A RETORT TO TORT REFORM AND THE REAL ISSUES FACING OUR TORT SYSTEM

By Matthew Taub

"We're a litigious society; everybody is suing, it seems like. There are too many lawsuits in America," George W. Bush proclaimed[1] during his 2004 Presidential Re-election Campaign, advocating "tort reform" to "protect honest job-creators from junk lawsuits."[2] This skeptical if not outright negative view is shared by many Americans for the tort litigation system, most notably for cases involving personal injuries, medical malpractice, mass torts, and class actions.[3] To some extent, the disapproval of the tort system is the result of a larger crisis involving the public's increasing disapproval of lawyers in general.[4] The tort law system has its share of blame as well, from encouraging poorly behaving lawyers from an institutional perspective[5] to reinforcement of the worst lawyer stereotypes through television advertisements.[6] But tort law is also the victim of notorious misconceptions, which are the result of persistent, calculated efforts by committed groups that have a stake in limiting tort liability.[7] Such groups have succeeded in portraying the tort system as against American economic and cultural interests,[8] and

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[1] Nick Anderson & Edwin Chen, *Bush Pushes Stance Against "Junk Lawsuits,"* L.A. TIMES, Oct. 22, 2004, at A20 (quoting President George W. Bush).
[2] Stephen Labaton, *Bush's Calls for Tort Overhaul Face Action in Congress*, N.Y. TIMES, Feb. 3, 2005, at A12.
[3] *See* Greg Pierce, *Inside Politics*, WASH. TIMES, Feb. 28, 2003, at A5 (citing a survey finding that 83 percent of Americans think that there are too many lawsuits);
[4] Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847, 848-849 (1998).
[5] *See generally* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 909 (1990); *See also* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).
[6] *See generally* Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 93-94 (2001)
[7] William Haltom & Michael McCann, DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS, 40-46 (2004).
[8] *Id.*

have promoted heavily-flawed "tort reforms" as the solution.[9] This paper debunks the flawed remedies of "tort reform," while noting that other problems with the system remain, including a negative perception of lawyers, an under-serving of eligible clients, and high transaction costs. The real issues facing the tort system are discussed, which address cost, accessibility, utility, and overall perception from the viewpoint of laypersons— those who are likely to use the system to bring suit but are rarely considered in the current debate.

I. MISCONCEPTIONS OF THE TORT LAW SYSTEM

Criticism of the tort law system is based on several significant misconceptions.[10] Far from a "litigation crisis," fewer claims move through the system than most people believe.[11] First, many eligible tort litigants do not file suit.[12] They believe their injury is *de minimis*, they want to get on with their lives, they are wary of any number of elements of the tort litigation system, or are unaware of how to proceed.[13] The reality is that there is a "pyramid" of cases,[14] with only the very top comprised of claims that are actually settled or go to trial.[15] From the lawyer's side, cases are further screened out at negotiation.[16] Esteemed author and legal scholar Marc Galanter refutes the notion that Americans sue "at the drop of a hat," and in fact argues that there is a "crisis of underclaiming" that leads to a "failure to compensate needy, deserving victims and

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[9] *Id.*
[10] *See generally* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1094-1095 (1996).
[11] Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L. J. 447, 456 (Nov. 2004). *See also* John Leo, *The World's Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24,
[12] Galanter, *supra* note 10, at 1099-1100.
[13] *Id.*
[14] *Id.*
[15] Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-81) (surveying households for potential lawsuits that could be brought as contrasted with actual litigation rates).
[16] Galanter, *supra* note 10, at 1101-1102.

failure to discourage unreasonable risks."[17] Galanter finds no spike in litigation, noting that tort cases "peaked in the late 1980s and have been relatively flat or trending downward since."[18] Asbestos litigation has not decreased or increased, but remains steady,[19] while product liability cases "cluster" around a small number of products and the associated corporations who produce them.[20] The only significant growth has been in the "mass tort" sector, again with a small number of products and industries.[21]

The definition of a "frivolous" claim is also misleading and not always clearly defined. Scholar and Law Professor Deborah Rhode notes how "what qualifies as a frivolous claim generally depends on the eye of the beholder."[22] Although rare and obviously frivolous cases exist, there are many other situations where "frivolous" depends on one's point of view:

> The line between vindictiveness and vindication is often difficult to draw... Sexual harassment lawsuits were once routinely dismissed as "petty slights of the hypersensitive," beneath judicial notice. Yet only through these "petty" claims have Americans finally begun to recognize the real price of such abuse in turnover, absenteeism, psychological damages, unequal opportunities, and lost productivity.[23]

Early suits on the tobacco industry faced similar skepticism, but ultimately raised the public's consciousness about a prominent national health concern, with real and substantial costs in medical care and treatment.[24]

