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TOWARD DECONSTRUCTING THE DECONSTRUCTION OF LAW AND LAWYERS

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Lawyers have yet to experience a period of great public approbation.[1] Nevertheless, the current offensive against lawyers, litigants, and litigation seems particularly virulent and widespread.[2] Lack of access to the legal system frustrates many citizens,[3] and professed pundits, liberal and conservative, point to overcrowded dockets as evidence of the system's failure to provide legal services to both the powerful and the disadvantaged.[4] A profusion[5] of overly zealous lawyers,[6] discovery abuse,[7] expansion of legal

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1. *See, e.g.*, Honestus (Benjamin Austin), *Observations on the Pernicious Practice of the Law*, 13 AM. J. LEGAL HIST. 244, 249 (1969); Lawrence Savell, *Why Are They Picking on Us?*, 78 A.B.A. J., Nov. 1992, at 72, 72; Mark G. Yudof, *Lawyers Aren't Really So Bad — And Times They Are A-Changing*, TEX. LAW., Jan. 20, 1992, at 12.

2. *See generally* Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987).

3. *E.g.*, Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17 LAW & SOC. INQUIRY 585, 621 (1992) (observing that lack of access is occurring at a time when people, more than ever, need technical legal advice to help them maneuver through complex administrative and corporate mazes, heightening citizen frustration).

4. *See, e.g.*, Joel B. Grossman & Austin Sarat, *Access to Justice and the Limits of Law*, 3 LAW & POL'Y Q. 125, 127 (1981); William Rich, *The Role of Lawyers: Beyond Advocacy*, 1980 B.Y.U. L. REV. 767, 780; Austin Sarat, *The Litigation Explosion, Access to Justice, and Court Reform: Examining the Critical Assumptions*, 37 RUTGERS L. REV. 319, 319-25 (1985).

5. *See* James Bishop, Jr., *Quayle vs. The Lawyers: The Hunt Is on for a Plump New Scapegoat to Blame for the Nation's Woes*, ARIZ. REPUBLIC, Dec. 8, 1991, at C5 (reporting that critics of the legal system claim that the United States has 20 times more lawyers than Japan per 100,000 population); Saundra Torry, *Quayle and Curtin Generate More Heat Than Light in ABA Debate*, WASH. POST, Aug. 19, 1991, at F5 (quoting Vice President Quayle as stating that America has 70% of the world's lawyers). See *infra* note 31 for commentators and studies that refute these claims.

6. Peter Carlson writes: "Standing by, ready and eager to help Americans bludgeon each other with lawsuits, are nearly 800,000 lawyers. . . ." Peter Carlson, *Legal Damages*, WASH. POST, March 15, 1992, at W11. Moreover, Robert Sayler quotes William F. Buckley as saying: "What we have too much of is litigation—but diminish litigation, and you diminish the things that keep lawyers busy . . . . The Result is the current litigious mess." Robert N. Sayler, *Don't Blame the Lawyers*, WASH. POST, Sept. 21, 1991, at A21. Mr. Buckley wrote this statement only a few weeks before he and seven other Yale alumni filed suit in a Connecticut state court seeking to bar women from membership in Yale University's Skull & Bones Society—a secret, all-male club. *Id.*

7. *See* Wayne D. Brazil, *Civil Discovery: Lawyers' Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 811, 833-35 (1980) (reporting that in a 1980 survey of Chicago attorneys, 96% said that they had settled a case knowing significant information the opposition had not discovered and that evasive or incomplete responses impeded discovery in 60% of their cases); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 192 (1992) (designating discovery abuse as a major problem in our courts); Maurice Rosenberg & Warren R. King, *Curbing Discovery Abuse in Civil Litigation: Enough is Enough*, 1981 B.Y.U. L. REV. 579, 579-80; Robert E. Sarazen, Note, *An Ethical Approach to Discovery Abuse*, 4 GEO. J. LEGAL ETHICS 459, 459-60 (1990) (observing that discovery is not achieving its purpose of assuring "mutual knowledge of all relevant facts" due to various forms of abuse).

doctrine,[8] and a litigation-loving populace[9] allegedly cause the overload.[10] The adoption of informal dispute resolution procedures like mediation and arbitration is urged as a way to alleviate court congestion.[11]

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8. *See* John H. Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975) (discussing two explanations given for the expansion of law: the increasing complexity of society and the perceived helplessness of the individual); Bayless Manning, *Hyperlexis, Our National Disease*, 71 NW. U. L. REV. 767, 767 (1977) (hyperlexis described as a "pathological condition caused by an overactive law-making gland"); George L. Priest, *The New Legal Structure of Risk Control*, 119 DAEDALUS 207 (1990) [hereinafter Priest, *Risk Control*] (changes in legal doctrine partially responsible for increase in products liability cases).

9. Chief Justice Warren Burger opined: "One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. . . . The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity." Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982). *See also* Maurice Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350 (1982) (Americans overemphasize litigation, seeing the courts as the solution to problems once thought of as personal misfortune). Peter Carlson disapprovingly notes that nearly 18 million new civil suits were filed in American courts in 1989—one for every 10 American adults. Carlson, *supra* note 6, at W11. *But see* Sarat, *supra* note 4, at 320-21 (the idea of an overly litigious society is largely a problem of perspective).

Studies belie the myth of litigious Americans. *See infra* note 31. In spite of the legal profession's growth and the organizational complexity of the United States, many Americans continue to avoid using lawyers. Epp, *supra* note 3, at 621.

