at three levels. The first is substantive: How dangerous or benign is the tort system, and more specifically, how dangerous or benign are

9. Open letter from Lewis S. "Mike" Eidson, President, Am. Trial Lawyers Ass'n (Dec. 5, 2006), *available at* http://www.atla.org/about/aaj.aspx.

10. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 4 (2001).

11. *See, e.g.*, Stephen D. Sugarman, *Ideological Flip-Flop: American Liberals Are Now the Primary Supporters of Tort Law*, *in* 2 ESSAYS ON TORT, INSURANCE, LAW AND SOCIETY IN HONOUR OF BILL W. DUFWA 1105, 1120 (Hugo Tiberg & Malcolm Clarke eds., 2006) ("As the voices on the left became more and more the voices of the plaintiff lawyers, and the voices on the right became more and more embittered . . . the battles over tort law became more and more strident and politically more partisan."); Stuart Taylor, Jr. & Evan Thomas, *Civil Wars*, NEWSWEEK, Dec. 15, 2003, at 42, 43 (surveying the effects of a "litigation explosion" over the last thirty years on professionals such as doctors, teachers, and ministers).

12. Alison Frankel, *It's Over: Tort Reformers, Business Interests, and Plaintiffs Lawyers Themselves Have Helped Kill the Mass Torts Bonanza—and It's Not Coming Back*, AM. LAW., Dec. 2006, at 78, 78.

13. Michael Orey, *How Business Trounced the Trial Lawyers*, BUS. WK., Jan. 8, 2007, at 44.

those people who populate the plaintiff's side of the equation (namely, those claiming compensation and the lawyers who assist them)? The second is technical: How did the tort reformers win? What techniques did they adopt? Could the defenders of the status quo have used the same tools? The third is analytical: Why has American civil litigation polarized in the way captured by my description above? Is it an inevitable feature of adversarial legalism? If so, is that a reason for those who defended the status quo to rethink the virtues of adversarial legalism and to consider alternative ways to promote the interests of society?

In Part II I discuss Tom Baker's *The Medical Malpractice Myth*;[14] in Part III I discuss Herbert Kritzer's *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States*;[15] and in Part IV I discuss William Haltom and Michael McCann's *Distorting the Law: Politics, Media, and the Litigation Crisis*.[16] In Part V, I bring together various themes developed in the earlier Parts that relate to the larger question of whether the tort reform movement has succeeded because it was able to successfully depict the tort lawyers and their clients as out of step with certain features of American political culture. I conclude that these three books do an excellent job of demonstrating that the tort reformers' critique of the status quo is based, in part, on a set of myths about how, at some point in the recent past, the plaintiff's bar stopped playing by the "rules" of America's system of adversarial legalism (by filing frivolous claims and putting their own interests above those of their clients and society). As I note in my review of Haltom and McCann's book, the conventional tort reform critique, as they portray it, depends crucially on the claim that many tort plaintiffs are undeserving and their lawyers—who know this—are dishonest. While I do not want to deny that there is a need for a rebuttal of this part of tort reformers' worldview, I want to suggest in the Conclusion that rebutting it has limited value to those who want to defend the status quo.

What these three books miss—or at least choose not to discuss—is that the tort reform movement may be motivated by a principled, almost ideological, disagreement with the defenders of the tort system that transcends mere allegations of self-interest and mendacity. The tort system has fundamentally changed since the late 1950s, and many of those fundamental changes are based on a rethinking of the role of individual fault in a system of private law liability. In the Conclusion I will suggest that the tort reformers, however crudely, have been motivated to attack not by myths about how plaintiffs lawyers subvert the tort system as a system of individual responsibility, but by an accurate understanding that, since the late 1950s, many defenders of the tort system have sought to challenge the principle that

14. TOM BAKER, THE MEDICAL MALPRACTICE MYTH (2005).

15. HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

16. WILLIAM HALTOM & MICHAEL MCCANN, DISTORTING THE LAW 60 (2004).

tort liability ought to be based on individual fault. The tort reformers' real fear is not that tort law after the 1950s was corrupted by dishonest men (and women) but that it was transformed by honest, well-intentioned scholars, judges, and lawyers whose views would have (in the tort reformers' view) disastrous consequences for the law as well as the economy. This Essay ends, therefore, not by defending the tort reformers, but by questioning whether a modern defense of the status quo can be effective if it fails to grapple the most interesting reasons for the tort reformers' critique.

II. Baker: Myths About Medical Malpractice

A. Two Kinds of Medical Malpractice Myths

Tom Baker's book, *The Medical Malpractice Myth*, presents a story about tort reform in one relatively small portion of the civil litigation universe. Recent surveys of the litigation rates in the United States suggest that medical malpractice suits comprise about 14% of all tort cases that go to trial.[17] Over the past ten years medical malpractice tort reform has gained momentum,[18] and although it is currently stalled in Congress, federal tort reform has been a goal of the Republican Party since 2000.[19] Baker's primary focus is the multiple myths that people believe about the world of medical malpractice.

The myths fall into two camps. On the one hand, there are the myths about how tort litigation has negatively impacted the environment in which medical professionals work, thus making medical care more expensive and less available. Baker identifies four myths. First, that tort litigation often

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17. THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 2001, at 2 tbl.1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc01.pdf; Seth A. Seabury et al., *Forty Years of Civil Jury Verdicts*, 1 J. EMPIRICAL LEGAL STUD. 1, 11 fig.2 (2004). It should be pointed out that Seabury et al. note that "[t]he fraction [of cases] involving medical malpractice increases fairly gradually over the first three decades [1960–1990], rising from 2.1 percent in the 1960s to 6.7 percent in the 1980s, and then increases sharply to 14.7 percent in the 1990s." Seabury et al., *supra*, at 12. The figure for the 1990s seems inconsistent with results for Texas as reported in Bernard Black et al., *Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRICAL LEGAL STUD. 207, 208–09 (2005) (reporting a study of the Texas Closed Claim Database, which includes data from 1988 to 2002, that shows malpractice claims and payouts were stable over that period).

18. The American Tort Reform Association reported, for example, that by 2006, fifteen states had passed tort reforms that exclusively limited non-economic damages in medical malpractice suits. *See* AM. TORT REFORM ASS'N, TORT REFORM RECORD 31–38 (2006), *available at* http://www.atra.org/files.cgi/7990_Record_7-06.pdf (cataloging exclusive reforms in Alaska, Colorado, Georgia, Idaho, Illinois, Kansas, Michigan, Mississippi, Missouri, Montana, North Dakota, South Carolina, Texas, Utah, and West Virginia).

19. *See* REPUBLICAN NAT'L COMM., THE 2000 REPUBLICAN PARTY PLATFORM (2000), *reprinted in Republicans Adopt "Uplifting and Visionary" Party Platform*, 56 CONG. Q. ALMANAC D-22, D-44 (2000) (arguing for federal rules changes to discourage frivolous lawsuits, for caps on non-economic and punitive damages in federal lawsuits, and for requirements that a party rejecting a reasonable settlement offer pay the opposing party's legal fees).

encourages unjustified claims of malpractice.[20] Second, that excessive tort litigation has caused a rapid and burdensome increase in medical malpractice premiums.[21] Third, that the current levels of medical malpractice litigation cause "defensive" medicine.[22] Finally, that current levels of medical malpractice litigation cause doctors to either move or retire.[23]

The second group of myths concerns the value of medical malpractice litigation to American society. Baker wants to show that medical malpractice litigation should be viewed as a socially valuable activity. Baker confronts the myth that there currently is enough (and maybe too much) medical malpractice litigation in America.[24] Baker argues that we currently tolerate a "crisis" of medical malpractice that is undetected and uncompensated. Consequently, more medical malpractice litigation would be good, since it would help society see just how much malpractice is really occurring. He also addresses the myth that medical malpractice litigation does not make medicine safer.[25] Some defenders of the status quo might think that medical malpractice litigation's primary or only value is to provide compensation to those who have been injured by medical error. Baker does not deny that this is one important function, but he goes further. He thinks that medical malpractice litigation is an important engine for safety and should be embraced for that reason. To his credit, Baker takes the somewhat unusual and brave view that policymakers, citizens, and even doctors should welcome an increase in medical malpractice claims and litigation in the near future.

B. Myths About What Litigation Does to the Practice of Medicine

1. Litigation and Frivolous Claiming.—According to Baker, the medical malpractice system does not bring unjustified claims into the system.[26] Of course, this claim depends on the definition of an "unjustified" claim. Baker defines an "adverse event" as an injury *caused* by medical treatment (as opposed to the underlying condition for which she was treated or some other cause) and medical malpractice as an adverse event "due to a reasonably avoidable error, or carelessness by either an individual or medical care system, or both."[27] The point of adding the modifier "reasonably

20. *See infra* notes 26–36 and accompanying text.

21. *See infra* notes 37–43 and accompanying text.

22. *See infra* notes 44–52 and accompanying text.

23. *See infra* notes 53–58 and accompanying text.

24. *See infra* notes 59–88 and accompanying text.

25. *See infra* notes 89–120 and accompanying text.

26. *See* BAKER, *supra* note 14, at 77–78 (citing analysis of closed malpractice claim files suggesting that unjustified payment of claims is not common).

27. *Id.* at 27–28, 32 (quoting from the survey form used by the Harvard Medical Practice Study). Studies that defined medical malpractice more liberally—for example, as an adverse event that was "preventable"—produced rates of malpractice up to two times higher than the Harvard Study. *See id.* at 35–36 (citing the Australian government's and Chicago universities' studies).

avoidable" to the noun "error" is to capture the simple truth that in tort law, not all errors are negligence, even if lay people (and doctors) sometimes conflate the two terms.[28]

According to Baker, numerous studies confirm that claims of malpractice, on review, usually involved adverse events that were reasonably avoidable.[29] In conclusion, says Baker, "the research clearly refutes the myth that the wrong people generally get paid in medical malpractice."[30]

To his credit, Baker acknowledges that others have interpreted the data differently. Professors Mello and Brennan have claimed that a follow-up to the Harvard Medical Practice Study shows that "the presence of negligence was not a statistically significant predictor" of whether a plaintiff would be compensated.[31] Baker explains his disagreement with this interpretation of the follow-up Harvard Medical Practice Study and directs the reader to a longer article he has published detailing his disagreement.[32] Since then, a separate Harvard study of closed cases has given strong support to Baker's conclusion.[33] This study examined 1,452 malpractice claims randomly selected from five insurance companies that were resolved with either a verdict, settlement, or dismissal (voluntary or court-ordered).[34] The researchers concluded that although the number of groundless claims was relatively high (close to 40%), insurers were very effective at weeding those claims out, resulting in a much higher rate of payment for injuries that were caused by medical error than for injuries that were not the result of medical error (73% versus 28%).[35] Also, payments for injuries that were not due to error

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28. *See* Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEXAS L. REV. 1595, 1599 n.22 (2002). It should be noted that some of the original *Harvard Medical Practice Study*'s authors have expressed serious doubts about the accuracy of adverse event studies based on file reviews. *E.g.*, Eric J. Thomas et al., *The Reliability of Medical Record Review for Estimating Adverse Event Rates*, 136 ANNALS INTERNAL MED. 812, 814 (2002).

29. Baker bases his conclusion on numerous studies, including a study from a major New Jersey teaching hospital. *See* Frederick W. Cheney et al., *Standard of Care and Anesthesia Liability*, 261 JAMA 1599 (1989); A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence: Results of the Harvard Medical Practice Study III*, 325 NEW ENG. J. MED. 245 (1991); Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS INTERNAL MED. 780 (1992).

30. BAKER, *supra* note 14, at 83.

31. Mello & Brennan, *supra* note 28, at 1619. "Rather, the most important driver of damages was the severity of the plaintiff's injury, whether due to negligence or not." *Id.*

32. BAKER, *supra* note 14, at 82–83; *see* Tom Baker, *Reconsidering the Harvard Medical Malpractice Study Conclusions About the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501 (2005); *see also* David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1095–97 tbl.2 (2006) (surveying nine studies of the accuracy of the medical malpractice system and finding a very low rate of "false positives").

33. *See* David M. Studdert et al., *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, 354 NEW ENG. J. MED. 2024 (2006).

34. *Id.* at 2025–26.

35. *Id.* at 2028 fig.1.

were typically much lower than for those due to error, resulting in claims not involving errors accounting for only 13% to 16% of the system's total monetary costs.[36]

2. Litigation and Insurance Costs.—Baker does not deny that doctors have sometimes experienced periods of rapid increases in their medical malpractice insurance rates.[37] He argues, however, that no evidence exists demonstrating a causal relation between medical malpractice litigation and the pricing problems facing medical malpractice insurers. His argument, in a nutshell, is that medical malpractice premiums are controlled by an unpredictable cyclical market in insurance premiums, not by rising costs to the insurers in the form of increased tort expenses (whether verdicts or settlements).[38] Baker notes that medical malpractice is different from the auto insurance market because of its "long tail."[39] Since insurers have to build a reserve against future losses at the same time that they sell a policy, there is a good chance that the reserves chosen by the insurer may prove to be too large or too small once claims start accruing. This basic source of uncertainty generates further sources of potential error that can produce over- and under-reserving in the cycle.[40]

This explanation makes some sense, but it seems to depend crucially on the claim that a normal medical malpractice insurance market *as it has evolved* is inherently unstable. This argument assumes that certain features in the delivery of medical care (the length of time between the issuance of insurance and the discovery of injury, for example) makes it unique among all other insurable activities such as automobile operation, property ownership, and the operation of a business. One wonders why medical malpractice is so difficult that even large companies who seem to be able to profitably market a wide range of insurance products are so incompetent in the area of medical malpractice.[41]

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36. *Id.* at 2031 tbl.3.

37. BAKER, *supra* note 14, at 66.

38. *Id.* at 51–61.

39. *See id.* at 58–60 (explaining various uncertainties in the medical malpractice context that make it difficult to forecast medical malpractice insurance pricing). The time that transpires between the purchase of insurance and the emergence of a claimant against the insured's policy can be very long, depending on the nature of the insured's specialty and the injury. A much more detailed version of this argument can be found in Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393, 398 (2005).

40. BAKER, *supra* note 14, at 53–54. To support his claim that it is impossible to blame medical malpractice litigation for the entry of insurers into hard markets, Baker cites research based on closed claims reported to the Texas Insurance Commissioner. *Id.* at 55. This research explores the idea that spikes in medical malpractice rates did not result from dramatic increases in payments by those insurers, but from underreserving in prior years. Black et al., *supra* note 17, at 253–55.

41. For example, the St. Paul Companies is one of the nation's largest insurers, with a history of success in other liability and property lines. It left the medical malpractice market in 2001, citing excessive liability costs. *See* Milt Freundenheim, *St. Paul Cos. Exits Medical Malpractice Insurance*, N.Y. TIMES, Dec. 13, 2001, at C14 ("St. Paul, the nation's fourth-largest business

Assuming, however, that Baker is correct and medical malpractice poses unique challenges to the insurance industry, the solution he proposes makes a lot of sense. Baker recommends that the medical malpractice insurance market be scaled upwards, away from individual policies marketed to specific professionals based on their individual risk profile, toward a system of enterprise insurance.[42] Under an enterprise insurance model, the risk of uncertainty is shared across a much wider set of insureds, thus maximizing the possibility that miscalculation and dramatic swings in liability exposure could be ameliorated. Furthermore, enterprise insurance allows doctors in low-risk, low-exposure specialties to subsidize those in high-risk, high-exposure specialties.[43]

3. Defensive Medicine.—Myths about medical malpractice litigation causing defensive medicine and driving doctors out of needed specializations and underserved areas are the most dangerous because they suggest that, at the very least, there may have to be a trade-off between the medical negligence system and access to health care.[44] Baker notes that the public understands "defensive medicine" as describing medical care that would not have occurred but for the fear of groundless litigation—that is, medical care that is wasted because it is not justified under the circumstances.[45] Notwithstanding this fairly important point, the definition of "defensive medicine" used by Congress's Office of Technology Assessment (OTA) is "tests and procedures used 'primarily as a protection against potential medical malpractice claims.'"[46] Defensive medicine under the latter definition might not be wasted medical care at all—when a physician takes

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insurer, said it was facing losses on its malpractice business of $940 million this year."); *see also* N.R. Kleinfeld, *The Malpractice Crunch at St. Paul*, N.Y. TIMES, Feb. 24, 1985, § 3, at 4 (reporting that "[o]nly about 15 percent of St. Paul's $2.4 billion in annual revenue last year came from medical malpractice premiums").

42. BAKER, *supra* note 14, at 174–78.

43. Baker concedes that in a perfectly competitive market, this cross-subsidy would not be necessary, since high-risk, high-exposure physicians could raise their prices to reflect the cost of insurance. *Id.* at 64–65. But the market for medical care does not operate in anything like a perfect market, although one might argue that the enterprise insurance Baker recommends mutes the deterrence signal that would drive doctors to be more careful. *See* Hyman & Silver, *supra* note 32, at 1131 (recommending that medical malpractice insurance premiums should be allowed to rise to whatever level reflects the risk that doctors are imposing on patients).