Another tort law misconception concerns jurors, who are often considered "capricious and erratic" in their decisions.[25] In reality, juries are no more or less prone

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[17] *Id.* at 1102-1103.
[18] *Id.* at 1103.
[19] *Id.* at 1107.
[20] Terence Dunworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts*, RAND INST. FOR CIVIL JUSTICE, 49 (1988).
[21] Galanter, *supra* note 10, at 1109.
[22] Rhode, *supra* note 11, at 454.
[23] *Id.*
[24] *See* Barry Meier, *Lawyers in Early Tobacco Suits to Get $ 8 Billion*, N.Y. TIMES, Dec. 12, 1998, at A1
[25] 1109.

than judges to find defendants liable in civil tort cases.[26] If anything, jurors were found to have unreasonable suspicions and biases against the plaintiff, causing them to not award a proportionate amount in damages.[27] The severity of the injury did not increase plaintiffs' chances for recovery in the eyes of the jury, and there were few "unjustified payments."[28] Still, the erroneous "pro-plaintiff" perception of juror bias is widespread.[29] And even when jurors awarded high amounts, judicial scrutiny and modification measures are in place to reduce excessive juror decisions when necessary.[30]

The issue of damages in the tort system has its own special set of misconceptions for most of the American public. While significant increases in awards have occurred, this is predominantly a reflection of two factors: increasing medical costs associated with new technology, and lawyers making more selective decisions about which cases to pursue.[31] Further, the increases in insurance premiums for most doctors reflect these factors, and are not the result of "runaway juries" or "abusive lawsuits."[32] While "disproportional awards" do exist, they are not the ones addressed by most tort-reformers. Instead, "the tort system tends to undercompensate large losses and overcompensate small loses."[33] Still, there is a perception of inflated, if not ridiculous, "pain and suffering" awards, when the real results were fair, proportional, and far from "erratic."[34] While there is massive research to support under-compensation in the tort system,

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[26] *See generally* Valerie P. Hans & Neil Vidmar, JUDGING THE JURY (1986)
[27] Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate*, 26 LAW & SOC'Y REV. 85, 94-95 (1992).
[28] Robert MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM, at 137 (Brookings Institution, Robert E. Litan ed.) (1993).
[29] Galanter, *supra* note 10, at 1112.
[30] *Id.* at 1115.
[31] Peter Eisler et al., *Hype Outraces Facts in Malpractice Debate*, USA TODAY, Mar. 5, 2003, at 1A
[32] *Id.*
[33] Galanter, *supra* note 10, at 1116.
[34] *Id.* at 1117-1119.

insurance companies use their resources to fight the most damaging cases, leading to such undercompensation.[35] The amounts of non-pecuniary injuries are not very significant, far from being some arbitrary "pain multiplier."[36] The public's perception of high damage awards comes from the small minority of exceedingly high damage award cases, which throw off statistics for the average jury awards.[37] Punitive damages were found to be exceedingly rare, and the award of such damages did not flow directly from the size of the compensatory award, both in personal injury and products liability cases.[38] Contrary to popular criticism, punitive awards are far fewer than assumed, and are mostly awarded in asbestos and intentional tort cases.[39] A very small amount of punitive damages are awarded in medical malpractice litigation, at a figure between 1-3% of all cases.[40] Yet despite the rarity of such damages being awarded, they are helpful for plaintiffs' attorneys in bargaining for a settlement, helping to get a defendant to stop contesting liability.[41] The perceived "chilling effect" of punitive or other damages to economic innovation and achievement is incorrect, as are notions of such damages being "jackpots" for plaintiffs' lawyers.[42]

In attempting to address these issues, "tort-reform" proposals are often short-cited, if not extremely harmful. While claiming a common-sense approach to the issues, tort-reforms "largely pass by the real problems of the tort-system and offer flawed and

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[35] *Id.* at 1120.
[36] W. Kip Viscusi, *Pain and Suffering in Product Liability Cases: Systematic Compensation or Capricious Awards?*, 8 INT'L REV. L. & ECON. 203, 219 (1988).
[37] Galanter, *supra* note 10, at 1135.
[38] *See* Stephen Daniels & Joanne Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards*, AMERICAN BAR FOUNDATION WORKING PAPER, NO. 8705 (1987).
[39] *Id.*
[40] *Id.* at 13.
[41] Galanter, *supra* note 10, at 1138.
[42] *Id.* at 1138-1139.

harmful prescriptions for change based on a misreading of the patterns, trends, and effects of litigation."[43]