10. *Cf.* Sarat, *supra* note 4, at 320 (acknowledging these explanations but critiquing their foundation). Generally, confusion abounds over where to place the blame for the alleged litigation explosion. *See* Saundra Torry & Mark Stencel, *Bush, Quayle Put Lawyers in Election-Year Docket*, WASH. POST, Aug. 28, 1992, at A16 (reporting President Bush's statement that the problem was not lawyers, but a legal system which had "spun out of control" and his very different statement four months later that the problem was "ambulance-chasing lawyers.").

11. During colonial times, the public sought alternative ways of resolving disputes out of fear that self-interested lawyers would protect only their own interests. Austin, *supra* note 1, at 267-72 (proposing that parties should offer their pleas personally rather than utilizing lawyers who engage in "lawcraft").

Today informal alternatives to litigation receive broad support. *See, e.g.*, STEPHEN B. GOLDBERG ET AL., DISPUTE RESOLUTION 7 (1985); Stephen R. Feldman, *A Statutory Proposal to Remove Divorce from the Courtroom*, 29 ME. L. REV. 25, 33 (1977) (encouraging divorce mediation in order to alleviate court congestion); Nancy Ann Holman & Jane Noland, *Agreement and Arbitration: Relief to Over-Litigation in Domestic Relations Disputes in Washington*, 12 WILLAMETTE L. REV. 527, 544 (1976); Joshua D. Rosenberg, *In Defense of Mediation*, 33 ARIZ. L. REV. 467, 467 (1991) (arguing that mediation empowers the parties, saves judicial resources, reduces court overloads, and is more likely to satisfy the parties than is the court process); *see also* Geoffrey C. Hazard, Jr. & Paul D. Scott, *The Public Nature of Private Adjudication*, 6 YALE L. & POL'Y REV. 42, 42-47, 52-60 (1988) (discussing how access to justice concerns have encouraged the movement to private justice). *See generally* LEGAL BREAKDOWN: 40 WAYS TO FIX OUR LEGAL SYSTEM 83-84 (Stephen Elias et al. eds., 1990) [hereinafter LEGAL BREAKDOWN] (neighborhood disputes should always be mediated to avoid entanglement in the court system and its costs). In Colorado the Judicial Department's long-range strategic planning project ("Vision 2020: Colorado Courts of the Future") has uncritically endorsed Frank Sander's vision of a multi-doored courthouse that offers disputants the choice of various dispute resolution alternatives. The project report, however, does reflect some sensitivity to the special problems alternative dispute resolution (ADR) presents in family cases. Craig Boersema, *Vision 2020: Building a Strategic Plan for Colorado Courts*, 22 COLO. LAW. 11, 16 (1993).

As George Priest notes, however, neither the size of the court system, the composition of the caseload, the number of judges, the number of cases per judge, the court's settlement policies, nor the provision of mandatory alternatives demonstrably affect the speed of case disposition. George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 528-29 (1989). Moreover, many commentators have questioned the virtues and have suggested the negative consequences of ADR. *See, e.g.*, Richard L. Abel, *The Contradictions of Informal Justice*, *in* 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE 267 (Richard L. Abel, ed., 1982); Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62

The formal system's frequent failure to dispense substantive justice also promotes public indignation.[12] Academic criticism reinforces public disdain. Scholars deconstruct the notion of legal rights, suggesting that rights rarely protect the disadvantaged,[13] increase alienation,[14] fail to address truly important needs like food and shelter,[15] and discourage the political mobilization of the powerless needed for reform.[16] Others con-

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TUL. L. REV. 1 (1987); Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 441 (1992); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35 (1991); Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 729, 774 (1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Robert J. Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 17 FAM. L.Q. 525, 525 (1984).

12. Charles Dickens provides a classic example of citizen frustration:

> The system! I am told on all hands, it's the system. It mustn't look to individuals. It's the system . . . . I mustn't go to Mr. Tulkinghorn, the solicitor in Lincoln's Inn Fields, and say to him when he makes me furious by being so cool and satisfied—as they all do, for I know they gain by it while I lose, don't I?—I mustn't say to him, "I will have something out of some one for my ruin, by fair means or foul!" He is not responsible. It's the system. But, if I do no violence to any of them . . . . I will accuse the individual workers of that system against me, face to face, before the great eternal bar!

CHARLES DICKENS, BLEAK HOUSE 228 (Signet 1974) (emphasis removed).

Public outrage in response to the Rodney King verdict affords a more current example. *See, e.g.*, Bill Maxwell, *Blacks Must Give Voice to Values*, ST. PETERSBURG TIMES, May 27, 1992, at A9; *Cycles of Political Expediency*, HARTFORD COURANT, May 17, 1992, at B2. For statistics on the public's reaction to the verdict, see Richard Morin, *Polls Uncover Much Common Ground on L.A. Verdict*, WASH. POST, May 11, 1992, at A15.

13. *See, e.g.*, STUART SCHEINGOLD, THE POLITICS OF RIGHTS 6-9 (1974); Michael Diamond, *Law, the Problems of Poverty, and the 'Myth of Rights,'* 1980 B.Y.U. L. REV. 785 (discussing the failure to provide housing for low-income citizens despite favorable legislation); Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 103-04 (1974) [hereinafter Galanter, *Why the "Haves" Come out Ahead*] (noting that those who are unfamiliar with the legal system and have limited access to legal services are disadvantaged by legal institutions and rules).

Members of the Critical Legal Studies Movement see little value in rights due to their indeterminate nature. *See* Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1584-85 (1984) (rights possess an "infinite number of surface meanings" that protect their "fantastic nature" and obstruct the desire to give them a realized meaning); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 359-60 (1979) (a conflict between rights forces a choice between categorizations that a skillful arguer can manipulate); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1364 (1984) (rights matter only when recognized in a specific social setting).

14. *See* Gabel, *supra* note 13, at 1567-76 (asserting that alienation occurs when people who desire authentic contact with each other assume the character of "rights-bearing citizens").