44. BAKER, *supra* note 14, at 118–19. In 1992, Professor Gary Schwartz, who was not especially hostile to the tort system, posed the following thought experiment:

> Assume [that you are a judge and] that you today read in a reliable journal that the high cost of liability insurance is requiring these centers to give up on certain medical services that the centers themselves regard as quite important to patients' welfare. . . . [F]aced with the reality of the clinics' new situation, you would be inhibited from issuing a ruling that might broadly define these clinics' tort liability.

Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 691 (1992).

45. BAKER, *supra* note 14, at 118–20.

46. *Id.* at 119.

steps to conform to the standard of care of her profession in order to avoid liability, it is an example of the tort system working properly.[47]

This confusion over the definition of defensive medicine explains why it has been hard for researchers to discover it in action. Baker rightly dismisses all the studies that are based on opinion surveys asking doctors to report their impressions about how much defensive medicine they perform, because they are likely to conflate the two definitions.[48] Other studies that were designed to capture how doctors perform certain procedures—either by conducting clinical scenario surveys or reviewing hospital records—revealed very little defensive medicine except in certain high-risk scenarios.[49] The only studies that showed any significant degree of defensive medicine were those based on comparing Medicare records of hospitals that, because of the passage of tort reforms, were subject to differential threats of malpractice litigation.[50] In two areas of heart disease, the researchers found that hospitals in states with tort reform spent less money on treating these diseases without any harm to the patients.[51] This suggests that the researchers found evidence of defensive medicine. But, as Baker suggests, it is very hard to generalize from their results, and even the authors concede that the deflationary effect of limiting tort liability was short-lived.[52]

4. The Supply of Doctors.—The problem with demonstrating that medical malpractice litigation drives doctors from certain practice areas or from certain states is the same as trying to prove that litigation drives defensive medicine. One must either ask doctors to report why they take certain actions, or one has to use very crude proxies—such as the relationship between the application of damages caps in medical malpractice litigation with certain statistical trends, for example the increase in prenatal health in underserved communities or the decline in heart disease rates. At most, what researchers found is that in areas where doctors are already under a great deal of financial stress—such as poor, rural areas—any lessening of financial risk

47. The OTA definition does not distinguish, therefore, between a physician responding to a liability-based incentive generated by the Hand Test and a physician overinvesting in safety. *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 85–86 (1987). This distinction may not be easy to define in practice, but it is central to much of modern tort theory, especially the law and economics school. *See* Mark F. Grady, *Why Are People Negligent? Technology, Nondurable Precautions, and the Medical Malpractice Explosion*, 82 NW. U. L. REV. 293, 299, 301–02 (1988).

48. BAKER, *supra* note 14, at 120–21.

49. *Id.* at 124–26.

50. *See, e.g.*, Daniel Kessler & Mark McClellan, *Do Doctors Practice Defensive Medicine?*, 111 Q.J. ECON. 353 (1996).

51. BAKER, *supra* note 14, at 127–28.

52. *See id.* at 129–30. Baker notes that the Congressional Budget Office was asked to substantiate the claim that cutting back on medical malpractice litigation (by capping damages, for example) would reduce defensive medicine. Much to the chagrin of the sponsors of proposed federal tort reform legislation, the CBO returned empty-handed. *Id.* at 133–34.

had an impact.[53] But, as Baker says, that tells us more about the uniquely parlous nature of practice in underserved areas, and not about the effect of malpractice litigation on the vast majority of doctors who are in suburban and urban practices.[54]

The one area, Baker acknowledges, where malpractice seems to affect substantially decisions about where and how to practice is obstetrics.[55] There was a time when family physicians maintained "part-time" obstetrics practices (as well as part-time surgery practices). As the cost of insurance for certain risky activities grew faster than the cost of insurance for "regular" family medicine, the general practitioners had to decide whether to pay a very large amount of insurance for a part-time activity, or to stop the occasional performance of procedures outside the field of family medicine.[56] Most chose the latter. This just tells us that the increase in the cost of medical malpractice premiums may reflect a trend in medicine toward greater and greater specialization.[57] Perhaps the adoption of the enterprise insurance proposal endorsed by Baker might reverse this trend, although as Baker points out, if policymakers were really concerned about increasing the number of family practitioners in areas underserved by specialists, there are cheaper and fairer ways to achieve this goal than by asking injured patients to accept less compensation in the event of negligence.[58]

C. Myths About Litigation's Lack of Social Value

There are two related myths about the social value of litigation that Baker wants to combat with his book. The first myth is that we already have too much medical malpractice litigation. The second myth is that medical malpractice litigation may serve certain compensation functions, but it does not serve any larger social goals, such as promoting safer medicine.

1. How Much Malpractice Litigation Should There Be?—Baker argues that there are far fewer people filing malpractice lawsuits than there are victims of medical malpractice.[59] He cites numerous sources for this proposition, and it seems quite plausible from everything that we know about the litigation system.[60] The proportion of victims of medical malpractice who sue seems to be less than 5%.[61] There are many reasons, some obvious

53. *Id.* at 151.
54. *Id.*
55. *Id.* at 154.
56. *Id.*
57. *Id.* at 153.
58. *Id.* at 154–55.
59. *Id.* at 68–70.
60. *Id.* at 69–70; *see also* Hyman & Silver, *supra* note 32, at 1089–91 (collecting studies and concluding that patients "like other tort victims" are reluctant to sue).
61. BAKER, *supra* note 14, at 69 (citing LORI B. ANDREWS, MEDICAL ERROR AND PATIENT CLAIMING IN A HOSPITAL SETTING (1993); Localio et al., *supra* note 29; David M. Studdert et al.,

and some not so obvious, as to why people who have suffered medical malpractice do not sue. Obviously, some medical malpractice may not result in injuries serious enough to justify litigation. Some medical malpractice may be corrected by those who caused it, in which case its effects may be mitigated, its costs absorbed by the potential defendant, and its occurrence concealed from the victim or third parties.[62] Even where medical malpractice has resulted in significant pain and suffering or permanent injury, victims may find it difficult to find an attorney willing to take a case in a jurisdiction that has damages caps if the economic damages do not comprise a significant portion of the injury.[63]

For Baker, litigation rates of 5% or less seem suspiciously low.[64] He does not make this argument by setting out an a priori litigation rate that he thinks would be closer to the "right" amount. To answer this question, he would have to venture into some very controversial territory concerning the point of litigation. Is it to replace all uncompensated losses caused by malpractice? Is it to incentivize optimal levels of precaution? If so, what counts as optimal? Levels of precaution that maximize social welfare, taking into account the social costs of investing in safety, or that level of precaution that maximizes the number of persons protected from negligent harm?

Baker's argument is more cautious. It is something like this: We know the rate is currently too low—but we will not know how much higher it should be until negligently injured persons have enough information to decide whether to sue.[65] And the evidence suggests that they do not. Baker marshals a variety of studies indicating that the reason there are so few "false positives" in medical malpractice litigation (payments for non-negligent care) is that the litigation process itself weeds out claims that are meritless.[66] Baker argues that few plaintiffs or their lawyers know whether their claims are legally meritless when they are filed. Since physicians and hospitals are not likely to volunteer information to a patient about the cause of an adverse

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Negligent Care and Malpractice Claiming Behavior in Utah and Colorado, 38 MED. CARE 250 (2000).

62. *See* John C.P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075, 1078 (2006) (noting that "[a] scheme designed to empower victims to pursue claims is failing if the reason those claims are not being brought is that wrongdoers are able to hide their wrongs").

63. *See generally* Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link Between Damage Caps and Access to the Civil Justice System*, 55 DEPAUL L. REV. 635 (2006).

64. *See* BAKER, *supra* note 14, at 157 ("[T]he fundamental problem with medical malpractice lawsuits is almost exactly the opposite of what the medical malpractice myth would have us believe. The problem is not that there are too many claims; the problem is that there are too few.").

65. *See id.* at 157–62 (arguing in favor of reform that would require "medical-injury disclosure" so that "patients with adverse outcomes will have a better understanding of the causes of those outcomes, and there should be fewer lawsuits filed in situations in which there was no medical management injury or negligence").

66. *Id.* at 83–87; *see also* Hyman & Silver, *supra* note 32, at 1101–04 (citing studies for the same proposition).

event, "patients use litigation to find out whether the hospital was negligent."[67]

Baker is aware of the fact that litigation is expensive, and so his information-forcing recommendation—more lawsuits—may be more costly than the benefits it might produce. The ultimate answer to this objection is, of course, that it depends on the scale of the benefits. But Baker has thought about the costs question and suggests ways to force information into the hands of injured patients in ways that arguably might be less expensive than one might first suspect.

First, Baker recommends the adoption of a "disclosure requirement."[68] Baker recommends the creation of an agency to which physicians and hospitals would be required to disclose any "adverse or possible adverse health-care event."[69] This sort of comprehensive information gathering is extremely attractive to anyone interested in adopting a no-fault, administrative approach to medical injury, since it allows institutions to gather large amounts of data and to adopt a systems-approach to the problem of medical injury.[70] Baker does not deny this advantage but stresses that adverse-event reporting would "improve the ability of patients to judge the merit of potential lawsuits," thus reducing the cost of bringing a legal claim.[71]

Second, Baker recommends the adoption of an "apology and restitution incentive."[72] A provider who acknowledged fault for a patient's injuries and who offered "restitution" would be released from the risk of liability if the offer was accepted.[73] If it was not, the provider would gain an advantage similar to the "early offer" plans or the "offer of judgment" rules.[74] A

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67. BAKER, *supra* note 14, at 84. Baker does not discuss why expert certification of a medical malpractice complaint prior to filing—a mild tort reform adopted in numerous states—does not perform a sufficient screening function. *See, e.g.*, Act of June 20, 1995, ch. 309, 1995 N.C. Sess. Laws 611 (codified at N.C. R. CIV. P. 9(j)) (requiring that plaintiffs alleging medical malpractice have a qualified expert review the case prior to filing a complaint). Baker's response, I think, is that as long as the defendants are not candid, a plaintiff's independent expert will not be able to make a considered judgment about the cause of an adverse event without the benefit of some process.

68. BAKER, *supra* note 14, at 159.

69. *Id.* at 160.

70. *See* Mello & Brennan, *supra* note 28, at 1626–28. The power of data collection as a tool to improve the organization of dangerous activities was first celebrated by the progressives and realists, who were suspicious of tort litigation based on fault. *See* Anthony J. Sebok, *The Fall and Rise of Blame in American Tort Law*, 68 BROOK. L. REV. 1031, 1040 (2003) (describing the realists' skepticism of individual fault as a useful datum for improving safety in industrial conditions); John Fabian Witt, *Speedy Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 37 (2003) (describing "safety engineers" and the rise of workman's compensation).

71. BAKER, *supra* note 14, at 168.

72. *Id.* at 162.

73. *Id.*

74. *See, e.g.*, Jeffrey O'Connell & Ralph M. Muoio, *The Beam in Thine Eye: Judicial Attitudes Toward "Early Offer" Tort Reform*, 1997 U. ILL. L. REV. 491; Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006). While Baker might find his and O'Connell's proposals

plaintiff who refused the offer would be forced to pay for the defendant's legal costs unless the plaintiff's jury award is at least 20% more than the defendant's restitution offer.[75] The proposal would lessen the cost of litigation by encouraging defendants to give plaintiffs for free something that otherwise would cost plaintiffs dearly (in terms of expert witness fees, discovery, etc.)—an admission of liability.

Baker argues that his apology and restitution proposal simply capitalizes on information that is easily within defendants' reach in medical malpractice cases. Research shows that insurance companies are able to identify early on which claims are valid and recommend bigger settlements in cases of clear liability than in cases of uncertain liability.[76] And research suggests that contrary to popular belief, medical malpractice insurers often do not offer to settle at all.[77]

Both these proposals are extremely attractive, but they reflect an ambivalence between differing goals. The disclosure requirement will force a lot of information out, but it is not clear that it will be fine-grained enough to allow victims of an adverse event to know whether it was caused by negligence. Baker notes that the Harvard Medical Practice Study found that "doctors and hospitals *injured* about one out of every twenty-five hospital patients and that there was *negligence* in about one of every four of those cases."[78] From the point of view of enabling litigation, the disclosure requirement is a good thing only if it improves victims' ability to detect

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quite different, I would argue that they share a fundamental premise: delay in litigation is bad for all parties and the right mix of carrots and sticks for plaintiffs to settle is a good thing.

75. BAKER, *supra* note 14, at 170.

76. *Id.* at 169; *see also id.* at 78–82 (reviewing closed claim studies); Cheney et al., *supra* note 29, at 1603 ("[T]he standard of care rendered to the patient significantly influences the likelihood and amount of payment."); Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 RAND J. ECON. 199, 216 (1991) (showing that hospitals are more likely to resolve disputes before mediation when care quality is clear); Frank A. Sloan & Chee Ruey Hsieh, *Variability in Medical Malpractice Payments: Is the Compensation Fair?*, 24 LAW & SOC'Y REV. 997, 1029 (1990) ("Randomness in predicting awards at verdict makes out-of-court settlement less likely."); Stephen J. Spurr & Sandra Howze, *The Effect of Care Quality on Medical Malpractice Litigation*, 41 Q. REV. ECON. & FIN. 491, 497–99 (2001) ("Whether or not there is a settlement payment seems to depend entirely on the strength of the evidence of negligence."); Taragin et al., *supra* note 29, at 781 ("[P]hysician care influenced the stage of resolution. A jury verdict was required for 15% of defensible cases, for 10% of cases in which defensibility was unclear, but in only 5% of indefensible cases . . . .").

77. *See* Hyman & Silver, *supra* note 32, at 1123 (citing Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 342 (1991) and Deborah Jones Merritt & Kathryn Ann Barry, *Is the Tort System in Crisis? New Empirical Evidence*, 60 OHIO ST. L.J. 315, 372 (1999)). As David Hyman and Charles Silver put it, "Why don't [insurers] just pay up?" *Id.* at 1122.

78. BAKER, *supra* note 14, at 29 (emphasis added). The Harvard definition of adverse event included non-negligent error; only after medical injuries that were identified as adverse events were collected did the researchers then ask the second question, which was whether the adverse event was the result of negligence. *Id.* at 28.

negligence. Given the fact that non-negligent adverse events vastly outnumber negligent adverse events,[79] it is not clear that it will do so.

This ambivalence extends to the apology and restitution proposal. For what is the provider supposed to apologize? Baker suggests that the option would be available for any "medical injury" that the patient suffered.[80] Given that under Baker's proposal an apology is an admission of liability, regardless of whether the restitution is accepted,[81] it is hard to imagine providers apologizing except when they possess credible (at least to them) evidence of their own negligence. This information is not likely to be developed in the absence of litigation.[82] Therefore, it is not obvious how the apology proposal would increase the flow of information to victims of malpractice who have not already decided to file a lawsuit.

Nonetheless, Baker suggests that providers would, for injuries caused by errors that were not negligent, offer apologies.[83] This seems to be how Lee Taft, upon whom Baker relies, imagines an apology system operating.[84] This impression is further reinforced by Baker's terminology: apology leads to restitution, not compensation.[85] The significance of this word change is not clear.[86] Restitution conventionally refers to redress of wrongful gains, not wrongful losses.[87] In the context of medical injury, is restitution supposed to refer to only a subset of losses suffered by the victim, such as the

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79. *See* Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients: Results of the Harvard Medical Practice Study I*, 324 NEW ENG. J. MED. 370, 371 (1991) (calculating based on a random sample study of New York medical records that, of the total number of adverse events, 27.6% were due to negligence).

80. BAKER, *supra* note 14, at 162.

81. *Id.* at 162, 171.

82. The closed claim studies all refer to insurance companies' decision to settle *lawsuits*. *Id.* at 78–83. It is not clear whether insurers or providers would be able to distinguish frivolous and nonfrivolous claims of negligence from the huge volume of adverse events that in theory ought to be reported. To be sure, once a report of an adverse event ripens into a lawsuit, the incentives built into the early offer structure would encourage early settlement. This was the lesson of the "offer of judgment" rule in New Jersey on auto and homeowner litigation. *See id.* at 169–70.

83. *See id.* at 171 (describing with approval an argument that "apology and restitution offer therapeutic benefits to both doctor and patient" because "'[u]ndisclosed error interrupts the essential ingredient of trust between doctor and patient and disrupts the doctor's sense of integrity'" (quoting Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 66 (2005))).

84. *See* Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55 (2005). In reporting on the experience of the Veterans' Administration hospital in Lexington, Kentucky, which had a very successful experience with an apology and restitution program, Taft states that the hospital would apologize if "risk management identifies 'an instance of accident, possible negligence, or malpractice.'" *Id.* at 83. *But see* Jonathan R. Cohen, *Apology and Organizations: Exploring an Example from Medical Practice*, 27 FORDHAM URB. L.J. 1447, 1453 (2000) (stating that an apology would follow if "the risk management committee believed that the hospital or its employees had been at fault").