A prominent example of a reckless common tort-reform proposal is the practice of "capping" non-economic damage awards by some arbitrary limit.[44] Such "caps" have a targeted effect on the types of clients that have substantial pain and suffering amounts but little economic damages, which in the worst scenarios includes para/quadripledia, brain damage, and cancer patients.[45] "Caps" also take away from the tort system in its notions of equity, deterrence, and prevention of harm, without any real benefit to the system.[46] As recently as 2003, the State of Texas placed $250,000 non-economic damages "caps" on all medical malpractice cases filed within the State.[47] So far, the result has been a disproportionate effect on the poor and senior citizens who were wronged by the negligence of doctors, but couldn't bring suit because there weren't enough "economic" damages in the form of lost wages to make the suit worthwhile for lawyers.[48]

II. WHY THE MISCONCEPTIONS REMAIN

Despite the lack of crisis in the tort system, and the benefits it is shown to provide to the average American consumer by means of protection and safety, there is still a prevailing skepticism and negative outlook by most of the American public.[49] Some explanations for these prevailing negative views are: (1) there is a negative perception of lawyers in general, which is a view held more commonly by most Americans over the

[43] *Id.* at 1097.
[44] *Id.* at 1122.
[45] *Id.*
[46] *Id.*
[47] *See* Terry Carter, *Tort Reform, Texas Style: New Laws Devastate Plaintiff and Defense Firms Alike,* ABA JOURNAL (October 2006).
[48] *Id.*
[49] Tyler, *supra* note 4, at 848-849.

last twenty years;[50] (2) the behavior of lawyers in the presence of clients or adversaries often promotes a negative image of the modern tort lawyer;[51] and (3) lawyer advertising in television form has significantly diminished the reputation of attorneys, and specifically personal injury attorneys, whose television advertisements are the most infamous.[52] However, the most culpable factors in fostering lingering stereotypes and misperceptions of the tort system involve political groups and the news media, who have inflated the negative perception of tort law and tort lawyers through selective reporting, misleading public relations campaigns, embellishment or outright falsification of cases, "argument by anecdote," and portraying tort law as counter to American notions of personal autonomy, independence, and economic achievement.[53]

1. Negative Views of the Entire Legal System

Over the last twenty years, the American public has become increasingly disenchanted with the court system, particularly local courts.[54] According to a 1977 Harris Poll, almost 75% of respondents believed the legal profession had either very great or considerable prestige.[55] Twenty years later, things had changed dramatically. A near majority (47%) of respondents in April 1997 ranked the legal profession as either having some or hardly any prestige at all.[56] Three predominant factors that cause the public's

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[50] *Id.*

[51] *See generally* Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 909 (1990); *See also* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).

[52] *See generally* Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 93-94 (2001)

[53] *See generally* David C. Johnson, *The Attack on Trial Lawyers and Tort Law*, COMMONWEAL INSTITUTE REPORT (Oct. 2003); *See also* Galanter, *supra* note 10; Rhode, *supra* note 11.

[54] Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (Spring 1998).

[55] *See* Amy E. Black & Stanley Rothman, *Shall We Kill All the Lawyers First: Insider and Outsider Views of the Legal Profession*, 21 HARV. J.L. & PUB. POL'Y 835, 850 (1998).

[56] *Id.*

dissatisfaction were: the length of time it takes to receive adjudication on any particular matter, the amount of money or valued time that must be sacrificed in court, and the uncaring behavior and demeanor of attorneys, judges, and other actors of the court system towards clients and other laypersons.[57] While such experiences are not indicative of the tort system alone, they are problematic nonetheless because they are easily imputed to tort lawyers, who are part of a highly visible element of the legal system. This could partly explain the lingering misperception of the tort system today. Even when negative misperceptions of the tort system are analytically refuted, an overall general disenchantment with the legal system forms an additional reluctance, or barrier, for many Americans to accept the system's realities.

The negative portrayal of lawyers in film and other similar media has also had a similar impact in affecting public opinion about the reputation of the profession. As mentioned earlier, polling data has shown that "the popular perception of the character and the ethics of American lawyers, and the prestige of the profession, have plunged precipitously since the 1970s."[58] This trend is matched with an increasing portrayal of lawyers in film as sinister and suspicious, if not the main evil role of the film.[59] This is in sharp contrast to earlier portrayals of lawyers as decent, ethical and competent professionals, even "heroes." While television portrayals of lawyers are more mixed, and the effect of movies on the public in uncertain, the trend of extremely negative portrayals

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[57] *Id.*
[58] Michael Asimow, *Law and Popular Culture: Bad Lawyers in the Movies,* 24 NOVA L. REV. 533, 536 (Winter 2000).
[59] *Id.* at 561.

of lawyers in film arguably has aggregate effect on the American public psyche that further devalues the legal profession.[60]

2. Behavior of Lawyers and the System in view of Presence of Laypersons

In addition to general grievances and dislike for the legal profession, the behavior of tort lawyers in the presence of clients and laypersons is a further cause for the public's negative view and mistrust of the system. The tort system often makes clients feel bad for bringing their case, with pressure for them to settle rather than seek a full trial coming from all sides, even from their own lawyers.[61] Often defendants don't have to admit wrongdoing, despite the fact that what clients often want more than money is for the truth to come out, which rarely happens.[62] Several studies also represent the view of lawyers lacking any sense of feeling or care regarding their clients.[63] In the quest to seem professional, lawyers seem to be lacking emotion, which leads clients to trust them less.[64] Ultimately, benevolence is as important as competence in the eyes of a client.[65] When such an element in the lawyer-client relationship is missing, it is further cause for clients, laypersons, and the public to buy into the worst lawyer stereotypes and misconceptions about the system, and resist efforts to correct them.