15. *See* Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 33 (1984) (arguing that people do not need rights, but rather forms of social life created through the building of movements).

16. *See, e.g.*, Richard D. Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 240-52 (1981); Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 424-26 (1984).

Professor Derrick Bell has hinted at the political immobilization that occurs when rights generate a false sense of security:

> One of the most insidious aspects of our civil rights policies is the false sense of racial neutrality that they provide. This mirage is so attractively pervasive, even some of the best young black minds are fooled into believing that they made it strictly on merit, and that affirmative action and other preferential policies deny them the credit and respect that they deserve.

firm what the public experiences and scholars surmise—the formal system's failure in many contexts[17] to deliver the substantive justice it promises.[18]

Courts themselves often invite public scorn by treating certain disputants with disrespect.[19] Lawyers, concerned with the economics of practice, sometimes do not provide the care and concern their clients seek.[20]

> The problem is that the new civil rights laws permit discrimination even as they outlaw it, and they make policies and actions that are non-discriminatory seem like mandated compliance, when, in fact, they are voluntary responses to self-interest and profit.

Stephanie B. Goldberg, *Who's Afraid of Derrick Bell? A Conversation on Harvard, Storytelling and the Meaning of Color*, 78 A.B.A. J. 56, 57 (1992); *see also* Linda Greenhouse, *Ginsburg a Rare Judicial Find: Though a Liberal, Nominee Favors Restraint by the Courts*, DENV. POST, July 25, 1993, at 6A (explaining that Ginsburg thought that the United States Supreme Court's decision in *Roe v. Wade* encouraged members of the abortion-rights movement to relax).

17. For example, Mark Tushnet argues that by stripping the states of power to control women's abortion decisions in *Roe v. Wade* the Supreme Court also created a foundation which allowed it later to find no state obligation to provide funding for abortions. Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 813-14 (1983). What the Court gave to the privileged with one hand it took from the disadvantaged with the other.

18. The pluralism of our society inevitably compromises our legal system's ability to produce results that a broad spectrum of our citizens will perceive as just. *See generally* ROBERTO M. UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY 198-200 (1976). *See also* Harry T. Reis, *The Multidimensionality of Justice*, *in* THE SENSE OF INJUSTICE: SOCIAL PSYCHOLOGICAL PERSPECTIVES 38-57 (Robert Folger ed., 1984) (suggesting that individual characteristics such as gender, belief in the Protestant Ethic, and belief in the legitimacy of various distributional schemes influence perceptions of substantive justice).

19. *E.g.*, Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1313 (1992) (reporting that the judge in an "attitude arrest" case paid little attention to defendant's testimony, turning his chair away from the witness stand so he could not see the defendant); Linda K. Girdner, *Adjudication and Mediation: A Comparison of Custody Decision-Making Processes Involving Third Parties*, 8 J. DIVORCE, Spring/Summer 1985, at 33, 37-38 (quoting an exasperated family law judge as telling the parties, "I never understand why parents want to spend all their money on lawyers' fees *for something between themselves*. . . . You two are probably going to fight on and on. . . . It's utterly ridiculous.") (alteration in original).

> As one report indicates:
> One Texas judge justified giving a light sentence to a convicted killer because the victim had been gay. Many commentators criticized the judge's candor, but not his prejudice.
> . . . .
> Judges often treat minority and women witnesses, court employees and lawyers without respect. For example, one California judge ordered an attorney—the only woman among a group of seven—to type up a settlement agreement. "Come on sweetheart," urged the judge. "I know you can type." African-American and Hispanic lawyers are often harassed by court officers who assume they are criminal defendants. Judges often call them by their first names and refer to their minority clients as "boy" or "girl."
> . . . .
> Such prejudice also destroys faith in the fairness of the court system. A 1989 New York investigation into racial bias found that many minorities mistrust the state's court system, which is overwhelmingly dominated by whites. . . .
>
> But despite the mounting evidence, most courts refuse even to acknowledge the problem. This hypocrisy and indifference, on top of the actual unfairness, make a travesty of the legal system's claims to provide equal justice under the law.

LEGAL BREAKDOWN, *supra* note 11, at 43-44; *see also* KAREN CZAPANSKIY & TRICIA D. O'NEILL, THE WOMEN'S BAR ASS'N OF MARYLAND, COURTWATCH REPORT 24-28 (1993).

20. From his hundreds of interviews with clients, Alan Levine concluded that clients value lawyers who, among other things, listen and treat them with respect. Alan P. Levine, *Looking for Mr. Goodlawyer: What Clients Want*, A.B.A. J., Sept. 1992, at 60, 60-62. He also noted

Further, the public grows increasingly uneasy with the law's steady encroachment into areas once thought private[21] and with the perceived gap between substantive law and individual mores.[22]

Faulty system operation and public resentment are not the only problems allegedly flowing from a surplus of lawyers and Americans' penchant for litigation. President Bush blamed ambulance-chasing lawyers for the reluctance of doctors to practice in rural areas and for the unwillingness of parents to coach Little League.[23] Increased malpractice premiums allegedly price medical care beyond the reach of most citizens and drive doctors from their profession.[24] The Bush Administration claimed that the litigation explosion bleeds our economy of $80 billion in

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that it is the rare lawyer who takes sufficient time to listen and understand client problems and concerns. *Id.* at 62; *see also* Robert D. Dinerstein, *Client-Centered Counseling, Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 506 (1990) (stating that in traditional legal counseling, the lawyer is concerned with the client's reaction to his advice but tends not to value client input and that the lawyer and client are likely to talk at, rather than with, each other); Suzanne B. O'Neill & Catherine G. Sparkman, *What Your Client Expects From You: A Guide for New Lawyers*, 36 PRAC. LAW., March 1990, at 39, 40 (noting that a frequently heard client complaint is that the lawyer failed to understand what the client needed in the first place, because the lawyer simply assumed she knew what the client wanted and failed to listen to the client's actual goal or problem).