85. *See* BAKER, *supra* note 14, at 162.

86. Baker may have taken the term from Taft. *See* Taft, *supra* note 84, at 84.

87. *See* Hanoch Dagan, *The Distributive Foundations of Corrective Justice*, 98 MICH. L. REV. 138, 143 (1999).

cost of repairing the medical error (e.g., economic losses)? This would make sense from the point of view of encouraging providers to apologize for any kind of error they may have committed, since they might be more willing to admit "liability" if all it entailed was that they act like a health insurer and cover all the subsequent medical costs resulting from the error that they caused.[88] But again, it would not necessarily do much to increase claims by victims for compensation for the full range of damages protected by the tort of negligence.

2. Does Medical Malpractice Litigation Deter Negligence?—Baker argues that the desire to sue for medical malpractice should be encouraged because it serves a number of important social goals. One obvious goal is compensation.[89] He accepts that, given that only about one out of every three dollars spent litigating medical malpractice cases goes to the plaintiff, it is an expensive way to compensate.[90] It is true that medical malpractice trials generate extremely high awards compared to other tort suits; the Bureau of Justice Statistics estimates that the median award in large counties in 2001 was sixteen times higher than that of other tort suits ($425,000 versus $27,000).[91] But this is to be expected—medical malpractice can create especially severe injuries. In fact, according to one study, the verdicts produced by litigation tend to undercompensate victims by half, as compared to the actual economic losses suffered by victims of medical malpractice.[92]

The other major social goal that litigation promotes is deterrence.[93] Baker's arguments for the deterrent effect of medical malpractice litigation are theoretical and empirical. As a theoretical matter, he seems to be a strong believer in the deterrent effect of liability.[94] Baker notes that the sort of cost–benefit reasoning that many civil liability scholars recommend for tort law in

88. It should be noted that one of the other reforms proposed by Baker is a supplemental no-fault compensation provision that would cover the economic costs of an adverse event. BAKER, *supra* note 14, at 163–64. This suggests that the restitution that would be offered under the apology and restitution reform would be a substitute for the full range of damages available under the fault system.

89. *Id.* at 110.

90. *Id.* at 111. By comparison, in the mid-1980s administrative costs consumed only 10% of New Zealand's accident compensation scheme, which had largely replaced its tort system. *See* STEPHEN D. SUGARMAN, DOING AWAY WITH PERSONAL INJURY LAW 40 (1989). Sugarman claims that once payment for collateral sources and non-economic damages are added to litigation costs, only "10–15 percent of the costs of the tort system go to compensating victims for out-of-pocket medical expenses, lost income, and the like." *Id.*

91. COHEN, *supra* note 17, at 1.

92. Frank A. Sloan et al., *Compensation*, *in* SUING FOR MEDICAL MALPRACTICE 187, 220 (Frank A. Sloan et al. eds., 1993). This study reported that the most severely injured received the smallest fraction of their actual losses. *Id.*

93. BAKER, *supra* note 14, at 105–06. Baker also diseusses a third social goal or, more properly, value that medical malpractice litigation promotes: "American values" in individual responsibility, autonomy, and corrective justice. *Id.* at 111–14. I will return to this theme in my conclusion below.

94. *Id.* at 106.

general is viewed with skepticism in the case of medical malpractice.[95] But this skepticism is ad hoc: there is no reason to believe that deterrence works differently in medical malpractice than in the rest of tort law. In fact, as Professors Hyman and Silver put it, "The main problem with the legal system is that it exerts too little pressure on health care providers to improve the quality of the services they deliver. . . . Safe health care is expensive, and the tort system forces providers to pay only pennies on the dollar for the injuries they inflict."[96]

Baker's empirical example for the deterrent effect of medical malpractice is the experience of anesthesiologists.[97] Throughout the 1980s anesthesiologists viewed themselves, like obstetricians today, as victims of the tort system gone awry.[98] They were facing soaring insurance premiums and were subjected to disproportionately high damage awards compared to other specialties.[99] The American Society of Anesthesiologists (ASA) decided that, in Baker's words, "if you can't beat them, join them."[100] Rather than blame tort lawyers or greedy plaintiffs for their rising costs, they decided to examine the way that anesthesiology was actually being done and to objectively evaluate whether it could be made safer.[101] The ASA comprehensively reviewed 6,400 closed insurance claims, looking for the frequency and circumstances of certain injuries and procedures.[102] It developed practice guidelines that changed the definition of the standard of care, which helped providers avoid simple errors that led to injury.[103] Reform has also been generated by studies in the wake of malpractice settlements, such

95. *Id.* at 105–06.

96. Hyman & Silver, *supra* note 32, at 1130.

97. BAKER, *supra* note 14, at 109.

98. *See* Bernard D. Morgan, *Medical-Malpractice: A White Paper*, BUS. WIRE, Aug. 5, 1985, *available at* LEXIS, News Library, Bus. Wire file (collecting media stories about medical malpractice and its purported effects on anesthesiologists among other medical specialties).

99. *See, e.g.*, Edward A. Brunner, *The National Association of Insurance Commissioners' Closed Claim Study*, *in* ANALYSIS OF ANESTHETIC MISHAPS 17, 25, 28 (Ellison C. Pierce, Jr. & Jeffrey B. Cooper eds., 1984) (finding that anesthesia injuries accounted for only 3% of all paid claims but for 11% of all dollars indemnified and that claims arising from anesthesia procedures were more costly than for other specialties); *see also* Joseph T. Hallinan, *Once Seen as Risky, One Group of Doctors Changes Its Ways*, WALL ST. J., June 21, 2005, at A1 (reporting that during the 1980s, anesthesiologists were "terrified" of soaring insurance premiums).

100. BAKER, *supra* note 14, at 108.

101. This story is also recounted in some detail in David A. Hyman & Charles Silver, *The Poor State of Health Care Quality in the U.S.: Is Malpractice Liability Part of the Problem or Part of the Solution?*, 90 CORNELL L. REV. 893, 917–23 (2005).

102. Hallinan, *supra* note 99; *see also ASA Closed Claims Project: Overview*, http://depts.washington.edu/asaccp/ASA/index.shtml (updating number of closed claims studied by the ASA); Karen B. Domino, *Closed Malpractice Claims for Awareness Under Anesthesia: A Closed Claim Analysis*, ASA NEWSL., June 1996, http://www.asahq.org/Newsletters/1996/06_96/feature3.htm (discussing the ASA's review of awareness under anesthesia as part of this comprehensive closed claim review).

103. Troyen A. Brennan, *Methods for Setting Priorities for Guidelines Development: Medical Malpractice*, *in* SETTING PRIORITIES FOR CLINICAL PRACTICE GUIDELINES 99, 103 (Marilyn J. Field ed., 1995).

as one that insisted on anesthesia machines with built-in alarms that sounded when the mixture of oxygen and nitrous oxide was unsafe.[104]

The effects of these reforms are striking. Fatalities and the percentage of total malpractice suits filed against anesthesiologists have declined.[105] Malpractice payments have declined and claims for serious injuries have become less frequent.[106] Finally, medical malpractice insurance rates for anesthesiologists have declined over 37% in inflation-adjusted dollars between 1985 and 2005, something that is practically unheard of in the medical profession.[107]

The evidence from anesthesiology is extremely powerful. Coupled with the deep acceptance of cost–benefit analysis as an explanatory device for much of American private law, it would suggest that if the full costs of medical malpractice were to fall on providers, there would be a commensurate response and an increase in safety. Resting this argument on the experience of anesthesiology may be risky from a social science point of view, since it may be that this specialty is characterized by certain features that make its response to market incentives impossible to export to other parts of the medical community.[108]

But there is a further problem with the anesthesiology example. One could argue that the "anesthesiology model" does not prove that providers responded to signals sent by negligence determinations made by the courts, since another possible explanation is that they responded to what they perceived as a regime of strict liability masquerading as a negligence regime. Their response was exactly what Guido Calabresi predicted in *The Cost of Accidents*—the cheapest cost avoider in the anesthesiologist–patient interaction is the anesthesiologist, and, faced with liability for adverse events even under circumstances where providers had followed the applicable standard of care, anesthesiologists sought ways to reduce the total accident rate.[109] Baker quotes the chairman of the ASA Committee on Professional Liability, who said, "The relationship of patient safety to malpractice insurance premiums was easy to predict. If patients were not injured, they would not sue, and if the payout for anesthesia-related patient injury could be reduced, then insurance rates should follow."[110] Baker takes this to mean

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104. Hyman & Silver, *supra* note 101, at 922.

105. *See id.* at 918 ("In approximately a decade, mortality rates fell from 1 in 10,000–20,000 administrations to 1 in 200,000—a ten- to twenty-fold improvement!").

106. Hallinan, *supra* note 99 (reporting that payments fell 46% in inflation-adjusted dollars and claims involving death or permanent brain injury dropped from 50% to less than 33% of all claims).

107. *Id.* Baker states that they have stayed flat between 1985 and 2002. BAKER, *supra* note 14, at 109.

108. *See* Wayne J. Guglielmo, *Is This the Way to Lower Malpractice Rates?*, MED. ECON., Dec. 2, 2005, at 35, 35 ("Anesthesiologists have reduced their premiums by focusing on safety. But is that a realistic model for primary care and other doctors to follow?").

109. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS 135–73 (1970).

110. BAKER, *supra* note 14, at 109 (quoting Dr. Fred Cheney); Hyman & Silver, *supra* note 101, at 922 (same quote).

that if patients were not injured by *negligent* anesthesiology, they would not sue (and therefore the payout rate for anesthesia-related patient injury would be reduced). However, the same conclusion might follow, from the Calabresean point of view, if, regardless of negligence, suits were filed by all patients who were injured and all of them were compensated under a theory of strict liability.[111] Maybe the "anesthesiology model" is of more use to those who think that we should move to a no-fault medical malpractice system than to Baker and other defenders of the status quo.[112]

The reforms cited by Baker, whose effectiveness cannot be denied, did not necessarily push physicians from a state of carelessness to a state of adequacy under the relevant standard of care. As Troyen Brennan notes, the ASA *changed* the standard of care for American anesthesiology in order to reduce the risk of accident that was occurring under the prior standard of care.[113] The standard of care in a medical malpractice suit is "that [the] procedure is medically acceptable in the relevant community."[114] Except under the rule in *Helling v. Carey*,[115] it is hard to see how providers who were operating under the standard of care prior to the reforms instituted by the ASA were negligent, even if we now know that non-negligent anesthesiology prior to the reforms was socially inefficient.

Many of the reforms that seem so obvious in retrospect had to do with correcting "systems" errors, not individual errors.[116] Hyman and Silver describe a case in which an anesthesiology resident failed to notice that he had turned off the oxygen supply instead of the nitrous oxide supply; the case

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111. Strict liability imposes all accident costs on the provider. According to Calabresi, the tort system should "allocate accident costs in such a way as to maximize the likelihood that errors in allocation will be corrected by the market. . . . It therefore urges us, to the extent we are unsure of who the cheapest cost avoider is, to charge accident costs to that loss bearer who can enter into transactions most cheaply." CALABRESI, *supra* note 109, at 150. The provider is clearly the cheapest cost avoider; accidents that she can cost-effectively eliminate she will, and those that she cannot she will allow.

112. *See* Mark F. Grady, *Better Medicine Causes More Lawsuits, and New Administrative Courts Will Not Solve the Problem*, 86 NW. U. L. REV. 1068, 1078 (1992) (book review) (arguing that to a "great extent . . . the current negligence system for medical malpractice is already a no-fault system").

113. Brennan, *supra* note 103, at 103. For example, the ASA promulgated a new standard of care for intubation, requiring the anesthesiologist to use pulse oximetry to determine whether a breathing tube had been properly inserted; until the ASA came to this conclusion, most hospitals did not even possess a device that could perform this task. *See* Hallinan, *supra* note 99 (recounting the reluctance of hospitals to purchase pulse oximeters and capnographs during the 1980s due to their high cost).

114. DAN B. DOBBS, THE LAW OF TORTS § 242, at 633–34 (2000).

115. 519 P.2d 981 (Wash. 1974). *Helling* held that when reasonable prudence makes a duty imperative, courts may define a duty of care differently than the standards of a profession. *Id.* at 983–84. Clearly, *Helling* is consistent with *The T.J. Hooper*: "Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932). However, it may be that *The T.J. Hooper* is a bad model for medical malpractice law.

116. *See* Hallinan, *supra* note 99 (suggesting that other organizations want to emulate the ASA by "concentrating more on identifying systematic errors and less on individual blame").

settled, presumably because the plaintiff could persuasively argue that this sort of oversight was negligence, plain and simple.[117] If the resident's mistake was, as Mark Grady would put it, pure "compliance error"—that is, failure to exercise reasonable care perfectly—one could argue that the real fault lay with the machine, because some compliance errors (even really dumb ones) are foreseeable.[118] This and similar incidents have led hospitals to replace older machines with newer machines that are alarmed and have led the Anesthesia Patient Safety Foundation to adopt a formal standard requiring that the alarms be kept on (since sometimes they are turned off because they annoy the surgeons).[119] These measures show how medicine is constantly improving, but then the question is whether we think that prior to the general acceptance of these measures, a hospital's failure to throw out all of its old machines and replace them with alarmed machines was a breach of duty. With the benefit of hindsight *and* a large-scale systems analysis of thousands of claims, it is clear that alarmed machines are preferable over nonalarmed machines. However, that does not tell us what an individual provider would have understood its duty to have been under the negligence standard. It only tells us that under a system of strict liability, individual providers should have been incentivized to devise strategies that would minimize the costs of the non-negligent performance of their activity. The irony of the anesthesiology example is that it seems to support those who are skeptical of the deterrent signal sent out by the current negligence-based medical malpractice system and who prefer a no-fault system directed at enterprises, not actors.[120]

III. Kritzer: Myths About Contingency Fee Attorneys

A. Why Myths About the Plaintiffs' Bar Cause More Damage than Myths About Defendants

One of the most effective strategies in the battle over civil litigation described in Part I has been the demonization of one's opponent. It is one thing to criticize their beliefs or point out the negative consequences of their policy choices, but it is another to attack their character. The latter strategy suggests that even if citizens cannot find fault with the content of their views, those views should be distrusted because they come from someone who has self-interested motives and is corrupt. At first glance one might think that the strategy advantages neither side—mudslinging is a game that anyone can

117. Hyman & Silver, *supra* note 101, at 922.

118. "No one can comply with the negligence standard every waking moment, and no one understands this better than doctors." Grady, *supra* note 112, at 1084–85. *But see* Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 967–68 (Me. 2000) (finding liability in a case where a pharmacist made a single mistake and then failed to notice it due to deviations from the standard of practice).

119. *See* Hallinan, *supra* note 99; Hyman & Silver, *supra* note 101, at 922.

120. *See, e.g.*, Mello & Brennan, *supra* note 28, at 1624–26 (advocating a shift in medical malpractice law toward enterprise liability).

play. While true, this fact conceals how the tactical use of demonization can be dynamic, thus providing one side or another with an advantage—as I think it has in recent years during the push for tort reform.

As William Haltom and Michael McCann point out, one of the hallmarks of the tort reformers' campaign has been an effort to portray plaintiffs' lawyers as immoral: "The most obvious charge . . . is obsessive greed."[121] But the moral defects they identify go deeper. Plaintiffs' lawyers are portrayed by their critics as hypocrites for claiming to be interested in helping "the little guy" yet acting like conventional businessmen.[122] A moment's reflection reveals that these attacks are ad hominem—even if true, it still could be that plaintiffs' lawyers bring nonfrivolous cases for deserving clients.[123] Yet the attacks help bridge these logical gaps in laypersons' minds because they play off of two preexisting assumptions in American popular culture.

The first is that although self-interest is good (it is, in fact, the basis of the free market), self-interest untethered from self-reliance is bad. As Haltom and McCann note, while self-reliance can fairly be described as a virtue throughout the Western world, in the United States it has been invested with an almost religious significance.[124] The greed and hypocrisy of trial lawyers reflects a deeper moral failing—they are not self-reliant; they are parasites on the healthy economy. As Charles Sykes puts it, "the proliferation of lawyers . . . threatens to strangle the economy" and fray "the social fabric."[125]

The second assumption is that lawyers are supposed to be motivated by altruism more than the average person in the working world, especially more than the typical businessman. At the same time tort reformers were depicting plaintiffs' lawyers as immoral, Ralph Nader co-authored a book in defense of the status quo titled *No Contest: Corporate Lawyers and the Perversion of Justice in America*.[126] Yet I would argue that even if laypersons were to encounter Nader's message as frequently as they might the tort reformers' message, the effect on their views of the two sides of the debate about civil justice would not be the same. As Marc Galanter has pointed out in his book

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121. HALTOM & MCCANN, *supra* note 16, at 60.