Lawyers also behave extremely aggressively and shamelessly in front of their client and in pursuit of a case. One example is pre-trial depositions, an essential part of the discovery process in civil cases before trial.[66] Lawyers from each side can question

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[60] *Id.* at 582.
[61] Bob Herbert, *Malpractice Myths*, N.Y. TIMES, June 21, 2004, A:19.
[62] *Id.*
[63] Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. CIN. L. REV. 847 (Spring 1998).
[64] *Id.*
[65] *Id.*
[66] David M. Malone & Peter T. Hoffman, THE EFFECTIVE DEPOSITION, pg. 27 (2d ed. 1996) ("Depositions are the most powerful discovery device available to a litigator."); *see also* A. Darby Dickerson, *The Law*

the opposing party's witnesses and extract information for the purpose of building a case for their client.[67] Most civil cases are settled before they ever get to trial, but depositions are usually conducted before a settlement is reached.[68] Such depositions are often crucial to discovering the facts of the case, allowing an attorney to achieve a just resolution of the matter for her client.[69] The Civil Practice Laws and Rules (C.P.L.R.) provide for objections to a counsel's questions during a deposition only under extremely limited circumstances.[70] Accordingly, attorneys usually agree to the "usual stipulations" of the C.P.L.R. before they begin conducting a deposition.[71] The rules are much more lenient than at the time of an actual trial, with the goal of eliciting the vital information to the case, and only later restricting what information can make it into the courtroom.[72] The deposition is thus a highly-regarded tool in the discovery process.[73]

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and Ethics of Civil Depositions, 57 MD. L. REV. 273, 277-278 (1998) (describing the nature of depositions and the opportunity they yield to uncover vital information).

[67] Hall v. Clifton Precision, 150 F.R.D. 525, 531 (E.D. Pa. 1993) ("Depositions are the factual battleground where the vast majority of litigation actually takes place."); *See also* Hickman v. Taylor, 329 U.S. 495, 507 (1947) (claiming that civil discovery allows both parties to establish the agreed-upon relevant facts of the case); cf. United States v. Shaffer Equip. Co., 11 F.3d 450, 457-58 (4th Cir. 1993) (claiming that discovering truth is the purpose of the adversarial system).

[68] *See generally* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1341(1994) (examining a common course in civil cases of filing suit, initiating discovery, and negotiating a settlement).

[69] *Id. See also* Robert S. Kelner and Gail S. Kelner, *New Rules on Conducting Depositions*, NEW YORK LAW JOURNAL, September 19, 2006, at 3:1; Malone & Hoffman, THE EFFECTIVE DEPOSITION, *supra* note 9.

[70] *See* C.P.L.R. § 3115(a), which states:

> Objection when deposition offered in evidence. Subject to the other provisions of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

[71] Edward F. Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 15 REV. LITIG. 503, 517 (University of Texas at Austin School of Law Publication, "The Review of Litigation") (1996) ("Attorneys also often choose not to make evidentiary objections at a deposition. A 'usual stipulation' made at the beginning of a deposition states that all objections, except those relating to form, are waived until trial").

[72] *Id. See also* NYLJ article: "[§ 3115(a)] is important because the scope of questioning and testimony which may be elicited at a deposition may be more extensive than that which may be admissible at trial."

[73] Robert S. Kelner and Gail S. Kelner, *New Rules on Conducting Depositions*, NEW YORK LAW JOURNAL, September 19, 2006, at 3:1. *See also* Malone & Hoffman, THE EFFECTIVE DEPOSITION, *supra* note 9.