In dissolution of marriage cases, the problem seems particularly acute. In their long-term study of divorce lawyers and their clients, Felstiner and Sarat found that lawyers continually encouraged clients to separate emotional from legal issues, while clients could not accept definitions of their cases that excluded emotional issues. William L.F. Felstiner & Austin Sarat, *Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions*, 77 CORNELL L. REV. 1447, 1455 (1992); *see also* John Griffiths, *What Do Dutch Lawyers Actually Do in Divorce Cases?*, 20 LAW & SOC'Y REV. 135, 152 (1986) (a survey of Dutch divorce clients revealed that clients often wanted to unburden themselves of emotional and social concerns, but that lawyers typically reacted to client overtures by offering a cup of coffee or by changing the subject).

21. Yudof observes that "[o]ur society's frustration with the legal system may result from the increasing involvement of lawyers with everyday decisions that used to be made by physicians, manufacturers, employers, teachers and police officers." Yudof, *supra* note 1, at 14; *see also* Hazard & Scott, *supra* note 11, at 52-60 (discussing how the growing public sentiment that the state should not interfere in voluntary arrangements has influenced the movement to private justice).

22. Rich, *supra* note 4, at 783; Lynne D. Wardle, *The Gap Between Law and Moral Order: An Examination of the Legitimacy of the Supreme Court Abortion Decisions*, 1980 B.Y.U. L. REV. 811, 811. To some extent, this gap exists because of the growing complexity and the pluralistic nature of our society. *See* Diamond, *supra* note 13, at 792-93; Richard D. Schwartz, *Law, Society, and Moral Order: Introduction to the Symposium*, 1980 B.Y.U. L. REV. 721, 727-33; *see also* UNGER, *supra* note 18, at 66-86 (arguing that the confluence of group pluralism and a belief in higher law, reinforced by a transcendent religion, produced the rule of law ideal in modern European societies).

23. Torry & Stencel, *supra* note 10, at A16.

24. Amy Goldstein & Rene Sanchez, *D.C. Council at Last Faces Malpractice Morass*, WASH. POST, Feb. 5, 1992, at C1. However, the reporters also explain that doctors and hospital officials remain unable to trace rising medical costs to malpractice liability or to offer firm figures on how many doctors have altered or left their practices in response to increasing insurance costs. *Id.* Others note that changes in technology, waste within the medical system, inappropriate treatment, administrative expenses, high doctor incomes, health insurance plans allowing insured individuals to participate in a treatment plan with little out-of-pocket expense, and ignorance and greed probably have more to do with the high cost of medical care than malpractice liability. Spencer Rich, *Demand for High-Tech Medicine Hampers Efforts to Curtail Health Costs*, WASH. POST, July 12, 1992, at A1. The first two factors alone explain 50 to 83% of the increase in medical costs. *Id.*

direct, and $300 billion in indirect, costs each year.[25] And, Professor George Priest informs us that in the products liability area substantive doctrine has expanded and liability policy has shifted to risk control.[26] These developments, he argues, cause American manufacturers to incur more liability[27] and process costs than manufacturers in other countries, hindering our ability to compete in international markets.[28] Moreover, anticipation of potential liability provides a disincentive for the creative development of innovative products[29]—another competitive disadvantage.[30] In difficult economic times, many Americans find these assertions

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25. Carlson, *supra* note 6, at W15 (quoting then Vice President Quayle).

Professor Galanter, however, identifies two flaws in these figures: (1) costs and transfers are conflated and (2) benefits are not used to offset costs. Marc Galanter, *Too Many Lawyers? Too Much Law?*, 71 DENV. L. REV. 77, 88 (1993).

26. Priest, *Risk Control*, *supra* note 8, at 207. Priest explains that two assumptions underlie this shift. First, if practical prevention of the injury were possible, liability should extend to the party in the better position to prevent the injury. *Id.* at 216. Second, if practical prevention of the injury were not possible, liability should extend to the party in the better position to spread the risks of injury. *Id.* at 216-17. For Priest's explanation of how this shift occurred, see George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2302 (1989).

27. Some commentators insist that part of the increased liability stems from jury bias against business. Yet, a recent study of jurors reveals that jurors admit skepticism of plaintiff tort claims against businesses; admit a greater focus on plaintiff actions and motivations than on businesses' responsibilities; and admit concern over the litigation crisis and the need to limit awards. 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 (1992).

28. Professor Priest receives support from ex-Vice President Quayle who stated that America is in the "midst of a 'litigation explosion'. . . . The result is a civil court system characterized by 'overloaded court dockets' and 'excessive delay,' a system that . . . puts American business at 'a self-inflicted competitive disadvantage.'" Carlson, *supra* note 6, at W15 (paraphrasing Vice President Quayle); *see also, e.g.*, Bishop, *supra* note 5, at C5.

A recent study by Charles Epp refutes the common assumption that large lawyer populations impair economic growth, claiming it lacks theoretical and empirical support. Epp, *supra* note 3, at 585; *see also* Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645 (1992) [hereinafter Cross, *Effect of Lawyers*] (finding no statistically significant evidence that lawyers impair economic growth). Moreover, risk managers and chief executive officers differ among themselves as to whether litigation affects competitiveness. Galanter, *supra* note 25, at 81.

Priest also explains that when a firm cannot pass along the increased cost of its liability insurance premium to consumers because buyers will refuse to purchase at the higher price, the firm removes the product from the market. He notes a recent survey showing 25% of the nation's 500 largest corporations had removed products from the market for this reason. George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 500 (1987). Perhaps, however, removing products from the market when consumers are unwilling to pay the full cost of producing them, including the cost of injury, is a social good rather than an economic evil.