122. "There is a funny thing about [plaintiffs' lawyers]: the more opulent it becomes, the more cloying an odor of sanctity it gives off." WALTER K. OLSON, THE LITIGATION EXPLOSION 46 (1991). Recall the clever adoption of the corporate-sounding moniker "Trial Lawyers, Inc." by the Manhattan Institute in its tort reform materials. *See supra* note 7.

123. "Private Vices by the dextrous Management of a skilful Politician may be turned into Publick Benefits." BERNARD DE MANDEVILLE, FABLE OF THE BEES: OR, PRIVATE VICES, PUBLICK BENEFITS 428 (London, J. Tonson, 3d ed. 1724) (1723).

124. HALTOM & MCCANN, *supra* note 16, at 57–58.

125. CHARLES J. SYKES, A NATION OF VICTIMS 248 (1992).

126. RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA (1996).

on lawyer jokes, popular views about the law changed after the Second World War:

> Before World War II, American law in practice provided little remedy for have-nots against dominant groups. . . . But after World War II, courts and legislatures extended legal protections and remedies for more of life's troubles and problems to more and more people, including those who earlier were largely excluded from it—injured workers and consumers, blacks, women, the disabled, prisoners, and so on. . . . *Expectations of remedy and compensation rose.*[127]

From an "historic high point of public regard for law and lawyers" in 1960, the recent past has seen a dramatic decline in the public image of lawyers, and what characterizes that decline is the rise of a "jaundiced view" of the civil justice system.[128] He attributes the decline to the various myths promoted by tort reformers: "Americans sue at the drop of a hat, the courts are brimming over with frivolous lawsuits," and so on.[129] Galanter notes that although the litigants themselves and judges are blamed, the chief culprit for this "pathological system" are the lawyers.[130] The moral critique of lawyers did more damage to those trying to defend the status quo than the parallel attacks by the status quo defenders on the tort reformer's corporate sponsors. Because of the high expectations of lawyers, the allegations of greed and hypocrisy were taken more seriously in the case of lawyers than for the rest of the commercial society.

B. The Myth of the Corrupt Plaintiffs' Bar

Kritzer's book, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States*, is partially an attempt to rebut the tort reformers' strategy of demonizing the plaintiffs' bar. At the outset, Kritzer points out that trial lawyers have been accused of a number of failings, such as encouraging their clients to blame others for their misfortune (the "blame game"), increasing insurance costs, enriching themselves through windfall fees, and taking advantage of "naïve" injury victims by "charging high fees to compensate for the risk they are undertaking when there is no doubt that the victim will recover damages."[131] Contained within these charges are all of the elements of the myth of corruption that were identified in the previous section: greed, dishonesty, and a lack of self-reliance.

Kritzer, although deeply aware of the consequences of this myth taking hold—he ends his book with a chapter entitled "Praying for Justice or Preying on Justice?"—tries to rebut it by identifying and confronting the

127. MARC GALANTER, LOWERING THE BAR 10 (2005) (emphasis added).
128. *Id.* at 6, 9.
129. *Id.* at 9.
130. *Id.*
131. KRITZER, *supra* note 15, at 1–2.

empirical assumptions on which it rests.[132] This is a useful exercise for a number of reasons, not the least of which is that the empirical data Kritzer gathers is fascinating and carefully presented. Additionally, his approach is useful because, as argued above, the argument for corruption is *ad hominem*. Kritzer helps us see the specious causal linkages between the venal qualities attributed to the plaintiffs' bar and the actual operation of the civil justice system. To put it another way, Kritzer's study of the way the contingency fee system really works usefully illustrates why the tort reformers think that the plaintiffs' bar not only possesses bad motives but has converted those bad motives into bad practices.

1. Contingent Fee as Windfall.—The core of Kritzer's book is its defense of the rationality and social utility of the contingency fee system. The contingent fee arrangement, which allows a lawyer to take an interest in the contingent result of her client's litigation in lieu of other forms of payment, is an American innovation.[133] As Kritzer points out, more legal systems have adopted the contingent fee than many American lawyers realize, and it is the subject of much discussion (as well as modest experimentation) in England and Wales.[134] The contingent fee was adopted originally "by mid-nineteenth century American jurists, some of whom were impressed by their potential for efficiency, more of whom decided that they were necessary from a humane perspective, as the only way poor men or women would gain their day in court."[135]

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132. It should be noted that Kritzer previously published an article that describes a number of the criticisms regarding contingency fees as "myths" and uses statistical data to create a more accurate portrait of the contingency fee system. *See* Herbert M. Kritzer, *Seven Dogged Myths Concerning Contingency Fees*, 80 WASH. U. L.Q. 739 (2002)

133. *See generally* Peter Karsten, *Enabling the Poor To Have Their Day in Court: The Sanctioning of Contingency Fee Contracts, A History to 1940*, 47 DEPAUL L. REV. 231 (1998) (recounting the development and acceptance of contingency fee principles in American jurisprudence).

134. KRITZER, *supra* note 15, at 258–59 tbl.8.1. *See generally* Peter Hurst, *Civil Procedure: Costs Including Conditional Fees in England and Wales*, 10 ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL 39, 45–46 (2005) (discussing the introduction of conditional fee agreements and the government's steps to eliminate challenges to such agreements).

135. Karsten, *supra* note 133, at 259.

Tort reformers have taken special aim at the contingent fee.[136] The arguments against it are various. I want to begin with the idea that the contingent fee is wrong regardless of whether anyone is harmed simply because it offends certain conceptions of honest labor. This can be seen in Walter Olson's description of the contingent fee: He compares it to betting.[137] Presumably, this is because lawyers are, with their labor, "buying" the right to a contingent outcome, as if they were buying a lottery ticket. In this sense, Olson's criticism is similar to the court's in *Wilson v. Harris*, an Alabama case that voided an investment in a lawsuit by a nonlawyer on the grounds that it violated Alabama's gambling laws.[138] Wilson "loaned" Harris $1,300 in exchange for 15% of a $4 million wrongful death award that was on appeal and was taking a long time to work its way through the courts.[139] The court held that Wilson had not made a loan, nor purchased anything, nor made an investment. Wilson had made a wager: "nothing more than a bet, 'by which two parties agree that a certain sum of

136. *See, e.g.*, LESTER BRICKMAN ET AL., RETHINKING CONTINGENCY FEES 29 (1994) [hereinafter BRICKMAN ET AL., RETHINKING] (proposing a reduced contingency fee for early settlement cases); JEFFREY O'CONNELL, THE LAWSUIT LOTTERY 136 (1979) (arguing that contingency fees, combined with the American rule that a losing party is not obligated to pay the other party's counsel fees, encourages litigation because there is little or no risk to deter a potential claimant); OLSON, *supra* note 122, at 43 (describing several downsides to contingency fees and arguing that they are "particularly frowned on where the costs of abuse fall on third parties who are not taking part voluntarily"); Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 269 (1996) (arguing that lawyers who charge the same contingency fee for every case regardless of risk encounter significant ethical issues); Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 34 (1989) (proposing a contingent fee based on "the lawyer's anticipated effort; estimated risk of nonrecovery; settlement value of the case; and the risk premium to be added to the lawyer's opportunity cost"); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 705 (2003) [hereinafter Brickman, *Effective Hourly Rates*] (characterizing contingency fees as anticompetitive and routinely violative of "ethical rules and fiducial rights of clients"); Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes Are Principally Determined by Lawyers' Rates of Return*, 15 CARDOZO L. REV. 1755, 1762 (1994) (arguing that "the same financial incentives that drive plaintiffs' attorneys to seek to expand tort liability also apply to plaintiffs' expert witnesses, especially in envelope-pushing tort-expansionary claims"); Angela Wennihan, Comment, *Let's Put the Contingency Back in the Contingent Fee*, 49 SMU L. REV. 1639, 1642 (1996) (advocating examination of "all of the methods that attorneys have employed to price their services" with special emphasis on the contingency fee). The Republican Contract with America in 1994 contained a contingent fee reform provision. *See* CONTRACT WITH AMERICA 148 (Ed Gillespie & Bob Schellhas eds., 1994). In 1996, contingent fee reforms were placed on the California ballot (Proposition 202 and Proposition 201). *See* Peter Passell, *California Propositions Are Anti-Lawyer, and No Joke*, N.Y. TIMES, Feb. 8, 1996, at D2.

137. OLSON, *supra* note 122, at 34. Others use the language of a "windfall." *See* Jeffrey O'Connell et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs' Personal Injury Bar—and a Proposed Solution*, 6 CONN. INS. L.J. 423, 424 (2000) ("In many situations, the attorney may have to do no more than author a demand letter or make a phone call, all of which may take fifteen minutes to an hour, yet walk away with a windfall of thousands of dollars.").

138. 688 So. 2d 265, 268–70 (Ala. Civ. App. 1996).

139. *Id.* at 266–67.

money, or other thing should be paid or delivered to one of them on the happening or not happening of an uncertain event.'"[140]

The obvious response is that a contingent fee is nothing like the nonrecourse loan in *Wilson*; lawyers are getting paid for their labor with an investment in the plaintiff's suit, just like lawyers might be paid for their work with shares in a new start-up company. The fact that both Wilson and the typical contingency fee lawyer were both exposed to the risk of the total loss is irrelevant; the difference that matters is that Wilson bought into that whereas the lawyer earned it through labor. Of course, the argument that the contingent fee is payment for labor has been challenged by critics such as Lester Brickman as being demonstrably false: the returns on the investment of labor are so "inordinately" high, he argues, that they cannot be fairly described as earnings for work performed.[141] Therefore, they must either be rents (Brickman's view)[142] or winnings from wagering (Olson's view).[143]

Kritzer's response is that there is no mystery as to what contingent fees represent. They are earnings taken in the form of an investment in the outcome of the lawsuit, and the best way to see this is to compare them against the earnings of other lawyers. He attempts, through his own research and by presenting the research of others, to demonstrate that what contingent fee attorneys recover on an hourly basis is not much more than what they would make if they were to charge a straight hourly rate to their clients.[144] Kritzer calculates the "effective hourly rate" produced by the average contingency fee case, and then he looks at variations in the effective hourly rate in terms of a lawyer's years of experience, caseload, gender, and other factors.[145]

In direct response to the tort reformers, Kritzer offers the following claim: his research suggests that the median effective hourly rate for contingency fee work is $132, which he claims is "almost the same as the mean/median hourly rate that these same lawyers report charging for their hourly fee work."[146] The mean is $242 an hour, which reflects the presence

140. *Id.* at 268 (quoting Thornhill v. O'Rear, 19 So. 382, 383 (Ala. 1895)).

141. *See, e.g.*, Brickman, *Effective Hourly Rates*, *supra* note 136, at 657–60.

142. *Id.* at 660.

143. OLSON, *supra* note 122, at 34.

144. KRITZER, *supra* note 15, at 180–218. In addition to his own survey of Wisconsin plaintiffs' attorneys, in which he asked them to keep time sheets and then calculated their "effective hourly rate" by dividing their fee received with the number of hours worked, *id.* at 186, Kritzer also analyzes results generated by the RAND Corporation, *id.* at 210–17 (discussing data compiled in JAMES S. KAKALIK ET AL., RAND, AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT (1996)). Kritzer also examines two dated studies but does not rely upon them. KRITZER, *supra* note 15, at 183–86 (examining Stephen K. Dietz et al., *The Medical Malpractice Legal System*, *in* APPENDIX: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE 87 (1973) and DAVID M. TRUBEK ET AL., CIVIL LITIGATION RESEARCH PROJECT: FINAL REPORT, Pt. A, S-53 (1983)).

145. KRITZER, *supra* note 15, at 200–01.

146. *Id.* at 189.

of a handful of cases with huge payoff, but once Kritzer removes the top 10% of these cases from the mean calculation, it falls back to $136.[147]

Kritzer stresses that his results suggest that plaintiffs' lawyers should do better under the contingency fee system than with an hourly system, although it is not obvious how much better they will do on an annual basis than a defense-side attorney.[148] This is evident in the mean effective hourly return, which is much higher than the median. The mean is higher because it reflects the occasional high-risk, high-return case. Kritzer argues that what many tort reformers do not appreciate is just how much contingency there is in the contingent fee arrangement.[149] The contingency is not just whether there will be a positive outcome for the client (often a given since most tort suits settle before trial) but whether that outcome will be large or small.[150] Other contingencies include the amount of time a case will take; expenses; the period of time between the investment of the first hour and payment by the client; and if there is a trial and a positive verdict, whether the money can be collected given the various obstacles that defendants can raise, including bankruptcy.[151] Kritzer argues that the premium represented by the mean is a risk premium; in that sense, choosing to do contingency fee work is like choosing to invest in the stock market. Kritzer, in fact, explicitly compares the decisionmaking process of the plaintiffs' attorney to that of a portfolio manager.[152] The lawyer who chooses to fully invest her time into hourly work is like a conservative investor who chooses to invest in bonds; the plaintiffs' lawyer who invests in 100% contingency fee work is like someone who invests in the stock market (and depending on the case mix, that market could be the NYSE or something much more volatile).[153]

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147. *Id.* at 189–90. These figures are not adjusted for the structure of Kritzer's sample, which underrepresents certain classes of lawyers and overrepresents cases going to trial. Adjusted for these factors, the median hourly rate is $167, the mean hourly rate is $345, and the mean hourly rate minus the top 10% of cases is $181. *Id.*

148. *See id.* at 218 (explaining that contingency fee practitioners produce a fee premium over "what market-rate hourly fee work generates" although this depends on an individual lawyer's case portfolio). It would seem that one important point of comparison between plaintiffs' and defense lawyers is not just how much they earn an hour but how many hours they work. Brickman reports that contingency fee lawyers and defense lawyers devote roughly the same amount of time to tort cases, Brickman, *Effective Hourly Rates*, *supra* note 136, at 691, but that does not mean that contingency fee lawyers have the same volume of work (or ability to predict and control the volume of work) as defense lawyers. It would have been useful for Kritzer to discuss this point.

149. *See* Herbert M. Kritzer, *Advocacy and Rhetoric vs. Scholarship and Evidence in the Debate over Contingency Fees: A Reply to Professor Brickman*, 82 WASH. U. L.Q. 477, 496–97 (2004).

150. *Id.* at 496.

151. Kritzer, *supra* note 132, at 799.

152. KRITZER, *supra* note 15, at 10–19.

153. *See id.* at 12–16 (analogizing contingency fee lawyers to portfolio managers, and the role of risk calculations and spreading in selecting cases). Obviously, over the long run, the average investors in equities will do better than investors in bonds—but that does not mean every equity investor will do better. Some will get wiped out.

2. Contingent Fee as the Devil's Candy.—Lester Brickman, in particular, has raised many questions about Kritzer's methodology, to which Kritzer has responded.[154] I suspect that, barring a massive investment of research dollars, the question of how much the typical contingency fee attorney earns per hour will always be controversial, partly because Kritzer and Brickman are interested in different kinds of contingency fee lawyers, a point to which I will return in a moment.[155] I want to move beyond the question of the true size of the contingent fee's effective hourly rate and onto another question that tort reformers have raised and that Kritzer only partially answers in his book.

Walter Olson argues that the contingency fee is disfavored in "professions to whom the interests of others are helplessly entrusted" because the temptation to self-deal is great and the ability to monitor is small.[156] Brickman and others have made a parallel argument: that the structure of the contingent fee relationship creates irresistible temptations to defraud third parties (defendants and the courts) by introducing claims known to be based on false facts or claims that one does not believe to be true (but does not know to be false).[157] In the silica litigation, some attorneys worked with a small number of physicians to produce false medical testimony for the sole purpose of producing as large a number of silica claims as possible.[158] A report by the federal judge in the silica case alleging

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154. *See* Brickman, *Effective Hourly Rates*, *supra* note 136, at 664, 668–86 (arguing that Kritzer's supportive studies are based on data that are "either trivial, unrepresentative, or unreliable"); Kritzer, *supra* note 149, at 480–504 (responding to specific methodologieal concerns while asserting that Brickman does not abide by the norms of scholarship in critiquing the author's scientific studies).

155. Some of Brickman's empirical claims have been critically reviewed by other tort reformers. For example, Brickman claims that "[s]ince 1960, the effective hourly rates of tort lawyers have increased 1000% to 1400% (in inflation-adjusted dollars)." Brickman, *Effective Hourly Rates*, *supra* note 136, at 655. This claim has been challenged. *See* Alex Tabarrok, *The Problem of Contingent Fees for Waiters*, 8 GREEN BAG 2D 377 (2005) (stating that "a growth rate of 1400% . . . appears to be inconsistent with what we know about lawyer income today"). Tabarrok and Helland have also argued that Brickman's allegation that contingency fee lawyers are currently engaging in a form of collusion rests on assumptions that are less likely than other, more innocent explanations for the current market for fees. *See* ERIC HELLAND & ALEXANDER TABARROK, JUDGE AND JURY: AMERICAN TORT LAW ON TRIAL 119 (2006).