Despite the stated rules of the C.P.L.R. and the limited range of objections allowed, the lack of a judge's presence at most depositions creates a ripe opportunity for attorneys to abuse the process.[74] Lawyers may also feel pressured by the American Bar Association's (ABA) *Model Rules of Ethical Conduct*, which require zealous advocacy of one's client, which can pose a conflict with other requirements, such as full compliance with opposing counsel's pre-trial discovery requests.[75] As a result, the conducting of depositions in civil practice is usually done in a hostile atmosphere, with "Rambo lawyers"[76] aggressively disrupting the process:

> Rambos [overly-aggressive lawyers] feed the public's negative perception that lawyers are out for their own gain and will do anything to win, including ad hominem attacks on other attorneys and witnesses during depositions. Since there is no judge present at the deposition to exercise immediate control over the Rambo lawyers, deponents leave these depositions with the perception that whoever has the toughest lawyer and enough resources to wear the other side down will carry the day. The deponent, and any friends and family with whom he has shared the story, may never learn that the legal system has sought to control its own members, even if judicial sanctions are eventually imposed on the offending lawyer.[77]

During any given deposition, a range of unchecked transgressions against the C.P.L.R. usually may occur, involving anything from lawyers improperly objecting, obstructing questioning, distorting questions, subtly or even explicitly coaching witnesses, or directing witnesses not to answer questions.[78] Most of this conduct is usually tolerated by the court, especially if the depositions could be completed and the case is eventually

[74] *See generally* Jean M. Cary, *Rambo Depositions: Controlling an Ethical Cancer in Civil Litigation*, 25 HOFSTRA L. REV. 561 (1996).
[75] A. Darby Dickerson, *The Law and Ethics of Civil Depositions,* 57 MD. L. REV. 273, 275-276 (1998) ("neither the Model Rules of Professional Conduct, the Model Code of Professional Responsibility, nor the Federal Rules of Civil Procedure provide clear guidance for lawyers faced with the ethical dilemmas associated with taking a civil deposition").
[76] *See* Cary, *supra* at note 63.
[77] *Id.* at 578-579.
[78] *Id.*

brought to resolution.[79] But the result for the client and all others is a furtherance of the negative view of lawyers as aggressive hustlers, eager to take any measures to serve their client, with the truth being a casualty.

3. The Effect of Television Advertising on the Legal Profession

Perhaps the most notoriously damaging aspect to the reputation of tort lawyers involves the use of television advertisements. The 1977 U.S. Supreme Court case of *Bates v. United States* allowed first amendment protection to commercial speech of lawyer advertising.[80] The court in *Bates* claimed, among other things, that the threat to lawyers' reputations was not significant enough to ban the use of advertising.[81] But the case also said that States could determine some levels of regulation for advertising practices.[82] In almost all states, print advertising is now allowed, and in-person solicitation is forbidden, leaving television advertisements somewhere in the middle.[83] Outside the scope of this paper are the constitutional implications for curtailing advertising only in its form through the medium of television. Instead, the focus here is on the effect such advertisements pose to lawyer's reputations.[84] While other forms of advertisements were shown to provide vital information and accessibility for laypersons and potential clients, television advertisements in particular were never specifically shown to provide this purpose. The role of television advertisements remains debatable, largely because of their perceived constitutional support. However, some scholars believe

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[79] Robert S. Kelner and Gail S. Kelner, *New Rules on Conducting Depositions*, NEW YORK LAW JOURNAL, September 19, 2006, at 3:1.
[80] Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977).
[81] *Id.* at 369.
[82] *Id.* at 383-384.
[83] J. Alick Henderson, *Attorney Advertising: Does Television Advertising Deserve Special Treatment?* 28 J. LEGAL PROF. 153 (2003-2004)
[84] *See* Jonathan K. Van Patten, *Lawyer Advertising, Professional Ethics, and the Constitution*, 40 S.D. L. Rev. 212, 212 (1995); *See also* Christopher R. Lavoie, *Have You Been Injured in an Accident? The Problem of Lawyer Advertising and Solicitation*, 30 SUFFOLK U. L. REV. 413 (1997);

that the use of "dramatization" in the advertisements "harms the honor and dignity of the legal profession."[85] As one of the most notorious negative portrayals of the legal profession, television advertisements may in fact do some of the most damage in perpetuating stereotypes of lawyers as being out for their own gain, with little actual care for clients or the merits of the system.[86]

4. Selective Rerpoting, "Argument by Anecdote," and Other Negative Portrayals

While the legal system has its own share of blame, as noted earlier, the following factors are far more culpable in shaping the public consciousness toward the tort system and tort lawyers. In some cases the methods discussed are haphazard, if not unintentional– those involved in reinforcing misconceptions of the tort system have other motivations and simply callously disregard the need for more accurate and thorough analysis. But for some of the most persistent promoters of misinformation, such as major insurance companies and other right-wing political interests, the methods used could not be more deliberate.