29. Priest, *Risk Control*, *supra* note 8, at 223 (noting that since 1987, 25% of U.S. manufacturers have discontinued new product research for liability reasons).

30. Priest's position implies an unacknowledged value preference for maximum economic prosperity over increased consumer safety. Priest, however, also suggested during his oral comments that increased tort liability hurts disadvantaged people because it causes firms to remove cheaper products that the poor people want from the market or to raise the price of these products beyond the poor's ability to purchase. He also explained that forcing manufacturers to insure for an average expected liability payout for a particular product resulted in the poor, in essence, subsidizing the insurance costs of high-income earners and the wealthy because their tort damages normally were considerably greater than those of the poor. For fuller development of this argument, see *id.* at 225-26.

threatening, increasing their disapproval of lawyers, litigants, and litigation in general.

These criticisms decrease the legitimacy of the legal system, tarnish the reputation of the legal profession, and discourage the public from bringing legal claims. If these accusations were valid, or if they told the entire story, our justice system would need sweeping reform and citizens would be wise to seek alternatives to legal representation. Yet, Professor Galanter and others have demonstrated that distorted and erroneous statistics provide the only support for most of these criticisms.[31] Moreover, discussions about the legal system and how to restructure the delivery of legal services appear one-sided, largely ignoring the system's positive attributes and what might be worth retaining or supporting. What promotes this shortsightedness and distortion? In seeking an answer, I first want to expand the discourse on the formal legal system by acknowledging its positive attributes, by transforming the pejorative language used to describe lawyers and litigants, and by discussing unacknowledged problems and potential solutions.

To begin, I agree with critics that talented and dedicated (rather than overly zealous) lawyers successfully have pushed for the expansion of substantive doctrine in many areas. The development of strict liability for defective products makes successful claims against manufacturers easier. The redefinition of marital property in family law gives divorcing wives rights to more of the marital assets.[32] Similarly, prior to the last two Republican administrations, the expansion of civil rights doctrine offered minorities and women greater redress for injuries.[33] In each of these areas, reform led by dedicated lawyers has helped the traditionally dis-

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31. For instance, commentators claim that American lawyers comprise 70% of the world's total of lawyers. Carlson, *supra* note 6, at W11. Yet, American lawyers (including judges, prosecutors, government lawyers, and in-house corporate counsel) only comprise between 25 and 30% of the world's lawyers. Galanter, *supra* note 25, at 108. Galanter also indicates that countries with the highest lawyer populations do not suffer impaired economic growth. *Id.* at 81. For additional statistical misrepresentations, I refer the reader to Galanter's article. *Id. See also* Cross, *Effect of Lawyers*, *supra* note 28, at 645; Epp, *supra* note 3, at 585. Galanter and others also dispute the perception that the American public is overly litigious. Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4 (1983) [hereinafter Galanter, *Reading the Landscape of Disputes*]; Earl Johnson, Jr. & Ann Barthelms Drew, *This Nation Has Money for Everything Except Its Courts*, 17 JUDGES J. 8 (1978); Laura Nader, *A Litigious People?*, 22 LAW & SOC'Y REV. 1017 (1988).

32. *E.g.*, Bryan, *supra* note 11, at 441, 442 & n.2.

33. *But see* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991) (arguing that courts by themselves largely are ineffective at bringing about meaningful social change). See Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715 (1993) for a review and critique of Rosenberg's analysis. *See also* Kimberle William Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (arguing that those who have not known the reality of oppression nor experienced its overpowering constraints cannot understand or evaluate accurately the civil rights movement).

empowered. These changes have occurred despite overcrowded dockets.[34]

Moreover, while Professor Galanter is correct in that some characteristics of the legal system impede legal rights from trickling down to the people they were designed to protect,[35] that the value of rights is not limited to the results achieved within the formal system. For example, the social validation implicit in the acquisition of legal rights can instill in recipients a sense of entitlement and dignity and can ultimately affect their expectations and the confidence with which they act.[36] Moreover, to the extent law shapes social attitudes, citizens treat individuals with legal rights (especially if they have the power to assert them) with more respect than those who lack the symbolic value the possession of the rights communicates.[37] The confluence of internal and external validation makes it more likely that a person will take offense at injury and seek redress.[38]

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34. Overcrowded dockets hurt the economically disadvantaged who cannot survive long waits for relief. *See* Marc Galanter, *Why the "Haves" Come out Ahead, supra* note 13, at 119-22 (arguing that overload increases the cost and risk of adjudicating, tending to favor the already influential); *see also* Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator,* 57 FORDHAM L. REV. 253, 254-55 (1988) (noting that the "twin demons" of cost and delay continue to afflict the judicial system, erecting a barrier to court access).

35. Galanter, *Why the "Haves" Come out Ahead, supra* note 13, at 95.

36. In August Wilson's play, *Two Trains Running,* a black man named Memphis Lee owns a small restaurant. The City of Pittsburgh wants to exercise its eminent domain power to condemn and purchase the restaurant. Memphis engages in negotiations with the city that come to a favorable conclusion. With a reinforced sense of worth and stature, he talks next of returning to Alabama to establish his ownership of land illegally taken long ago from his father. Memphis might be unsuccessful, but his first experience with the law motivates him to proceed with the second claim. AUGUST WILSON, TWO TRAINS RUNNING (1992).

37. For a discussion of how the adoption and transformation of standard legal texts by the disadvantaged can alter mainstream consciousness see Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations,* 22 HARV. C.R.-C.L. L. REV. 323, 323-35 (1987). *See also* Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?,* 22 HARV. C.R.-C.L. L. REV. 301 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights,* 22 HARV. C.R.-C.L. L. REV. 401 (1987).