156. OLSON, *supra* note 122, at 43. Olson recognizes that defense lawyers are in a similar position vis-à-vis their clients and maintains that the hourly rate gives the clients more control. *Id.* at 42. It is hard to see why.

157. *See, e.g.*, David E. Bernstein, *The Breast Implant Fiasco*, 87 CAL. L. REV. 457, 493–94 (1999) (examining arguments for reforming contingency fee practice in response to tort litigation based on unproven causation claims); Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833, 840–41 (2005) (arguing that contingency fees in asbestos litigation are often unreasonably high because of the slight or insubstantial risk involved); Lester Brickman, *On the Applicability of the Silica MDL Proceeding to Asbestos Litigation*, 12 CONN. INS. L.J. 35, 36–38 (2006) (noting that plaintiffs' lawyers involved in asbestos litigation have "responded opportunistically" to the tendency of defendants to settle asbestos claims "without demanding much in the way of proof of injury or liability").

158. *See* Roger Parloff, *Diagnosing for Dollars*, FORTUNE, June 13, 2005, at 96.

fraudulent diagnoses has given additional support to allegations that an unknown number of medical diagnoses involving so-called "unimpaired" asbestos plaintiffs were similarly manufactured.[159] Brickman attributes this to the "entrepreneurial model" of lawyering—litigation in which the attorneys have a stake in the outcome.[160]

Kritzer has a number of answers to the "devil's candy" argument. The first is that he did not look at that portion of the plaintiffs' bar that handles asbestos and breast implant cases.[161] These cases belong, as the RAND Institute puts it, to the "third . . . world of mass latent injury cases," which must be treated separately from automobile or medical malpractice cases.[162] But this is not a sufficient answer for two reasons. The first is that the "third world of torts" is a very important part of the civil litigation system. It represents a significant portion of many courts' caseloads and may sometimes represent significant liabilities for defendants.[163] The second is that for many laypeople, cases arising from the "third world of torts" are all they know about the tort system through the media, whether it be tobacco, lead paint, or Vioxx litigation.

Of course, Kritzer cannot have been expected to survey every kind of plaintiffs' lawyer, so his decision to focus on more typical lawyers in Wisconsin is understandable. But the tort reformers might still object that there is still an irresistible temptation for fraud even in garden-variety personal injury cases. As Olson says, "[T]here are things lawyers will do when a fortune for themselves is on the line that they won't do when it is just a fortune for a client."[164] A rational self-interested "investor"—as Kritzer calls the plaintiffs' lawyer—would be incentivized to take steps to increase his client's expected return, since he now owns part of that return. This might explain, for example, why RAND discovered that 35% to 42% of medical expenses in automobile accident claims "appear to be excess."[165]

Kritzer's chapters on the work of the contingency fee lawyer (Chapter 4) and the role of reputation to the contingency fee lawyer (Chapter 7)

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159. *See* Lester Brickman, Op-Ed., *False Witness*, WALL ST. J., Dec. 2–3, 2006, at A9.

160. *See* Lester Brickman, *An Analysis of the Financial Impact of S.852: The Fairness in Asbestos Injury Resolution Act of 2005*, 27 CARDOZO L. REV. 991, 992–93, 996–1001 (2005) (describing the emergence of the "entrepreneurial model").

161. *See* Kritzer, *supra* note 149, at 484–86 (relying on data from automobile and medical malpractice cases to demonstrate paucity of large-fee settlements); *see also* Herbert M. Kritzer, *From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century*, 51 DEPAUL L. REV. 219 (2001) (discussing the growing divide between latent mass tort lawyers and personal injury lawyers with regards to contingency fees and economic interests).

162. DEBORAH R. HENSLER ET AL., RAND, TRENDS IN TORT LITIGATION 3 (1987).

163. *Id.* at 10 (discussing the "explosive" potential of mass latent injury suits such as Dalkon Shield and asbestos in 1987).

164. OLSON, *supra* note 122, at 45.

165. STEPHEN CARROLL ET AL., RAND, THE COSTS OF EXCESS MEDICAL CLAIMS FOR AUTOMOBILE PERSONAL INJURIES 3 (1995).

answer, to some extent, the "devil's candy" argument. The chapter on the lawyer's daily work suggests that there is less of an opportunity to manufacture fraudulent material than one might suspect. Kritzer's lawyers were passive information processors, not investigators. "[L]ittle of [their] information processing involves 'investigation' in the sense of on-scene assessments, digging for details or obscure facts, or interviewing witnesses."[166] Most of the lawyers' energies seem to be dedicated to taking the facts as they were received at face value and trying to figure the value of the case in the settlement market.[167] In addition to managing information, Kritzer describes the lawyer as having two additional major tasks: "managing" the client and working with the opposing parties.[168] In fact, a more accurate way to describe the former is that the lawyer's job is to shape her clients' expectations to fit the reality of the settlement market[169] and the latter is that her job is to negotiate with the opposing side to secure the highest possible price the settlement market will bear.[170] Of course, the lawyer can try and stack the deck in anticipation of these negotiations by advising his client to undergo unnecessary and costly medical treatment or by trying to get a medical expert to write an evaluation most favorable to his client, but Kritzer suggests that this is really not an important part of what the lawyer does with his day.[171]

Why not? Kritzer's book is basically empirical, so he does not hazard too many explanations for the behavior he observed. But his description in Chapter Seven of the role of reputation in contingency fee practice suggests an answer. Reputation is valuable to the contingency fee lawyer for many reasons.[172] The lawyers Kritzer studied received most of their clients through referrals, not advertising.[173] Reputation also plays an important role at the moment of what Kritzer calls "portfolio redemption."[174] For the contingency fee lawyer "cases must be resolved short of trial."[175] The reputation a plaintiffs' lawyer has in the community of defense lawyers and insurers will be critical to creating the circumstances where those actors will want to offer

166. KRITZER, *supra* note 15, at 111.

167. *Id.*

168. *Id.* ch. 4.

169. *Id.* at 121–22.

170. *Id.* at 130–32.

171. *See id.* at 117 ("While a lawyer could try to steer a client to providers who would overtreat and thus build up medical expenses, I did not see any clear evidence of this, nor would I expect to.").

172. *See* Hyman & Silver, *supra* note 32, at 1121 (explaining that lawyers invest in their reputations in order to attract new clients, facilitate referrals, and encourage insurers to respond to their claims).

173. KRITZER, *supra* note 15, at 58–65 (detailing how approximately 20% of clients are referred from other lawyers, 19% are "existing clients," 26% are referred from other clients, and 15% are referred by community contacts).

174. *Id.* at 241–42.

175. *Id.* at 241.

the highest possible settlement value before trial. While Kritzer focuses to a great degree on interpersonal style[176] and courtroom skill,[177] it would seem that attempts to engage in fraud or other kinds of unethical behavior would cost more in the long run than they would gain in the immediate case. This depends, of course, on plaintiffs' lawyers actually being repeat players, something that the very concept of reputation presumes. Still, it would explain why the lawyers Kritzer studied found it more profitable to "broker" the cases they had with their defense counterparts based on the facts they received, rather than try to manufacture cases or injuries out of whole cloth.

A weaker version of the "devil's candy" argument is that the contingency fee does not create for plaintiffs' lawyers an irresistible temptation to engage in fraud but that it creates an incentive for lawyers to take weaker cases than they would otherwise under a system of hourly fees. David Bernstein argues that the "investment" logic of mass tort litigation creates an irresistible business pressure for lawyers to invest early and heavily in an immature tort, on the hope that a few large early decisions will create a cascade of settlements.[178] Eric Helland and Alex Tabarrok have argued that the opposite might be true: If contingency fees were eliminated, lawyers who worked on the basis of an hourly fee would face rational incentives to be less careful in screening cases. They hypothesize that, since the plaintiff is the sole investor in a lawsuit in a system of hourly fees, the plaintiff's attorney has less of an incentive to do what Elihu Root said was the basic job of every lawyer—to tell the client he is a "damn fool[] and should stop."[179] They tested this hypothesis by comparing the frequency with which plaintiffs dropped cases after they were filed in states that limited or capped contingency fees compared to states that had no such restrictions.[180] They discovered that in states where the contingency fee was marginally unavailable, more cases were dropped later in the litigation process. From this they concluded that "contingent-fee restrictions erode screening and increase the proportion of low-value suits within the system."[181]

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176. *Id.* at 234–41.

177. *Id.* at 243–45.

178. *See* Bernstein, *supra* note 157, at 493 (describing the "avalanche of copycat lawsuits" that can result if a defendant loses just one major lawsuit); David E. Bernstein, *Procedural Tort Reform: Lessons from Other Nations*, 19 REGULATION 71, 79 (1996), *available at* http://www.cato.org/pubs/regulation/reg19n1e.html (arguing that the contingent fee "encourages attorneys to engage in speculative litigation in the hopes of landing the occasional large jackpot").

179. HELLAND & TABARROK, *supra* note 155, at 101 (quoting MARY ANN GLENDON, A NATION UNDER LAWYERS (1994)).

180. *Id.* at 107–10. This argument is more fully developed in Eric Helland and Alexander Tabarrok, *Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from Two Datasets*, 19 J.L. ECON. & ORG. 517 (2003).

181. HELLAND & TABARROK, *supra* note 155, at 110. They also hypothesized that the same incentives that would lead plaintiffs' attorneys operating under an hourly fee system to be less selective would also lead them to drag their heels when it came to settlement (because more hours

One criticism of the Helland and Tabarrok argument is that the evidence on which they relied only supports their argument if one assumes that restrictions on contingency fees will drive plaintiffs to substitute contingent fee attorneys with lawyers who charge hourly fees. This assumption is a little unrealistic, as Lester Brickman and others have pointed out. The intuitive result of limiting the amount of money that a lawyer can receive from a case brought under a contingent fee contract is that fewer lawyers take cases overall and that some drop out of the litigation process.[182] As one tort reformer has argued, "Lawyers couldn't afford to pursue as many of those cases, of the shoot-the-moon variety [like medical malpractice, products liability, and personal injury], with contingency fee caps."[183]

Even if this were true (and Helland and Tabarrok are not so sure[184]), it does not prove that the contingency fee promotes frivolous litigation. Contingency fee attorneys, because they are risking their own money, should be no more nor less risk averse than the plaintiffs themselves or third party lenders whose only security is the recovery. Helland and Tabarrok's argument tries to determine whether, assuming that *someone* would fund a case that had a positive expected return, it made a difference whether the lawyer was the funder and the mechanism was the contingency fee.[185] Anything that creates a "liquidity constraint[]" will lead plaintiffs to file fewer low-probability, high-reward cases.[186] Except for very wealthy individuals and firms, limits on the ability of plaintiffs' lawyers to fund cases will create a liquidity constraint because there is no other legal source of investment.[187]

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spent on the case means more income for the lawyer). They found evidence for this as well. *Id.* at 115.

182. *See, e.g.*, Lester Brickman, Remarks at American Enterprise Institute for Public Policy Research Event: What Do We Know About Contingency Fees? (Sept. 22, 2004), *available at* http://www.aei.org/events/filter.,eventID.887/transcript.asp ("If you have damage caps, they're lower than they would be in the absence of caps, you get less contingency fee income, and therefore, under my conclusion, you get less contingency fee-funded litigation."); James R. Copland, *Drop by Drop*, POINTOFLAW.COM, Apr. 13, 2006, http://www.pointoflaw.com/feature/contingent_claims0406.php (disputing Helland and Tabarrok's thesis and instead contending that contingency fee caps will reduce the amount of contingency fee cases taken).

183. Copland, *supra* note 182.

184. HELLAND & TABARROK, *supra* note 155, at 102–04.

185. Not all cases that have a low probability of a plaintiff verdict have a negative expected value—from an economic point of view, it all depends on the expected payoff. Nor does the fact that a case is a "shoot-the-moon" case—meaning that an objective legal observer would predict that the chances of a plaintiff victory were low—make it frivolous. Was *Macpherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), a frivolous case just because it created new law in New York?

186. Alex Tabarrok, *The Contingent Fee Distraction*, POINTOFLAW.COM, Apr. 10, 2006, http://www.pointoflaw.com/feature/contingent_claims0406.php.

187. It is important to recall that the doctrine of champerty, which is "helping another prosecute a suit . . . in return for a financial interest in the outcome," was, like most forms of maintenance, illegal in the United States. Osprey, Inc. v. Cabana L.P., 532 S.E.2d 269, 273 (S.C. 2000) (quoting *In re* Primus, 436 U.S. 412, 424 n.15 (1978)). Even today, direct investment by anyone other than a client's attorney into the client's ease is under such a legal cloud that no robust market has developed. Paul Bond, Comment, *Making Champerty Work: An Invitation to State Action*, 150 U. PA. L. REV. 1297, 1310 (2002).

But why do tort reformers want to shrink the number of cases with relatively lower expected returns or the number of cases in general? A case with a low expected return is, by definition, one in which plaintiffs' lawyers have a good chance of losing money, and if they bring too many of these they go out of business. As Helland and Tabarrok point out, the only reason a tort reformer would want to start at this end of the problem is because they suspect that too many weak cases are winning.[188] But then, "[t]he problem is not how lawyers are paid, but that the court system does not do a good job of screening meritless cases."[189] Blaming contingent fees for out-of-control courts "is like blaming credit cards for personal bankruptcy."[190]

3. What Does the Contingent Fee Premium Pay For?—The tort reformers' myth of the corrupt plaintiffs' lawyer cannot be supported by reference to either the effective hourly rate they receive or the allegedly perverse incentives under which the contingent fee contract places them. Further, on the plus side, as Kritzer notes, the contingency of the plaintiffs' lawyer's fee creates access: victims with few assets can retain the services of a lawyer to pursue their claims.[191] But the contingency of the plaintiffs' lawyer's fee also creates costs that are recovered at the back end, if there is a recovery. Kritzer's argument, that the mean effective hourly rate is so high because it reflects the many uncertainties that plaintiffs' lawyers face, makes sense. The high mean (compared to the median) reflects a premium paid to the lawyer for assuming those uncertainties. That is why the contingent fee is properly categorized as an investment by the lawyer in the client's case.

This "return on investment" is paid by the plaintiff. Ever since the 1980s, scholars have expressed concern about the relatively large portion of total tort expenditures that is consumed by transaction costs like lawyer fees.[192] Kritzer raises the idea that perhaps nonlawyers could take some of the claims that are currently handled by lawyers and settle them with the defendant's insurance company for a percentage much lower than 33%.[193] This thought experiment merely begs the question, however: Why can't lawyers do those cases for less than 33%? Kritzer's assumption seems to be that once a lawyer steps into the picture, the uncertainties that attend litigation immediately arise and so, too, the 33% risk premium demanded by the plaintiffs' bar. Is this because there is something about the risks inherent in even garden-variety personal injury litigation that necessitates a high reward? As Kritzer describes it, a good lawyer can guess at the range but not the exact

188. HELLAND & TABARROK, *supra* note 155, at 123.

189. *Id.*

190. *Id.*

191. KRITZER, *supra* note 15, at 262–63.

192. In 1987 RAND noted that net compensation for victims in auto cases was 52 cents per dollar spent on tort claims; in non-auto claims the net amount was 43 cents; and in asbestos cases it was 37 cents. HENSLER ET AL., *supra* note 162, at 28–29.

193. KRITZER, *supra* note 15, at 264.

amount of a case's settlement value because litigation is unpredictable.[194] The other side might have a confrontational negotiating style, or maybe not all the information needed to evaluate the claim has been released. But these risks seem manageable and are not at the same level of complexity (I think) as those that attend disputes about the interpretation and application of the law. So why couldn't a lawyer—not just a layperson—handle these routine cases for less than the standard contingency fee?

If the answer is that there are certain features of the contingency fee itself—such as the cross-subsidization of weak cases by strong cases[195]—that make a significant premium mandatory, then one question that ought to be asked is whether the provision of this service—cross-subsidization—should be treated as a professional skill unique to lawyers. Or is the activity of providing funding through the contingency fee treated as a part of legal practice for other reasons, such as the self-image of the contingency fee lawyers as independent professionals? The daily work of the contingency fee lawyer looks a lot like the work performed by insurance adjustors and government case workers. Obviously, insurance adjustors and government case workers are paid less than either plaintiffs' lawyers or defense lawyers, and their working conditions and status are quite different. Perhaps the reason that the premium is relatively high is that there are factors inherent to bringing lawyers into a claims process that increase the unpredictability of outcomes, and that the return on investment is fair given the risks encountered. But that only begs the question of why lawyers acting *qua* lawyers should be doing this kind of claims processing.