The most important issue to understand is the political backdrop of the tort-reform, involving a calculated agenda by right-wing political interests to defund trial attorneys and groups like the American Trial Lawyers Association (ATLA), a large donor base for the Democratic Party.[87] Indeed, there is a heavily politicized nature to the entrenched perceptions in the tort reform debate. Republicans have aligned with big businesses for tort-reform measures, and coincidentally, trial lawyers groups are high on

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[85] Daniel Callender, *Attorney Advertising and the Use of Dramatization in Television Advertisements*, 9 UCLA ENT. L. REV. 89, 106 (2001)
[86] Van Patten, *supra* note 79, at 212.
[87] *See* David C. Johnson, *The Attack on Trial Lawyers and Tort Law*, COMMONWEAL INSTITUTE REPORT (Oct. 2003);

the list of Democratic donors, second only to Labor Unions.[88] The result is that the plaintiff's bar has given their voice to the democratic party on the political scene, while the Republican machine, representing big business interests, works its way into people's hearts and minds with ideas of "frivolous suits" and other erroneous beliefs that are against the very interests of most people but support the agenda of the Republican Party's biggest players. For these reasons, the alliance of political interests of the right-wing and the dissemination of the "tort-reform" campaign has formed over the last fifteen to twenty years, driven less from any direct interests in the tort system than with an eye on eliminating their opposition:

> By working to limit jury awards, and thus limiting the income of plaintiffs' attorneys, conservatives seek to "defund the trial lawyers," thereby undermining the attorneys' ability to lobby effectively and to contribute money to the conservatives' political opposition.[89]

The attempt of many "tort-reformers" is simply a coordinated effort to weaken political opposition by taking away the spending power of the Democratic Party. This marriage of right-wing political interests with big business interests of greater profits has little concern for the actual effects of their efforts for the real people in the system. Similar efforts are made targeting other Democratic funders: the Labor movement through "Paycheck Protection" legislation, or the urban poor by attacking voting rights.[90]

These "tort-reformers" have done well as spoon-feeding a "common-sense" view of torts to much of the American public that involves a negative perception of almost every aspect of the system. The "common sense view" involves too many claims, pursued "at the drop of a hat" by most Americans when other remedies are available, "avaricious lawyers," overwhelmed and congested courts, mounting numbers of suits,

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[88] *Id.*
[89] *Id.*
[90] *Id.*

frivolous claims, irresponsible juries, and excessive damage awards, with a damaging result to American businesses and a chilling effect on innovation.[91] Tort reform's proponents claim they seek to curb excessive litigation that benefits lawyers at the expense of everyone else, and famous politicians and political advertisements have supported this view.[92] Indeed, the tort reform debate is often framed as a "morality play" and that the bad guys "are, of course, 'fat cat' trial attorneys who are 'living in the 'lap of luxury' at the expense of taxpayers and consumers' [and] 'making out like bandits,' while bankrupting businesses, clogging the courts, and pricing insurance out of reach for millions of consumers."[93] Much of the argument is made not by logical reasoning, but mere anecdote. It is with such anecdotes that two kinds of legal demons portrayed to the public:

> At one end of the spectrum are megasuits [sic] that ambled along for decades, wreaking financial havoc on all but the lawyers. At the other end of the spectrum are trivial pursuits: football fans who sued referees, prison inmates who wanted a legal right to chunky rather than smooth peanut butter, mothers who asked a court to resolve a playground shoving match between their three-year-olds, fathers prepared to litigate over their fifteen-year-olds' positions on high school athletic teams, a purchaser of Cracker Jacks who demanded damages for a missing prize, and a McDonald's customer who sought $15,000 for damage to his teeth and marital relations caused by a defective bagel.[94]

Reasonable minds may disagree over the same facts or set of data, but the different sides of the tort reform debate may not even be considering the same information.[95] There is a wealth of empirical research to rely on to debunk the tort law myth that outrageous cases (such as those mentioned in the quote above) represent the norm. But most tort-reformers rely on speculation and embellishment of such selectively

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[91] Galanter, *supra* note 10, at 1094-1096.
[92] *Id.* at 1096.
[93] Rhode, *supra* note 11, at 452.
[94] *Id.* at 447-448.
[95] Galanter, *Real World Torts*, 1097-1098.

outrageous cases.[96] According to Marc Galanter, "much of the debate on the civil justice system relies on anecdotes and atrocity stories and unverified assertion rather than analysis of reliable data."[97] Deborah Rhode agrees with this contention, noting that "the public gets anecdotal glimpses of atypical cases without a sense of their overall significance."[98] She discussed the content analysis of one widely publicized book, *The Litigation Explosion*, and tallied up its evidence: "272 short anecdotes, 1 case study, and 6 citations to statistical surveys… [and] many of the statistical data were highly misleading."[99] As a result, much of what we think we know about the tort system is untrue, the result of a public relations campaign coordinated by insurance companies, the US Chamber of commerce, and right-wing political interests with the intentional purpose to deceive the American Public.[100] Many of the negative lawyer stereotypes that are only indirectly related to the tort law system are also promoted by these groups for this same purpose.[101]