38. As noted by Professor Matsuda in discussing Japanese-Americans' struggle against racism:

> If trust in the Constitution sustains Japanese-Americans in their uphill battle against racist oppression, then the Constitution for them has become a radical document. Their consciousness—legal consciousness, if you will—of the ultimate legitimacy of their fight against racism allows them to hold unpopular and ultimately transformative opinions with confidence, and to risk retribution from powerful opponents.

Matsuda, *supra* note 37, at 340-41.

Other critical race theorists explain that the impact of rights on those who traditionally have gone without is different than for those whose power guarantees their advantaged social positions. *See* Delgado, *supra* note 37, at 305-06; Williams, *supra* note 37, at 404-05; *see also* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 310 (1990) ("Rights pronounced by courts become possessions of the dispossessed. . . . Legal language, like a song, can be hummed by someone who did not write it and changed by those for whom it was not intended.").

Professors Felstiner, Abel, and Sarat note that class, education, work situations, and social networks contribute to whether, and how quickly, an individual will recognize an experience as an injury, blame someone other than herself for inflicting the injury, and make a claim for redress of the harm. William L.F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .,* 15 LAW & SOC'Y REV. 631, 632-37, 640 (1980-81); *see also* Linda R. Singer, *Nonjudicial Dispute Resolution Mechanisms: The Effects on Justice for the Poor,*

Additionally, when people expect the formal legal system to recognize certain rights, the system's failure to do so can produce outrage and meaningful social change may follow.[39] The insurrection in Los Angeles following the Rodney King verdict suggests this possibility.[40] Finally, sometimes the disadvantaged effectively can use the formal legal system to secure their rights.[41] Missing from the discourse that explores the legal system's value, then, is any recognition of its ability to expand rights for the disadvantaged in a society that allegedly reveres equality and justice for all.

In the civil rights arena, minority protection has eroded under the last two Republican administrations and a reactionary Supreme Court.[42]

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13 CLEARINGHOUSE REV. 569, 573 (1979) (noting studies which reveal that minority and low socioeconomic status negatively influence the propensity to complain about injury).

39. SCHEINGOLD, *supra* note 13, at 131 (arguing that the sense of entitlement associated with rights can help initiate and nurture political mobilization).

Many citizens, for instance, called for reform after the Rodney King verdict. *See, e.g.*, Melanie E. Lomax, *Race, Politics and the System: Carry out Much-needed Reforms Now*, ATLANTA J. & CONST., May 6, 1992, at A15.

40. *But see* Kimberle Crenshaw & Gary Peller, *Reel Time/Real Justice*, 70 DENV. U. L. REV. 283 (1993) (discussing how dominant discourse employs the pejorative narratives of "irrationality" and "deviation from the rule of law" to delegitimate social protest—ultimately reinterpreting insurrection as riot).

41. See Matsuda, *supra* note 37, at 332-39 for a discussion of how minorities have used legal doctrine in their fight against racism. While remaining skeptical about law's ability to effect change, Professor Diamond acknowledges, "[t]he legitimization by the law of new norms, the recognition of personal 'rights,' provides a basis around which people can organize so that the legal abstractions may be achieved, at least in part." Diamond, *supra* note 13, at 794-95. *See also* ROSENBERG, *supra* note 33 (setting forth conditions which the author considers necessary, but rare, before courts can effect significant social change). Professor Galanter notes that rule-changes that redistribute symbolic rewards may make use of the courts more attractive to have-nots. Galanter, *Why the "Haves" Come out Ahead*, *supra* note 13, at 137. He also observes, however, that symbolic do not always lead to tangible rewards and that symbolic rewards may decrease the drive to secure tangible benefits. *Id.*

Sally Merry's research supports the above legal theorists. She found that courts frequently deny working-class individuals enforcement of their legal entitlements, defining their problems as moral or therapeutic rather than legal. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN 180 (1990). She also observes, however, that working-class court users frequently resist:

> Yet, there are forms of resistance. Even within this relationship of domination, plaintiffs struggle to control their problems, to shape the legal system to their needs rather than to be shaped by it. Despite the efforts of lower-court personnel to convert these legal claims to moral discourse and to send them out the door, plaintiffs struggle to keep the legal issues in the forefront, to assert their claims for protection of their rights. Plaintiffs come back, renewing their demands, learning to use legal categories with more sophistication, mastering legal discourse, asserting their problems in their full complexity and emotional power, demanding recognition in their own terms. This is a continuing struggle, a pull between plaintiffs who wish to harness the power of the law for their own ends and those who would use it to control the weaker and subordinate members of society.

Id.

42. In a recent blow to civil rights litigants, the United States Supreme Court placed the burden of persuasion on the plaintiff in a wrongful dismissal action to show that the employer gave false reasons for firing the plaintiff and to show that the actual reason for the firing was racially motivated. St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2748-49 (1993). In his dissent Justice Souter wrote: "[A] victim . . . lacking direct evidence will now be saddled with the tremendous disadvantage of having to confront, not the defined task of proving the employer's reasons to be false, but the amorphous requirement of disproving all possible nondiscriminatory reasons that a factfinder might find lurking in the record." *Id.* at 2762 (Souter, J., dissenting). Public protest was immediate. *Overburdened; The Supreme Court*

Knowing the political and legal opposition they face, concerned advocates and courageous clients nevertheless voice their complaints and bring their formal claims in the legal system.[43] Although their activity may not meet with success for the individual claimant, it keeps the public apprised of significant social grievances. Moreover, highly visible verdicts from the formal legal system, like the verdict in the Rodney King case, expose the hegemony of racism in this country and promote agonizing moral dialogue and intellectual debate.[44] Missing, then, from disparaging discussions of the legal system is acknowledgment of yet another positive attribute: the facilitation of moral discourse on important social issues.[45] Without dedicated civil rights advocates, we, as citizens, might be more easily persuaded that our moral problem is solved and that we no longer need be concerned about racism in our society.[46]

In addition to ignoring positive attributes of the formal system, the critical discourse disregards several serious problems and potential solutions. For instance, as a faculty supervisor in the University of Denver's poverty clinic, I am convinced our system needs more lawyers.[47] Or, if we

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Has Made It Too Difficult to Prove Bias. The Congress Must Act, NEWSDAY (N.Y.), July 1, 1993, at 54.