IV. Haltom and McCann: How the Myths Are Created

A. The Social Construction of Tort Knowledge

Haltom and McCann's goal in *Distorting the Law* is to explain why the tort reform agenda of the last twenty-five years succeeded. The most important measure of the success of the tort reform movement, they suggest, is not the large number of liability-limiting laws that have been passed by state legislatures or Congress but the emergence of what they call a new "common sense" about law in the United States.[196] The common-sense view of law today, as evidenced by media, popular culture, and elite culture, is that there is an "epidemic" of civil litigation and that unethical trial lawyers encourage excessive "rights claiming," which serves their own interests, not the interests of their clients or society.[197]

194. *See id.* at 17–19, 155–58 (describing the uncertainties in valuing a case and the process by which initial offers are formulated).

195. *See id.* at 260.

196. HALTOM & MCCANN, *supra* note 16, at 6.

197. *Id.*

Haltom and McCann acknowledge from the outset that one obvious explanation for the rise of the tort-reform view is the "realist" account that "well-funded business advocates have successfully infiltrated the media, mobilized support of policy elites, and beguiled the mass public with their message."[198] Haltom and McCann suggest that the realist account needs to be supplemented by a "social constructionist" approach.[199] Social constructionism in law focuses on legal culture, not just actors' perceived economic self-interest.[200] This approach makes sense, since those who have a direct self-interest in limiting liability cannot directly reshape legal institutions: There are too many intermediary institutions and individuals whose support would have to be recruited and who may have a sincere commitment to the relative autonomy of law.[201] Therefore Haltom and McCann focus on three "determinants" of legal knowledge in American society: (1) the instrumental strategies adopted by institutional actors committed to either tort reform or the status quo, as well as scholars committed to keeping the critics honest; (2) the news reporting conventions by which the mass media communicates to the larger public information about the civil liability system; and (3) the ideological background against which the instrumental strategies and news reporting practices operate.

B. The Instrumental Strategies

1. The Tort Reformers.—Haltom and McCann's three chapters on the three instrumental strategies of the civil society organizations committed to debating tort law in America can be easily summarized by the following insight: In American political conflict, a good narrative beats good facts. According to Haltom and McCann, the tort reform movement took the view that the information environment for policy debate had been poisoned by a media that had been biased toward the plaintiff's point of view.[202] Tort reformers, by this logic, were licensed to respond in kind to counteract the cloud of bias that had already been created.

The strategy, then, was dictated by the goal. The goal was not to produce knowledge so esoteric that it would never be picked up by a print,

198. *Id.* at 8.

199. *Id.* at 7.

200. *Id.* at 7–8.

201. As Max Weber put it, "Economic situations do not automatically give birth to new legal forms; they merely provide the opportunity for the actual spread of a legal technique if it is invented." MAX WEBER, ON LAW IN ECONOMY AND SOCIETY 3 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., Harvard Univ. Press 1954) (1925); *see also* David M. Trubek, *Reconstructing Max Weber's Sociology of Law*, 37 STAN. L. REV. 919, 921 (1985) ("[U]nlike those who stressed economic determinism, Weber recognized that the legal order had a degree of autonomy from economic relations.").

202. "Liberal media bias is the product of systematic efforts by Left thinkers over several generations to influence reporters." HALTOM & MCCANN, *supra* note 16, at 41 (summarizing a February 18, 1986, Manhattan Institute memorandum).

radio, or television journalist. Nor was the strategy to carefully work in the background, trying to build coalitions and shape political solutions. Since the goal was to get a message into the mass media, the strategy was to create information that would be attractive to journalists and would communicate a clear, consistent message.[203] Once public attitudes were shifted *back from where liberal bias had taken it*, the work of creating legislation—with all the attendant compromises—could be conducted from a much more attractive starting point.[204]

This analysis helps explain a remarkable feature of the tort-reform approach, at least as reported by Haltom and McCann—that is, the emphasis on narrative over statistics. Haltom and McCann claim that they could not find many examples of tort reformist social science—for example, large scale data collection that might establish historical changes in the tort system or suggest some causal link between the liberalized tort system and certain social ills.[205] Instead, the tort reformers combined generalizations without foundation with anecdotes. Peter Huber's statement that "[j]unk science verdicts, once rare, are now common," was not proven by him statistically but was meant to be demonstrated by the fact that he could point to specific episodes where speculative theories of causation, later proven false, had generated compensation in the tort system.[206]

Haltom and McCann's theory as to why the tort reformers' approach worked is subtle and bears close analysis. The stories told by the tort reformers often involve plaintiffs who are dishonest; who have weak characters; who try to use the tort system to get something they don't deserve;[207] or who refuse to accept responsibility for their own lives and try to shift their misfortune onto others.[208] These stories match ready-made stereotypes that are available in popular culture and therefore easy for

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203. *See id.* ("'The competitive nature of journalism works to the favor of those with new ideas,' thus providing opportunities for conservative thinkers with 'well presented and properly marketed' ideas." (summarizing a February 18, 1986 Manhattan Institute memorandum)).

204. *Id.* at 40–41, 51.

205. They cite Vice President Dan Quayle's statements that America had 70% of the world's lawyers and 18 million civil suits per year, President Reagan's Tort Policy Working Group's statement that the United States had seen a 758% increase in products liability suits over a ten-year period, and Peter Huber's 1989 estimate that the "tort tax" in the United States "may amount to . . . $300 billion." *Id.* at 52–54.

206. *See id.* at 55 (noting that "by 'common' . . . Huber need only have meant 'not rare'").

207. Haltom and McCann begin their book with the story of Judith Richardson Haimes, who was made infamous for her successful medical malpractice suit. *See id.* at 1. As reported in the media, she was a psychic who received $1 million for the loss of her abilities. *Id.* at 2. In reality, Haimes, who suffered a severe allergic reaction to an iodine-based dye that was injected into her despite her protests, was awarded $600,000 for weeks of pain and suffering, plus interest. *Id.* She had attempted to recover lost wages due to her loss of psychic ability, but that was rejected by the trial judge. *Id.* The trial judge also reversed the jury award as excessive, and Haimes ended up receiving no damages. *Id.*

208. Haltom and McCann focus on the case of Stella Liebeck, an 82-year-old woman who suffered severe burns after spilling a 170 degrees Fahrenheit cup of coffee onto her lap. See *infra* notes 268–74 and accompanying text for a more detailed discussion of this case.

journalists to adopt. Furthermore, the point of view from which these criticisms were launched was highly individualistic.[209] The implicit message is that being a victim is a bad thing; there is no public honor in it; and it confers negative social status.[210] The titles of tort-reform books, such as Charles Sykes's *A Nation of Victims: The Decay of the American Character*[211] and Philip Howard's *The Death of Common Sense*,[212] convey the sense that those who enter the tort system are unhealthy and may threaten the health of the body politic, too.[213]

In the end, it seems that the decision to argue for tort reform through the use of anecdote was quite canny. Anecdotes are appealing to journalists, thus increasing the likelihood that the tort-reform message would reach a wide audience, and the anecdotes that the reformers chose—stories of greed and weak character—are easy for a mass audience to grasp because they fit tropes already rooted in the culture. In an odd, postmodern twist, conservative tort reformers seem to have adopted interpretation over science. As Haltom and McCann note, "[tort reformer] Walter Olson has been quoted as saying that . . . stories matter more to most people than statistical data."[214]

2. The Scholars.—Unlike the tort reformers, legal scholars and social scientists have an interest in developing a rich statistical picture of civil liability. Haltom and McCann focus on a group they call "sociolegal" scholars who had a professional interest in testing the claims of tort reformers.[215] Their instrumental interest, Haltom and McCann admit, is hard to define.[216] Haltom and McCann argue that, whether or not the sociolegal

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209. Haltom and McCann very aptly quote Robert Bellah et al.: individual responsibility is the "first language of American moral life." HALTOM & MCCANN, *supra* note 16, at 61 (quoting ROBERT NEELY BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 154 (1985)).

210. It is instructive to compare this attitude with the stories of the women who brought the first suits over DES, stilbestrol, a drug given to prevent miscarriages that caused severe gynecological problems in female children. *See* Anita Bernstein, Hymnowitz v. Eli Lilly and Co.: *Markets of Mothers*, *in* TORT STORIES 151 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (explaining that many of the gynecological problems, including cancer and repeated stillbirths, that resulted from DES did not manifest until after the applicable statutes of limitations had expired, so victims lobbied to change the law).

211. SYKES, *supra* note 125.

212. PHILIP HOWARD, THE DEATH OF COMMON SENSE (1994).

213. *See* HALTOM & MCCANN, *supra* note 16, at 58 (noting that "Sykes's rhetoric repeatedly likens the penchant for . . . litigation to a disease").

214. *Id.* at 67. Haltom and McCann note that Olson has "challenged this account of his words" (taken from a *National Law Journal* story), but they suggest that it sounds like something he would say. *Id.*

215. *See id.* at 76, 83 n.9, 86, 101 n.19, 103 n.20. The scholars mentioned or discussed in their book include, for example, Marc Galanter, Stephen Daniels, Theodore Eisenberg, Deborah Hensler, Joanne Martin, Herbert Kritzer, and Michael Saks. Of course, there were academics who supported the tort reform movement; for example, George Priest, Kip Viscusi, and Lester Brickman. Victor Schwartz, general counsel to ATRA, was once a full-time academic.

216. HALTOM & MCCANN, *supra* note 16, at 76.

scholars entered the debate in order to secure anything other than intellectual integrity, their work rapidly became part of the public debate to the point where the tort reformers felt compelled to respond to criticisms coming from them.[217]

The sociolegal scholars asked a series of simple questions. Where was the evidence that Americans had become highly litigious? Where was the evidence that juries were overly and unjustifiably sympathetic to plaintiffs? Where was the evidence that damage awards were rising very quickly? Where was the evidence that products liability litigation was a threat to American industry and that punitive damages were out of control? The sociolegal scholars gathered the data as best they could and tested these claims. According to Haltom and McCann, "any fair-minded reader" would see that the sociolegal scholars had reduced the tort reformers' claims to "rants."[218]

If this is correct, then why did the common sense view prevail? Haltom and McCann examine the various ways that mass media does not behave like a "fair-minded reader." They point out that the scholarly journals where almost all of the sociolegal scholarship was published are very obscure and intimidating.[219] The sociolegal scholars, as full-time academics, had neither the time nor the resources to promote themselves like the tort reformers at the Manhattan Institute.[220]

But one further limitation hobbled the sociolegal scholars. They did not promote a positive agenda. The tort reformers could tell a causal narrative—there was a crisis and certain positive action (tort reform) would reverse the crisis. As Deborah Stone has written, "There is an old saw in political science that difficult conditions become problems only when people come to see them as amenable to human action."[221] The sociolegal scholars were certain that there was no crisis. Therefore, they saw no need for positive action.

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217. Haltom and McCann detail the running dispute between the Manhattan Institute and Ted Eisenberg and James Henderson, Jr., both of Cornell. *Id.* at 102. Peter Huber, a senior fellow at the Manhattan Institute, had taken Eisenberg and Henderson to task for arguing in a 1990 *UCLA Law Review* article, *see* James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990), that the rate of plaintiff verdicts in products liability flattened and declined in the 1980s. *See* Peter Huber, *Cockroaches in Court*, FORBES, Oct. 1, 1990, at 248, 248. Eisenberg and Henderson forcefully responded to their critics in 1992. *See generally* Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992). Haltom and McCann's clear delight in this episode is understandable, but a little ironic. James Henderson—an eminent scholar and coreporter for the *Restatement (Third) of Products Liability*—was quite a critic of the expansion of products liability law in the 1970s and 1980s. *See* Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1244–45 (1994) (noting Henderson's belief that "strict liability should be abolished and that a negligence standard should govern").

218. HALTOM & MCCANN, *supra* note 16, at 74.

219. *Id.* at 100–01.

220. *Id.* at 101.

221. Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281, 281 (1989).

They did not embrace the status quo; they thought it was enough that they could prove that attacks upon it were without foundation.[222] This might be good social science, but it is bad politics.

Haltom and McCann argue that the sociolegal scholars found it difficult to positively endorse the status quo for two reasons. First, at the time the tort-reform movement began, the sociolegal scholars "evaded" hard questions that "journalists, pundits, and ordinary citizens" wanted answered.[223] While the idea of a "litigation explosion" was a myth, the world of civil litigation denounced by the tort reformers was really breaking apart into three almost independent tort systems.[224] As the RAND Institute noted in 1987, the world of routine personal injury cases, dominated by auto suits, is different from the world of high-stakes personal injury and business torts, such as medical malpractice, products liability, and fraud, which is different yet again from the world of mass latent injury torts, such as asbestos and mass exposure to a pharmaceutical.[225] Although the first world of torts was not changing at all, and the second world of torts had changed only slightly, the third world of torts *was* novel and needed to be explained and defended, something which Haltom and McCann think did not happen, at least in response to the tort reformers.[226]

The second reason goes even deeper. Haltom and McCann note that many sociolegal scholars "systematically evaded direct engagement with the moral ethos at the heart of the commonsense lore embraced by reformers."[227] Haltom and McCann suggest that many of these scholars did not think that they needed to adopt a normative position about the tort system in order to understand it, and so they had none. This put the sociolegal scholars at a disadvantage because the ideology of individualism partially informs popular and political culture in America, and so one ignores it at one's peril. Haltom and McCann argue that sociolegal scholars, by refusing to challenge the "individualistic moral frames" illustrated by the anecdotes (and by focusing just on the tort reformers' absent statistics), lost the war even though they won many battles. This is an idea to which I will return below.

3. The Defenders of the Status Quo.—The final group that had an instrumental role to play in the debate over civil liability was the organized trial bar. The main organization representing lawyers who identify themselves as plaintiffs' lawyers is the American Trial Lawyers Association

222. HALTOM & MCCANN, *supra* note 16, at 106.
223. *Id.* at 107.
224. HENSLER ET AL., *supra* note 162, at 2–3.
225. *Id.*
226. HALTOM & MCCANN, *supra* note 16, at 107.
227. *Id.* at 107–08.

(ATLA).[228] Haltom and McCann also discuss smaller "public interest" groups that had the same policy goals as ATLA, such as Public Citizen, Trial Lawyers for Public Justice (TLPJ), and Congress Watch, which are closely associated with Ralph Nader.[229] By their own admission, though, Haltom and McCann deliberately focus on ATLA, which is the wealthiest and largest group dedicated to defending of the current civil liability system.[230]

They characterize ATLA's response to the tort reformers as a continuation of the strategy it had developed since its creation in the 1950s: stealth and insider politics.[231] ATLA had reason to be confident. It had developed a very powerful relationship with both elected officials and elected judges through its political donations.[232] ATLA's lobbying and legislative strategy was the opposite of the strategy adopted by the tort reformers. Rather than push their message into the mass media with an eye to shaping legal culture, ATLA chose techniques that not only kept it from the public eye, but in the case of lobbying, required it, to some extent, to conceal its efforts and victories.[233]

At some point, Haltom and McCann report, ATLA realized that it would have to confront the retail, media-oriented approach that tort reformers had adopted. Early attempts simply pushed corrective facts into the public sphere—for example, ATLA would collect "urban legends" that the media had reported (such as the man who allegedly used his lawn mower to cut his hedges and sued when injured)—but this strategy had limited success.[234] As Haltom and McCann note, a list of rebuttal facts is not the same thing as telling a story.[235]

Haltom and McCann speculate why ATLA and its allies never developed a repertoire of stories about *defendants'* wrongdoing that would fit the media's need for a narrative frame and the ideology of the mass media's audience. They suggest a number of reasons. First, they hypothesize that confidentiality agreements kept some of the best cases out of the hands of ATLA's media handlers.[236] Second, they suspect that the modern image of the trial lawyer—as greedy and immoral—would have overwhelmed the

228. In 2006, ATLA changed its name to the "American Alliance for Justice," or AAJ. *See* Eidson, *supra* note 9.

229. HALTOM & MCCANN, *supra* note 16, at 114–15.

230. *Id.* at 114. Haltom and McCann estimate that ATLA has a membership of 56,000, or 7.5% of the membership of the ABA. *Id.*

231. *Id.* at 115–16.

232. Haltom and McCann estimate that, from 1999–2000, ATLA was the second largest contributor to federal candidates. *Id.* at 117.

233. *Id.* at 121.

234. *Id.* at 124.

235. *Id.* ("Such diffuse, often complex, fact-laden accounts can hardly hope to match the simple moralistic appeal of tales told by critics . . . .").

236. *"Attorneys who are best situated to tell powerful stories about the valuable role of cause-oriented personal injury litigation typically are forbidden to do so by law."* *Id.* at 129.

plaintiff's story.[237] Third, they note that, just as there were three worlds of torts by the 1980s, there were multiple communities of plaintiffs' lawyers and that they did not agree on many things. Haltom and McCann quote Paul Rheingold, a veteran of both the second and third world of torts, who noted that lawyers who worked on individual cases—especially high stakes cases like medical malpractice—were suspicious of the motives and the methods of lawyers who worked in mass torts, and vice versa.[238]

C. *How the Media and Legal Culture Constrain Social Construction*

In the second half of the book, Haltom and McCann turn to the consequences of the various failures and successes of the instrumental strategies. An important part of their argument is that the construction of social meaning about law is a joint project between (at least) the civil society groups they introduce at the beginning of their book and the large, complex institution they call the media.