There is also an underlying ideology of tort law that perceives American culture as based on certain notions of independence and autonomy, and for which the tort system is seen as disruptive of this goal. Tort-reformers are bounded together in their supportive of a sometimes rutheless capitalistic atmosphere where sometimes "bad things happen," business and people take losses, all of which is accepted as the spirit of capitalism:

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[96] *Id.* at 1098.
[97] *Id.*
[98] Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform*, at 451.
[99] *Id.*
[100] Shailagh Murray, *Trial-Lawyers Lobby Discovers Unlikely Friends: Republicans*, WALL STREET JOURNAL, July 8, 2004, at A1.
[101] *Id.*

> [A] number of tort reform arguments rest upon a broader, underlying ideological foundation, one built around the ideas of personal responsibility, free markets, deregulation of business, and privatization of government functions. For example, the values of self-reliance and personal responsibility are evoked in tort reform arguments regarding the dangers of cigarette smoking and fast food. The free enterprise theme is frequently evoked in arguments for limiting punitive damages, because of the potential harm to a company or a whole industry. By promoting an anti-government, pro-corporate philosophy that encompasses many issues, the Right has laid the ideological groundwork for public acceptance of these tort reform arguments.[102]

In contrast to this, the process of the tort system is often portrayed in movies, by society, and particularly by these committed groups as antithetical to such themes. Tort law is seen as rehashing the past, not allowing for the capitalist market and free will to work their course, and to disrupt the natural healing process to occur where one simply "moves on."[103] While most people have concerns that cut across the tort law debate, these themes of American culture are promoted to drive people against plaintiff's lawyers and the tort system. Only when an individual or someone he or she knows is injured do these perceptions then possibly change.

III. THE REAL ISSUES

Though there are misperceptions of the tort law system and flaws in the current "tort-reform" proposals, the system is not flawless. There are a number of areas where the system is problematic, and possibly could in fact be improved. The expensive costs of the system, accessibility, utility, proper use, and overall perception from the viewpoint of laypersons are of the most concern.

One aspect of the tort system that most scholars agree to be troubling is the high transaction costs for allowing someone to bring suit and have their case work through the

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[102] Johnson, *supra* at note 87.

[103] Austin Sarat, *Exploring the Hidden Domains of Civil Justice: "Naming, Blaming, and Claiming in Popular Culture*," 50 DEPAUL L. REV. 425, 432 (Winter 2000) ("Rather than providing closure, the law promises to prevent the healing of psychological wounds left behind after the accident").

system.[104] However, those who have studied this phenomenon are not in agreement about the best remedy. While costs are high, some find the figures to be misleading, or not as high as is often reported. Estimates of the costs of the tort system are somewhere around $151 billion.[105] But even this figure is misconstrued, and misunderstood. Though this figure is higher than European countries, one argument for the higher cost in the U.S. is a lack of other social welfare programs for citizens to rely on, whereas the tort system is another countries is but one of a few methods of compensation for citizens.[106] Even with such a high figure, tort-reform advocates conflate the costs to the defendant with the costs of the system, which is misleading. They also fail to consider the benefits the tort system provides, which would offset costs.[107] Claims that health care costs and availability are threatened by the system are similarly misleading, and few doctors are really "driven out of business."[108] Little evidence supports harm to the U.S. economic well-being; in fact, deterrence from harm-causing products and activities is a benefit to the economy, and can even have a positive net effect on innovation.[109] Instead, the problem with costs is the large contingency fees that plaintiff's attorneys must charge in order to make sure they are compensated, which, along with other factors, threatens to hinder an adequate recovery for the plaintiff. Research on medical malpractice cases finds that "plaintiffs on average recover just over half of their costs, and those claimants with the most severe injuries end up with only a fourth of their costs."[110]

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[104] Pamela Sherrid, *Lawyers on Trial*, U.S. NEWS & WORLD REPORT, Dec. 17, 2001, at 34.
[105] Robert W. Sturgis, TORT COST TRENDS: AN INTERNATIONAL PERSPECTIVE 15-16 (1989).
[106] Galanter, *supra* note 10, at 1141.
[107] *Id.* at 1142.
[108] *Id.* at 1143-1145.
[109] *Id.* at 1145-1148.
[110] Frank A. Sloan & Stephen S. van Wert, *Cost and Compensation of Injuries in Medical Malpractice*, 54 LAW & CONTEMP. PROBS. 131, 155 (Winter 1991).

A related issue involves the lack of accessibility for deserving clients to have their cases heard and adjudicated. There is no "litigation crisis" in the sense of clients suing too easily; instead, clients likely sue too rarely.[111] Further, if all deserving clients did pursue a cause of action, the system would likely be unable to manage all of the cases.[112] The system has not been expanded to include more legitimate claims, which would need to be done.