43. For instance, in Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2081 (1991), an African American sued his employer for injuries he sustained on the job. During *voir dire* the employer used two of its three peremptory challenges to remove African Americans from the perspective jury. The Court of Appeals for the Fifth Circuit reversed the district court's refusal to require the employer to articulate a race-neutral reason for the strikes. Later, however, a divided en banc panel affirmed the district court. *Id.* Finally, the Supreme Court reversed the court of appeals and remanded to the district court to determine whether a "prima facie case of racial discrimination has been established . . . requiring Leesville to offer race-neutral explanations for its peremptory challenges." *Id.* at 2088-89. Edmonson fought his way through four major judicial proceedings to establish the precedent that civil litigants are entitled to the same racially neutral juror selection process as criminal defendants. Edmonson's individual claim against his employer, however, still remained unsolved. Thus, dedication and perseverance seem required of both the lawyer and the client who are concerned with civil rights.

44. *See, e.g.*, Crenshaw & Peller, *supra* note 40; Jerome McCristal Culp, Jr., *Notes From California: Rodney King and the Race Question*, 70 DENV. U. L. REV. 199 (1993); Deborah W. Post, *Race, Riots and the Rule of Law*, 70 DENV. U. L. REV. 237 (1993).

45. The high ethical precepts sometimes articulated in law also help maintain the tension between the ideal and the actual, which is a precondition of a community's moral growth. UNGER, *supra* note 18, at 216.

The relation of law to morality has received the attention of many scholars. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); LON L. FULLER, THE MORALITY OF LAW (rev. ed. 1969); JOHN RAWLS, A THEORY OF JUSTICE (1972); PHILIP SOPER, A THEORY OF LAW 101-09 (1984); Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Schwartz, *supra* note 22.

46. The increase in hate crimes across our country suggests our continued racism and our need for constructive moral dialogue. *See* Dan Lovely, *We Came Here for Freedom . . . We Live in Hell*, USA WEEKEND: DENV. POST, Jan. 10, 1993, at 4, 5 (citing statistics reported by Richard Vega: during 1992 seven percent of adults were hate crime victims and racially motivated crimes increased by 22% in Los Angeles between 1990 and 1991).

47. Laura Nader also notes substantial evidence that, in proportion to population and need, litigation in the United States is not great. Laura Nader, *The Recurrent Dialectic Between Legality and Its Alternatives: The Limitations of Binary Thinking*, 132 U. PA. L. REV. 621, 635-36 (1984) (reviewing JEROLD S. AUERBACH, JUSTICE WITHOUT LAW (1983)). Statistics show, for instance, that households use a third party to handle a complaint in only 1.2% of cases where consumers have problems with purchases. *Id.* at 635 n.77.

do have a surplus of lawyers, they seem to work for all the wrong (or perhaps all the same) people.[48] Expansion of legal aid services, government funding for law school staffed poverty clinics, or national insurance for legal representation might alleviate this problem. The deficit in or misallocation of legal services and potential solutions, however, receive scant, if any, consideration.

Overcrowded dockets certainly present problems, particularly in urban areas[49] and especially for the economically disadvantaged who cannot survive a long wait for relief. The creation of more courts, or specialized courts with highly trained support staff, might mitigate this difficulty.[50] Yet these potential solutions remain outside the discourse.

An increase in poverty lawyers and in courts might, however, create a corresponding increase in substantive legal doctrine sensitive to the interests of the disadvantaged and the injured, compromising the interests of the privileged. So, too, might litigation that expands the rights of the disadvantaged and exposes and encourages moral debate on significant social problems. A consistent, yet all too familiar, theme emerges. The current assessment of the formal legal system's viability selectively omits positive attributes and potential adjustments that threaten the powerful.

Consider the following question. If you were worried about (1) the troublesome redistribution of wealth from the powerful to the disadvantaged that can occur when lawyers advocate in the formal system; (2) the expansion of substantive law offering greater sensitivity to the rights of and injuries suffered by the underprivileged; (3) the growing sense of entitlement and dignity of the traditionally disempowered; (4) the continuation of moral discourse on social issues you did not want acknowledged; and

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Similarly a significant body of research shows that the vast majority of negligently injured people who legally are entitled to compensation receive none at all. Epp, *supra* note 3, at 591. For instance:

> [R]esearch on medical malpractice consistently finds that very small percentages (in the range of 5-15%) of negligently injured patients, even those suffering from significant permanent injuries, attempt to gain compensation. According to other studies, there are similarly low claiming rates for various other types of injuries. In a compelling survey of such evidence, Saks notes: "One of the most remarkable features of the tort system is how few plaintiffs there are."

Id. at 591-92 (footnotes omitted).

48. *See* BARBARA A. CURREN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT 20 (1988) (indicating that of the 723,189 lawyers in the United States in 1988, only 7,369 or 1% of them were employed as legal aid attorneys or public defenders, while 519,941 or 71.9% were in private practice and 66,627 or 9.2% worked for private industry).