Haltom and McCann make a very convincing case that, given the constraints of modern mass media, it is easy to predict how these strategies play out. They have performed a great service by actually sifting through the thousands of pieces of individual evidence—in one study, twenty years of coverage of torts cases in five major newspapers[239]—to prove what many people would simply assume. Their conclusions, however, are not surprising. They demonstrate quite convincingly that even "quality" newspapers distort the world of torts in a way that helps reinforce the anecdotes and generalizations promoted by the tort reformers.

So, for example, they discovered that routine coverage of tort litigation increased dramatically in the 1980s and 1990s, that plaintiff victories were overreported, and that awards and settlements were exaggerated.[240] Haltom and McCann also note that the media, for all of its increased coverage, tells society very little about the law in the cases.[241] Factual allegations, many of which are irrelevant to the case as it is actually tried, make it into news reports,[242] and in general the legal rationale of a case's outcome is excluded from coverage.[243] They note that the media tends to focus on the amount of money awarded to plaintiffs (and their lawyers' share) and not on the plaintiffs' injuries.[244] Finally, Haltom and McCann note that social-policy torts, such as asbestos, are covered no differently than first or second world

237. *Id.* at 133.
238. *Id.* at 139.
239. *Id.* at 159–74.
240. *Id.* at 164–66.
241. *Id.* at 175.
242. *Id.* at 172.
243. *Id.* at 175.
244. *Id.* at 176.

torts.[245] The final picture that the media provides of civil litigation is that it is filled with "adversarial contests waged by narrowly self-interested parties [with] outcomes seemingly as arbitrary as any lottery."[246]

It is important to recognize the importance of the role that the commonsense view of the motives of plaintiffs and lawyers in civil litigation plays in how the media reports a story. The "facts" on which the media dwells—such as the size of verdicts or the ease by which plaintiffs win—are in themselves morally neutral. Analogous facts in criminal law—the large sentences won by unstoppable, tireless prosecutors such as Rudolph Giuliani have been treated as positives by the media. Once the commonsense view of civil plaintiffs is added to the mix—that they lack self-reliance or are frauds (or both)—their success in tort litigation becomes evidence of the system's dysfunction and of its lawyers.

Why do Haltom and McCann assume that tort law could not be socially constructed with stories that make plaintiffs' claims look worthier than the defenses of those who injure them? They seem to have two arguments. The first is that the stories that tort victims tell do not fit easily into the media's storytelling conventions.[247] This strikes me as wrong. Stories about sympathetic tort plaintiffs—and, more importantly, unsympathetic tort defendants—can be found that fit the "proclivities that define workaday news worth: personalization, dramatization, fragmentation, and normalization."[248] There was a time when the media did this. The media coverage of the Ford Pinto litigation shared many of the same storytelling conventions identified by Haltom and McCann.[249] The chief difference is that the conventions worked in favor of plaintiffs in the late 1970s. If the only reason that this does not happen today is that the pro-tort reform segment of civil society simply has a lot more money and is more interested in reaching the media than the anti-tort reform segment, then their theory of social construction collapses into the realist account.

Haltom and McCann's second reason for why more proplaintiff tort stories would not necessarily stop or reverse the tort reformers distinguishes their theory from realism. They suggest that the pursuit of the preconditions of a successful proplaintiff campaign of tort stories will just strengthen the worldview upon which the tort reformers have based *their* campaign.[250]

> As we have argued throughout this book, the prevailing legal lore has reinforced American tendencies to evaluate social problems largely in terms of individual responsibility and moral character. The result

245. *Id.*

246. *Id.* at 175.

247. *Id.* at 156–57.

248. *Id.*

249. *See generally* Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

250. *See* HALTOM & MCCANN, *supra* note 16, at 174–76.

> is . . . that the presumed legal wisdom . . . has reduced the scope of debate over legal justice itself to one that *is almost exclusively about apportioning liability to discrete parties.*[251]

The ease with which plaintiffs and their lawyers can be caricatured as corrupt or lacking in character is a product of the individualism that runs deep in American political culture. Adversarial legalism is the only legitimate way to channel demands of compensation from other citizens. Demands based on something less individualistic—such as claims based on distributive justice, not corrective justice—belong in the realm of politics, and someone who tried to smuggle them into legal discourse would be viewed as lacking in proper respect of the law.

D. Individualism, Responsibility, and the Tort System

The argument that any appeal to individual fault reinforces the ideological premises of the tort reformers should come as a shock to civil justice advocates like Ralph Nader. Contrary to Haltom and McCann, a Naderite might argue that the social construction of tort law in the United States could be more proplaintiff if only the defenders of the status quo refocused their efforts on creating a commonsense view in which the motives of injurers were viewed with suspicion and their attempts at avoiding responsibility were viewed as cowardly. This moral picture of tort law would still be individualistic, but it would take the perspective of those who demand that their neighbors *take responsibility* for the consequences of their actions. This individualistic defense of tort law was first laid out by ATLA in the 1950s and 1960s, and in its first iteration it was given a distinctly nationalistic twist.[252] Melvin Belli recruited Roscoe Pound to throw his considerable reputation as a legal scholar behind the idea that America had to resist the drift towards totalitarianism that gripped European nations throughout the twentieth century.[253] This argument equated personal liberty with an individual's right to seek private redress through the courts, as opposed to waiting for a hand-out from a bureaucrat: "[a]dministrative commissions for automobile injuries and the accompanying abolition of the jury trial were but steps on the path toward what Belli called a 'Big Brother' state."[254]

The key to understanding the genius of the early ATLA strategy is that it linked the moral principle of individualism with the political principles of democracy and equality. The embrace of individualism and liberty allowed

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251. *Id.* at 285–86 (emphasis added).

252. *See* JOHN FABIAN WITT, PATRIOTS AND COSMOPOLITANS 254–64 (2007).

253. *Id.* at 246, 252.

254. *Id.* at 259. In 1961, Louis Banks argued in *Fortune Magazine* that America needed *more* courts to process *more* trials. Law was a public resource that strengthened Ameriea: "Law is the authentic idiom of the American people in the struggle for the world, carrying within its wisdom much of the morality, the charity, the restraint and experience in the nation's heritage—all waiting for application to specific, new cases." Louis Banks, *The Crisis in the Courts*, FORTUNE, Dee. 1961, at 86, 198.

trial lawyers like Belli to say that they were not opposed to the free market or the individual pursuit of wealth. The equation of egalitarianism with a skepticism of large institutions allowed them to present tort law as a populist bulwark against the predations of powerful institutions—including big business.[255] In fact, the instinct to merge individualism and egalitarianism might have been a very canny move on the part of those who hoped to promote the tort system in the 1950s and 1960s. According to political scientists Daniel Polisar and Aaron Wildavsky, American political culture has always been a product of the interplay (or tension) between individualism and egalitarianism.[256] Both ends of this spectrum place blame at the center of their political worldview: individualists explain accidents by looking at the fault of individuals, while egalitarians explain accidents by blaming "the system."[257] When egalitarians blame the "system," they are viewing its symbols—experts, corporations, municipalities, etc.—as filled with the potential for wrongdoing, which is made manifest whenever there is an accident.[258]

System blame is really nothing more than the relative widening of the type of occasions when society will deem certain actions as legitimately blameworthy, with a shift in the presumption (although not the burden of proof) of how likely it is that the victim is the author of her own injury.[259] Under the regime of what Polisar and Wildavsky call "individual blame," relatively more accidents are presumed or adjudged to be either the victim's or no one's fault, while in the period of "system blame," relatively more accidents are presumed or adjudged to be the fault of someone with whom the victim had some sort of relationship.[260]

The ascendancy of a belief in system blame by plaintiffs' advocates explains the persistence of *moral* terminology in the rhetoric of tort litigation, notwithstanding the emergence of strict liability for injuries caused by products, as well as in a few other areas of the law.[261] The persistence of the language of blame in modern tort law is not something over which there is

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255. William Simon, *Solving Problems vs. Claiming Rights: The Pragmatist Challenge to Legal Liberalism*, 46 WM. & MARY L. REV. 127, 136 (2004).

256. Daniel Polisar & Aaron Wildavsky, *From Individual to System Blame: A Cultural Analysis of Historical Change in the Law of Torts*, 1 J. POL'Y HIST. 129, 143–44 (1989). Individualism and egalitarianism form two cells of a four-cell matrix. The other two cells are "fatalism" and "hierarchy." *Id.* at 144. An example of a society suspended in tension between egalitarianism and hierarchy is a social democracy such as Sweden. *Id.* at 148.

257. *Id.* at 144.

258. *Id.* at 146.

259. Somewhat hyperbolically, Polisar and Wildavsky characterize the effect of the shift from individualism to egalitarianism on American tort law thusly: "Fault once had to be proved; today it is presumed." *Id.*

260. *Id.* at 148.

261. *See* Richard Abel, *Torts*, *in* THE POLITICS OF TORT LAW 445, 451 (David Kairys ed., 3d ed. 1998) (arguing that "fault principles have reappeared in every no-fault scheme").

widespread agreement.[262] George Priest has argued that advocates for plaintiffs have abandoned theories of liability based on moral concepts, such as fault, which they replaced with the theory of "enterprise liability."[263] According to enterprise liability, tort law should spread the costs of accidents by imposing such costs on those actors who are in the best position either to absorb them or to impose them on some third party who is in the best position to absorb them—but not to impose liability on irrelevant and outmoded conceptions of culpability or responsibility.[264] Under enterprise liability, plaintiffs do not need to identify anything wrongful about the defendants' conduct (what, in theory, he should have done differently).[265] However, under system blame, the plaintiff does need to identify something wrongful about the defendant's conduct, albeit the wrong might refer to very complex conduct, such as the failure to adopt an improved training program for employees or an improved design for a mass-produced product.

The insight motivating Polisar and Wildavsky's concept of "system blame" is that *blame* is a shared point of orientation around which American political culture, in its different modalities, revolves. This is consistent with various scholars' analysis of the incentives that drive political actors toward the courts and away from bureaucratic institutions.[266] Courts, not agencies, are sites where the language of blame is readily heard.[267] This explains the persistence of tort *litigation* as the primary vehicle for the satisfaction of requests for compensation by injured parties, notwithstanding the rapid and promising entry of workman's compensation and first-party insurance into American society in the twentieth century.

However, Haltom and McCann's argument implies that the language of system blame—while available to victims—will spur the growth of the language of individual blame until the latter crowds out the former. But that is not the worst of it from their perspective. A further implication of their

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262. *See* Sebok, *supra* note 70, at 1048–53 (offering competing explanations for the resurgence of blame in tort law).

263. *See* George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) (detailing the emergence of the theory of enterprise liability in modern tort law).

264. "[I]t is always better to divide a loss among a hundred individuals than to put it on any one." *Id.* at 471 (paraphrasing Fleming James, Jr., *Contribution Among Tortfeasors in the Field of Accident Litigation*, 9 UTAH B. BULL. 208 (1939)).

265. "An important implication of [enterprise liability] as the principal function of civil law is that issues of motive and volition central to the legal regime that prevailed until the 1960s are rendered largely irrelevant." George L. Priest, *The Modern Transformation of Civil Law*, 54 BUFF. L. REV. 957, 970 (2006).

266. *See generally* THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS (2002) (asserting that America's "litigious policies" promote the use of litigation in place of regulation and government programs in resolving disputes and implementing public policy).

267. *See generally* Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming" in Popular Culture*, 50 DEPAUL L. REV. 425 (2000) (discussing *The Sweet Hereafter*, a movie that explores the process of "naming, blaming, and claiming" following a tragic accident).

argument—borne out in the examples they use—is that, given the constraints of the political culture we have and the limitations of the storytelling conventions of our media, the introduction of the rhetoric of individual responsibility will end up weakening the legal claims of individuals trying to attribute responsibility to corporate actors. In the chapter on the infamous McDonald's coffee cup spill, *Liebeck v. McDonalds*,[268] Haltom and McCann focus both on the initial telling of *Liebeck* in an AP wire service story after a jury awarded the plaintiff $160,000 in compensatory damages and $2.7 million in punitive damages, and on the way in which the story was retold and turned into an urban legend.[269] Their point is that the media's own framing mechanisms fit the tort reformers' agenda by focusing on the issues of Liebeck's *individual* blame and the legal system's irrationality.[270] The media found it easier to present a story in which the plaintiff was at fault (for the misfortune of spilling the coffee),[271] and the jury verdict was another random product of the legal system, unguided by law.[272] Haltom and McCann's way of reading the history of tort law's proplaintiff expansion is that it played right into the hands of the tort-reform movement that followed. The language of individual blame was a tremendous resource for Belli and ATLA, but it is an even more powerful resource for corporate America.

Another way of reading the case is that it illustrates the limitations of adversarial legalism in trying to use the language of blame to settle complex questions of policy. There were two legal messages in *Liebeck*. First, under New Mexico law, McDonald's was required to pay for 80% of the victim's damages. The second message was that McDonald's decision to serve coffee at 180 degrees (or more) was wrong, and the $2.7 million punitive damage award was designed to make sure that neither McDonald's nor anyone else serves coffee at that temperature again in New Mexico. McDonald's took the position at trial that its decision to serve coffee at a very high temperature was justified by consumer demand for coffee prepared in that fashion and by the very low accident rate associated with its coffee.[273] Its position was upheld in a number of products-liability cases subsequent to *Liebeck*, including *McMahon v. Bunn-O-Matic Corp.*[274] Yet the punitive damages award was

268. No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Ct. Aug. 18, 1994).

269. *See* HALTOM & MCCANN, *supra* note 16, at 183–226.

270. *Id.* at 225.

271. *Id.* at 207.

272. *Id.* at 209–10.

273. McDonald's took the position that coffee needed to be brewed at above 200 degrees and stored at 180 degrees to retain its flavor and that the rate of reported accidents (all ranges of severity) for the ten-year period prior to the trial was 1 in 24 million. *See* Matt Fleischer-Black, *One Lump or Two*, AM. LAW., June 2004, at 15, 16.

274. 150 F.3d 651, 653 (7th Cir. 1998) (holding that a manufacturer of coffee makers did not bave a duty to warn and that the coffee maker producing 179-degree coffee was not defectively designed); *see also* Fleischer-Black, *supra* note 273, at 16–17. As of 2004, the Specialty Coffee Association of America recommended that coffee be served up to 185 degrees in temperature, and Starbucks served its coffee between 175 and 185 degrees. Fleischer-Black, *supra* note 273, at 17.

based on the conclusion that McDonald's decision was not just wrong, but antisocial and outside the boundaries of acceptable conduct.

Therefore, laypersons may have reacted negatively to the *Liebeck* verdict not because they thought she was at fault for spilling coffee on herself, but because they rejected the idea that she (and her attorney) had the right to punish McDonald's for choosing to serve extremely hot coffee in New Mexico. James Henderson, whose work with Ted Eisenberg is showcased in *Distorting the Law*, argued in the 1970s that there were limits to the sort of questions that a court could decide and still retain its legitimacy as a legal institution.[275] Henderson's argument was based on the arguments by the Legal Process School and especially Lon Fuller that certain questions of policy were "polycentric" and therefore not suitable for reasoned adjudication but could be resolved only by the exercise of "managerial authority."[276] The decision of the proper temperature to serve coffee that is intended to be carried in a car in a disposable cup may be one over which reasonable minds may disagree. One might say that it is a "polycentric" decision that a judge or jury may not be especially well suited to perform. The problem with *Liebeck* might not be that the media presented what occurred in such a partial fashion that lay observers were left with the desire to blame the victim. The opposite might be the case—that, despite the lack of detail presented in the case, lay observers got the gist of what happened and rejected the idea that courts are the appropriate place to decide on the proper temperature of take-out coffee, and blame is an inappropriate reaction to what McDonald's did.

V. Conclusion

In 1969 Robert Keeton wrote that "[t]he most striking impression that results from reading the weekly outpouring of torts opinions handed down by appellate courts across the nation for the decade commencing in 1958 is one of candid, openly acknowledged, abrupt change."[277] Keeton observed that the state courts had, between 1958 and 1968, "candidly and explicitly" overruled precedents in a "wide range of problems in the law of torts," and he listed ninety overruling decisions on at least thirty-five topics, ranging from eliminating or limiting common law immunity doctrines, to expanding the right to recover for pure emotional distress, to expanding the doctrine of strict liability.[278] As Gary Schwartz famously commented, until the early

275. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1534–39 (1973) (arguing that "broad-scale" attempts by courts to solve polycentric problems present a "very real threat to the integrity of the adjudicative process").