In the meantime, some measures of reform could be taken to ensure that the litigation system is not abused, or used for the wrong reasons. Awards of money are not always the most useful means of compensation, and invite abusive clients to embellish the extent of their injuries.[113] Such abuse could be curtailed if awards were altered to something less liquid.[114] For example, in cases where a plaintiff can receive monetary damages outright for emotional distress, the plaintiff could instead be able to receive such monies only as a discount or voucher for psychological services received. Further, police investigations and crackdowns could also be used to make sure the right cases are going to court in the first place. A common problem in the tort system involves accident "victims" who fake injuries, or embellish their injuries to receive higher recovery awards. "Undercover" operations, involving fake accident victims who actually are police informants, have been successful[115] in the past at prosecuting lawyers who take such cases. Such programs could be used more commonly in the future.

The pay structure in the tort system is also problematic. Though lawyers need to charge substantial contingency fees in the event a case is unsuccessful, oftentimes there is

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[111] Richard Abel, *The Real Tort Crisis - Too Few Claims*, 48 OHIO ST. L.J. 443, 447 (1987).
[112] *Id.*
[113] Robert A. Kagan, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW, (2001).
[114] *Id.* at 127.
[115] *Texas Bar Sends a Warning To Its Overzealous Lawyers,* N.Y. TIMES, Sept. 15, 1996, 1:42.

all too much money ending up in lawyers' hands.[116] Another problem involves the nature of a monetary award, which is often far from the desired result of most clients, who simply want the defendant to admit wrongdoing, which would provide a sense of closure. Unfortunately, most defendants, especially large corporations, will refuse to admit wrongdoing and will instead pay large sums of money to litigants.[117] Perhaps the costs of damage awards could be reduced if "admitting wrongdoing" became a method to substantially reduce possible damaging jury awards to defendants, if not some sort of partial immunity from suit.

Another important question to ask is whether the tort system is actually reaching its intended goal of deterrence. While compensation of victims is the primary goal, tort law is also supposed to serve as a preventative method for further future risks. However, in many industries, lawsuits have become an assumed part of business, rather than a motivation for reform. For example, in areas such as the construction industry, where countless lawsuits assail companies for their poor safety practices, workers are still constantly being abused.[118] Most companies still show a wanton failure to update their technology and safety practices, or to adequately follow safety regulations in the industry, despite persistent lawsuits when workers are injured.[119] Such examples are evidence of the tort system doing too little, rather than too much. There must be a way to really deter unsafe practices, either with additional penalties or other means.

While all of these factors might be ways to improve the system, the most important focus should be on restoring the public's perception of lawyers to a reputation

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[116] *See generally* Lester Brickman, et al., RETHINKING CONTINGENT FEES, at 20-23 (1994);
[117] *Id.*
[118] Damien Cave, *City Forms Task Force to Improve Safety of Workers on Scaffolding*, N.Y. TIMES (Nov. 3, 2006), B3.
[119] *Id.*

of dignity, competence, and professionalism. The tort system will run more efficiently, and lawyers in all aspects of practice will have more success if the public's view of victims, tort law, and tort lawyers could be improved. In response to the concerted efforts of certain political interests to denigrate the tort law system, tort lawyers and the ATLA have worked on their own public relations campaign.[120] These efforts need to be continued at the national level, and perhaps even through documentaries and other mediums, to show the true nature of the system, whether it be through documentaries, congressional hearings, or other media that can overcome the cruel disbelief and hatred victims face,[121] and general misconceptions of the system.

IV. CONCLUSION

The "tort reform" debate is a largely disingenuous attempt to mislead the American public and alter the legal system to further protect the insurance industry and other right-wing political interests. "Tort reformers" rarely consider layperson clients in their analysis, who are most affected by the system and by any changes that would be made. No matter what reforms are made to the system, if any, any position about the tort reform debate involves the acknowledgement of certain trade-offs in national priorities. For example, the United States can't be easily compared to European countries that have tort system that is used less frequently and is not as costly, because such countries have other forms of social welfare programs that we don't subscribe to. Further, "reforms" such as capping damages or reducing the statute of limitations for filing suit hardly "fixes" the system. Such reforms merely foreclose the possibility of otherwise deserving clients from filing suit, letting them suffer instead. In reality, much of the needed

[120] *See* Martin Lasden, *On the Air*, CAL. LAW., June 2003, at 12.
[121] Herbert, *supra* at note 61.

"reform" is already done by existing judicial controls, whereby judges can reduce or reverse unreasonable jury awards.

For those who support the merits of the tort system, the question should be: why do misconceptions of the system remain? The main reason, stemming from many sources, is a negative view of lawyers and the legal system. Targeted efforts at improving the image and reputation of lawyers can in turn help raise the public's consciousness of the merits of the system. And an improved image of tort lawyers and the tort system is a benefit to all lawyers, regardless of their area of practice.