Interestingly, the 250,000 to 300,000 lawyers in the Soviet Union in 1990 offered private citizens little relief because representation normally went to state enterprises, foreign businesses, and organized crime. David Lempert, *Russians Still Can't Get Much Justice*, N.Y. TIMES, June 5, 1992, at A28.

49. Dockets are more crowded in urban areas. *See* Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 948 n.7 (1991) (noting that urban dockets are more crowded); *see also* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 345 n.70 (1990) (noting that in urban jurisdictions, the criminal justice systems are often overburdened).

50. Others in the past have suggested these solutions, e.g., James Willard Hurst, *The Functions of Courts in the United States, 1950-1980*, 15 LAW & SOC'Y REV. 401, 413 (1980-81), but recent discussion contains little or no mention of these possibilities. *See also* Hazard & Scott, *supra* note 11, at 47-52 (discussing potential difficulties with specialized tribunals).

(5) the occasional suggestion that more lawyers and more courts are needed to address disputants' grievances—what would you do? How would you reign in troublesome grievants and their even more troublesome lawyers? A number of things might occur to you.

To control grievants, especially the disadvantaged, you might launch a negative publicity campaign that distorts statistics and constrains reality. To convince poor, minority and/or injured persons that legal remedies should be avoided, you might decry the litigiousness of the American public, making them appropriately ashamed if they dared to litigate their disputes. Japanese citizens who seek conciliation rather than litigation could be offered as desirable models.[51] In essence, you might strive to create an ideology of conciliation rather than confrontation—of compromise rather than rights.

Against overly zealous and misdirected lawyers a similar campaign could be mounted. Those fulfilling the traditional role of advocate would suffer professional ostracism and stigmatization as greedy and insensitive undesirables. Your new script for lawyers might proclaim that only "bad" lawyers pursue client interests and fight for what they believe is right and fair.[52] "Good" lawyers compromise or "cool out" complaining clients. Aggressive use of Rule 11 sanctions might provide an additional disincentive for creative and expansionist lawyering.[53]

To further protect the interests of the powerful and retard evolution of substantive doctrines, your publicity campaign might focus on specific legal areas where the interests of elites seem most threatened. For instance, you might carefully craft arguments and compile statistics designed to instill fear in the public that the expansion of legal rights in the products liability area threatens the economy and, ultimately, the jobs of those working for besieged manufacturers. In the family law area where the economic interests of powerful divorcing husbands are under siege, you might label mothers who litigate as greedy and insensitive to the psychological and emotional harm litigation causes their children. Discouraging litigation in these and other targeted areas would retard the expansion of substantive law favoring the less powerful.

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51. As Professor Galanter notes, Japan often is offered as a counterpoint to litigious America. Galanter, *Reading the Landscape of Disputes*, *supra* note 31, at 11. He also comments, however, that the much cited Japanese preference for conciliation might result as much from structural barriers to litigation as from disputant preference. *Id.* at 58-59.

52. William Rich writes: "Many a couple reconciled to separation has been driven to hostility by the maximum demands asserted by their spouse's lawyer." Rich, *supra* note 4, at 782.

53. For a thoughtful appraisal of how Rule 11 sanctions negatively affect civil rights litigation, see Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1989); *see also* Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988) (suggesting Rule 11 sanctions disproportionately and negatively affect plaintiffs—especially plaintiffs in civil rights, employment discrimination, and other types of "disfavored" litigation); Georgene M. Vairo, *Rule 11: Where We Are and Where We Are Going*, 60 FORDHAM L. REV. 475 (1991) (discussing the chilling effect of Rule 11 sanctions on various types of plaintiffs and the rule's propensity to increase, rather than decrease, litigation); Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (discussing the effect of Rule 11 sanctions on civil rights litigation).

To address the threatening solution of more courts and lawyers, and to further retard legal reform, you might also propose informal alternatives for resolving disputes. These procedures could be offered for cases that are believed to cause court congestion, thereby reducing the pressure and temptation to establish more courts. For example, petitions for dissolution of marriage constitute a large percentage of filed cases.[54] Mediators could help divorcing couples resolve their differences, significantly reducing judicial caseloads. Lawyers then would become unnecessary and unwelcome participants in divorce dispute resolution, alleviating any perceived need for more lawyers. Ordering large numbers of disputes into informal procedures where legal rights lack relevance and rights conscious lawyers are unwelcome, would produce the additional benefit of retarding doctrinal expansion in sensitive areas like divorce and products liability. No litigation. No new precedent. No expansion of doctrine. At least not through litigation.[55]

I stop here—struck by the similarity between our fanciful plot and the current campaign against lawyers, litigants, and the formal legal system. While I cannot and do not wish to deny the formal legal system's problems, I wonder whether the current critical discourse on the system's shortcomings has insidious as well as altruistic underpinnings. Could this discourse be shaped by elites who want to encourage lawyers and disputants to behave in ways that compromise further the interests of those who have yet to achieve equality? Perhaps our legal system does have significant, yet unacknowledged, difficulties. As Professor Ely notes:

> Malfunction occurs when the *process* is underserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out . . . .[56]

54. *See* Rudolph J. Gerber, *Recommendation on Domestic Relations Reform*, 32 ARIZ. L. REV. 9, 10 (1990) (stating that matrimonial actions comprise over half of the cases filed in trial courts); *see also* David M. Trubek, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 87 (1983) (reporting on research showing post-divorce disputes as 59% of all litigation).

55. The covert nature of mediation also restricts public knowledge of substantive results. Thus the public outrage in response to grossly unfair results that sometimes fuels reform largely is lacking in divorce mediation.

56. JOHN H. ELY, DEMOCRACY AND DISTRUST 103 (1980).