276. "Even though polycentric problems are not suited to adjudication, it does not follow that they are incapable of rational resolution. Adjudication is, of course, only one of several social processes of decision .... [M]anagerial authority is exercised when one person has the authority to impose his own judgment upon the circumstances which he confronts." *Id.* at 1538.

277. ROBERT KEETON, VENTURING TO DO JUSTICE 3 (1969).

278. *Id.* at 10.

1980s these changes were "almost all triumphs for plaintiffs; the collection of these cases could be referred to as 'plaintiffs' greatest hits.'"[279]

It would be surprising if the widening of opportunities to sue in tort did not result in an increase in the amount of liability claimed and awarded in the United States. It did. According to Towers Perrin Tillinghast, a not totally uncontroversial source, "tort costs" in the United States relative to GDP grew from .62% in 1950 to 1.53% in 1980.[280] Whereas tort costs were $1.8 billion in 1950, they were $42.7 billion in 1980.[281] Helland and Tabarrok surveyed tort expenditures, awards, settlements, and filings and concluded that "[t]he tort system in the United States expanded significantly during the 1970s and 1980s."[282] According to RAND, once one takes into account medical inflation, average damage awards did not grow between 1960 and 2000.[283] This suggests that more suits were filed, rather than that suits became more costly. This is consistent with the idea that the world of tort claiming expanded between 1960 and 1980, and some data supports that as well.[284]

Nor is there necessarily any reason to be defensive or apologetic about the increase in tort costs after 1960. Before 1960, the law denied compensation for reasons that we now reject. The doctrine of contributory negligence, rejected now except in a handful of states,[285] would have left empty-handed a plaintiff who was deemed to be much less at fault than the defendant. In addition, it is worth thinking about how many additional people filed lawsuits after 1960 not only because the law permitted more claims, but because they were permitted to enter the courthouse freely and with dignity.

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279. Schwartz, *supra* note 44, at 603. According to George Priest, a tort reformer, after 1960 there was a marked shift towards plaintiffs in the courts. Priest, *supra* note 263, at 462.

280. TOWERS PERRIN TILLINGHAST, 2006 UPDATE ON U.S. TORT COST TRENDS 5 (2006) [hereinafter TPT]. Tort costs as a percentage of GDP grew to 2.24% in 1990. *Id.* Towers Perrin, a consulting firm, is viewed as very sympathetic to tort reform, and some are skeptical of their data, their methods, and their conclusions. *See, e.g.*, LAWRENCE CHIMERINE & ROSS EISENBREY, ECON. POLICY INST., THE FRIVOLOUS CASE FOR TORT LAW CHANGE (2005), *available at* http://www.epinet.org/briefingpapers/157/bp157.pdf (criticizing the accuracy of and motivations behind the Towers Perrin report). Chemerine and Eisenbrey argue that insurance payments are not "costs" of the tort system but "transfer payments from wrongdoers to victims." *Id.* at 2. It is not clear what Chimerine and Eisenbrey mean by this argument. An obligation created by tortious conduct is a cost that exists only because the tort system exists. If Towers Perrin were counting payments made under first-party policies, the criticism would make sense, but Towers Perrin did not. ECON. POLICY INST., REACTION AND RESPONSE: ANSWERS TO TOWERS PERRIN'S "CORRECTIONS AND CLARIFICATIONS" 4 (May 25, 2005), http://www.epi.org/policy/200505_response_to_ttp-policy_memo.pdf. Marc Galanter, Eric Helland, and Alexander Tabarrok, who do not share the same view on tort reform, rely on the Towers Perrin data to make the same point I am making here. *See* HELLAND & TABARROK, *supra* note 155, at 2–3; *see also* GALANTER, *supra* note 127, at 10.

281. TPT, *supra* note 280, at 5.

282. HELLAND & TABARROK, *supra* note 155, at 7–8.

283. Seabury et al., *supra* note 17, at 21.

284. *See* HENSLER ET AL., *supra* note 162, at 6–8 (characterizing tort litigation between 1975 and 1985 as slowly growing, with marked growth in certain claim categories).

285. DOBBS, *supra* note 114, § 201, at 504.

Blacks, women, and others were not as free to enter the tort system before 1960 as they are today.

The component features of adversarial legalism are likely partly responsible for the growth of tort law. "Litigant activism" means that private parties can push forward with their claims, regardless of what others might think about the social utility or moral attractiveness of the claims.[286] The norms of "formal legal contestation" give private parties access to a set of reasons for compensation that are, in theory, independent of other social or political commitments.[287] Determined litigants are limited only by their ability to comply with the rules of procedure, to find and pay for a lawyer, and their imagination. The individualism of private law—its independence from the state or society—is one of the things that roots tort law most deeply into American culture.

But we should also not be surprised if tort law increasingly becomes a site of contestation as it increases in size—faster than the growth of the GNP and faster than the growth of the population.[288] As tort law increased the opportunities for claiming, those interests who saw themselves as the object of that claiming reacted, and those interests who saw themselves as the beneficiaries of that claiming reacted back. The result is the permanent adversaries in the struggle over tort law that I described in the beginning of this Essay.

The interesting question, I think, is how the struggle between the tort reformers and the defenders of the status quo will manifest itself. What I think the three reviewed books reveal is that the tort reformers have, so far, chosen not to try to reverse the revolution described by Keeton above. To be sure, tort reform has reversed certain doctrinal gains from that period, such as certain rules of joint and several liability, that were extremely favorable to plaintiffs.[289] But by and large, the doctrinal gains won by plaintiffs at the expense of defendants have not been touched. Instead, the tort reformers have tried to slow down or reverse the growth of tort by either challenging the motives of certain categories of plaintiffs and their lawyers or making litigation more difficult by suppressing funding sources—either ex ante (the contingent fee) or ex post (the damage award).[290] In response, the plaintiffs' bar and its allies have tried to expand the reach of tort, either by uncovering new wrongs, by developing new theories of liability, or by developing new mechanisms for financing litigation.

The recent advantage gained by the tort reformers, when looked at in historical perspective, seems less impressive. The doctrinal revolution still

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286. *See supra* note 5 and accompanying text.

287. *See supra* note 4 and accompanying text.

288. TPT, *supra* note 280, at 5.

289. DOBBS, *supra* note 114, § 389, at 1085–87.

290. In fact, the most recent Towers Perrin report noted that 2005 experienced the lowest average increase in torts costs since 1950. TPT, *supra* note 280, at 3.

stands. But the method of attack is worrisome. As Haltom and McCann detail in their book, the rhetorical strategy is to characterize the decision to be a tort plaintiff and to be a tort lawyer as evidence of falling outside the mainstream American values of self-sufficiency and individualism. Understandably, the defenders of the status quo have tried to highlight exactly those features of the tort system that reflect these same American virtues. It is deeply ironic that the tort system attacked by the tort reformers is, as Belli, Pound, and ATLA stressed in the 1950s and 1960s, an extension of the individualistic political culture the tort reformers claim to revere. The contingency fee is a highly individualized way of financing access to civil justice. The premium it generates for the plaintiffs' bar comes to a great degree from the uncertainty that this highly fractured, atomized system produces. Kritzer's contingency-fee attorneys partner with private citizens who believe they have been wronged by other private citizens, thus empowering individuals to secure redress without having to wait for the state to do it for them.[291] Similarly, medical malpractice litigation allows individuals to enforce norms of responsible conduct and thus "avoids excessive reliance on top-down regulation."[292] The deterrent function of the medical malpractice system, if it indeed exists, appeals to a picture of human error that emphasizes the choices made by individuals and the power of punishment (liability) to motivate individuals to make better choices—even when those individuals are embedded in large institutions, despite all we know about the difficulties individuals acting autonomously within large institutions.

One question is whether, in a struggle over the interpretation of the meaning of adversarial legalism and individualism, either side of the permanent struggle has the upper hand. These three books suggest that the answer is that, for the moment, the tort reformers have a distinct advantage, at least at the level of rhetoric. A further question is whether the struggle over who controls the language of individualism in civil litigation excludes other justifications for compensation in the debate over the tort system. Haltom and McCann think that the very language of adversarial legalism is fundamentally hostile to other ways of promoting social goals: "Moralistic judgments about the relative responsibility, reasonableness, and character of legal disputants are encouraged by news practices over assessments that turn on moral sentiments of compassion and empathy."[293] They decry the current state of affairs, where even among liberals the discourse has shifted away from "social rights" toward rights "that are contingent on and promote personal displays of proper moral discipline and resource capacity."[294] The

291. *See* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 606–11 (2005) (writing that tort law is a law of redress as well as an integral part of American legal culture).

292. Goldberg, *supra* note 62, at 1077.

293. HALTOM & MCCANN, *supra* note 16, at 275.

294. *Id.* at 294.

clear implication is that any attempt by those who care about helping those who are most in need of social welfare—injured consumers, patients, etc.—are playing a fool's game by investing so much of their energies and hopes into the tort system.

In the end, Haltom and McCann's book poses a challenge to Baker and Kritzer. The challenge is whether the individualism that characterizes the negligence-based, contingency-fee tort system is, at its core, structurally prodefendant. Their worry recapitulates the permanent factional struggle that characterizes the modern theory of adversarial legalism described at the beginning of this Essay, albeit from a more explicitly ideological perspective. If Haltom and McCann are correct, they provide new reasons for American liberals to return to scholarship from the second half of the last century that recommended replacing the tort system with a social insurance scheme.[295]

Reading Haltom and McCann in tandem with Baker and Kritzer might encourage American liberals—and anyone else concerned about the recent shift in the balance of power in the tort wars—to look more deeply inward at the meaning and role of individualism and blame in adversarial legalism. I would suggest that each of these concepts is more controversial and contested than Haltom and McCann acknowledge in their book. For example, consider the concept of individual responsibility in tort law. According to George Priest, a critic of the status quo, Baker and Kritzer are right to claim, as a descriptive matter, that the turn toward the plaintiff in tort law that developed in the postwar period was characterized by constant rhetorical reliance on the idea of individual responsibility: "[F]ar from incorporating a diminished view of individual responsibility, the shift . . . represents a vastly expanded commitment to standards of individual liability."[296] This is because, according to Priest, the expansion of tort liability described at the beginning of this section was fueled by the theory of enterprise liability. Because enterprise liability grounds liability judgments on whether a defendant would be a good cost-spreader or cost-avoider,[297] "[t]he law charges each citizen to carefully monitor every action for its potential contribution to risk of loss."[298] For Priest, the status quo defended by Baker and Kritzer creates liability rules where individuals are held to be responsible for the injuries of others without any attribution of blame: "It is no longer useful

295. This branch of reform scholarship began with Fleming James, Jr. in the 1950s, *see, e.g.*, Fleming James, Jr., *Tort Law in Midstream: Its Challenge to the Judicial Process*, 8 BUFF. L. REV. 315 (1959), developed in the 1960s and 1970s with the work of Jeffrey O'Connell, *see, e.g.*, JEFFREY O'CONNELL, THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN (1977), and continued into the 1990s with the work of Steven Sugarman and Patrick Atiyah, *see, e.g.*, P.S. ATIYAH, THE DAMAGES LOTTERY (1997); SUGARMAN, *supra* note 90.

296. Priest, *supra* note 265, at 974.

297. *Id.* at 965.

298. *Id.* at 974.

in such a regime to distinguish between the guilty and the innocent or the culpable and the blameless."[299]

Priest's picture of tort law, which emerged from the proplaintiff revolution described by Keeton, seems to have almost nothing to do with the world of torts defended by Kritzer and Baker and described as an ideological trap by Haltom and McCann. How can this be? Is it simply because, like Baker and Kritzer, the defenders of the status quo and tort reformers like Priest are looking at different areas of practice? There is some of that to be sure, since Priest does often return to products liability for examples, whereas Kritzer's study restricts itself to the more quotidian world of personal injury, and Baker focuses exclusively on the very narrow world of medical malpractice. But Priest claims to be explaining a change in the whole universe of civil liability—e.g., the large increase in tort claiming and compensation that forms the rapid increase in the amount of GNP dedicated to tort expenses identified by Towers Perrin.[300] And Haltom and McCann's story covers a very wide range of injury claims, from products liability, to tobacco litigation, to medical malpractice.

I would like to suggest that the picture that Baker, Kritzer, Haltom, and McCann have of the status quo as populated by variations on the trope of individual blameworthiness is not easy to reconcile with the picture of the status quo drawn by their books. As noted above, it is not obvious that the reforms that would produce the most social benefit in the area of medical malpractice are in fact based on the idea that the purpose of litigation should be to help victims of negligent conduct identify and prove the blameworthiness of their injurers.[301] Nor is it obvious, as I noted above, that Kritzer's portrayal of the daily work of contingency-fee attorneys supports the view that they are in the main occupied with the question of identifying, defining, and proving blameworthy conduct on the part of others. As I suggested above, as Kritzer describes it, the work of the average contingency-fee lawyer can better be described (1) as a broker negotiating the market value of an insurance claim between both the client and the third-party insurer and (2) as an investor in the client's contingent insurance claim.[302] Finally, some of the chief examples offered by Haltom and McCann, such as the *Liebeck*

299. *Id.* at 975.

300. *See, e.g.*, George L. Priest, *The Culture of Modern Tort Law*, 34 VAL. U. L. REV. 573, 573 (2000) (arguing that recent decades have seen a change from negligenee to strict liability standards in areas "extend[ing] far beyond the products field").

301. *See supra* notes 97–115 and aecompanying text (discussing Baker's example of anesthesiology, litigation, and patient safety); *supra* notes 72–77 and accompanying text (discussing Bakcr's recommendation that providers adopt an "apology and restitution" incentive). In fact, a recent paper reviewing apology proposals suggests that apology programs similar to those recommended by Baker could jeopardize "the fragile foundation" that supports "the affordability of the medical malpractice system." David M. Studdert et al., *Disclosure of Medical Injury to Patients: An Improbable Risk Management Strategy*, 26 HEALTH AFF. 215, 225 (2007).

302. *See supra* notes 152–53, 166–71 and accompanying text (describing Kritzer's research suggesting investor and negotiator roles for contingent fee lawyers).

coffee cup case, reveal efforts by plaintiffs' lawyers to secure compensation for an individual client by pretextually reframing a complex question of policy as a question of blameworthiness.[303]

Let me be clear about what I am not saying by noting the disjunction between the model of individual blameworthiness embraced in the abstract by the books reviewed in this Essay and the various other norms instantiated by the stories they tell. I am not saying that tort law cannot serve aims other than identifying individual blameworthiness. Perhaps tort law should be an engine of welfare maximization by imposing strict liability on the cheapest cost avoiders in the health care delivery system. Perhaps it should provide a mechanism for sophisticated professionals to invest in insurance claims and advocate on behalf of their clients or partners. Perhaps tort law should be a means by which public policy questions of health and safety are settled, especially in the absence of an accessible or effective system of representative government. Maybe tort law should, despite the cries of horror by critics like Priest, adopt James's original vision of social insurance and enterprise liability. These are questions that can only be answered by normative and interprctive arguments about the history, practices, and point of tort law. My point is simply that, if it is true that the status quo, which came about during the great transformation of the 1960s, is based on some or all of these aims, then it should come as no surprise that tort reformers have been able to put it on the defensive. The story that the defenders of the status quo—at least as presented by these three books—have chosen to tell doesn't quite jibe with the real world of torts they are trying to defend.

These concluding remarks should not be taken as criticisms of the books reviewed in this Essay, since their main project was to examine the myths created by the tort reformers about the status quo. These books each succeed at this task. However, exposing the myths made by the tort reformers cannot be the end of the story. I have suggested that the defenders of the status quo have deployed their own set of myths of the centrality of individual blame in the world of torts that came about after 1960, which they are trying to preserve. It is possible that individual blame is so central to tort law in America that we would want to preserve it at the cost of revising our goals for the tort law and its domain. Perhaps we will come to the conclusion that tort law is valuable even if it does not produce improvements in patient safety. Perhaps we will decide that its domain should be limited to a subset of the cases now handled by plaintiffs' lawyers and, following Kritzer's suggestion, rewrite our rules on licensing so that nonlawyers will invest in and directly negotiate with third-party insurers.[304] Or perhaps we will come

303. I discuss modern pretextual litigation designed to settle controversial political questions in Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177 (2004).

304. *See* KRITZER, *supra* note 15, at 270 (describing a hypothetical nonlawyer "Kritzer Claims Service").

to the conclusion that tort law can be a way for society to pursue many ends, in which case the costs that seem inherent to a system of adversarial legalism, which we seem to tolerate because they are entailed by our commitment to basing liability on individual blameworthiness, might seem less acceptable. In any event, what each of these three excellent books do, in their own way, is raise the possibility that the best way to defend the tort system today is either to bring our tort theory in sync with our tort practice—or to bring our tort practice in sync with our tort theory. But ignoring the disjunction between the two only lends credibility to the critics of the status quo.

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