

12-2005

# Explaining the American Norm Against Litigation

Shawn J. Bayern

*Florida State University College of Law*

Follow this and additional works at: <http://ir.law.fsu.edu/articles>



Part of the [Litigation Commons](#)

---

## Recommended Citation

Shawn J. Bayern, *Explaining the American Norm Against Litigation*, 93 *CAL. L. REV.* 1697 (2005),

Available at: <http://ir.law.fsu.edu/articles/50>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact [bkaplan@law.fsu.edu](mailto:bkaplan@law.fsu.edu).

# HEINONLINE

Citation: 93 Cal. L. Rev. 1697 2005



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Fri May 1 09:25:02 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0008-1221](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0008-1221)

# Explaining the American Norm Against Litigation

Shawn J. Bayern†

## INTRODUCTION

In the United States, a social norm discourages people from vindicating at least some of their rights in court. However, if courts are an instrument of justice and of sound public policy—for instance, if they provide fair compensation for injured parties and efficient incentives for potential injurers—then a norm against using courts is puzzling.

This Comment explores and evaluates explanations for the norm against litigation; the Comment's goal is to provide a plausible account of the norm. As such, the Comment is largely descriptive. However, normative implications may follow from my exploration; for instance, to the extent that an explanation of the norm is plausible, the explanation may help to frame the debate about tort reform in the United States.<sup>1</sup>

By referring to a “norm against litigation,” I do not mean to suggest that there is a norm against all lawsuits under all circumstances. The norm against litigation is clearly stronger in some cases and weaker—or nonexistent—in others. For instance, there appears to be a particularly strong norm against “litigiousness”—against filing lawsuits too readily.<sup>2</sup> Similarly, there are salient norms against “nuisance lawsuits”<sup>3</sup> and against suits that

---

Copyright © 2005 California Law Review, Inc. California Law Review, Inc. (CLR) is a California nonprofit corporation. CLR and the authors are solely responsible for the content of their publications.

† J.D. candidate, School of Law, University of California, Berkeley (Boalt Hall), 2006. This Comment is based on a paper I wrote for a seminar on law and social norms taught by Amir Licht; I thank Professor Licht and the seminar's students. I also especially thank Professor Mel Eisenberg for extremely helpful comments, and I am indebted to Megan Lorenz, Jocelyn Sum, Steve Swerdlow, and Meliah Thomas of the *California Law Review* for terrific editing.

1. This Comment advances some explanations that are etiological and some that are teleological; in other words, the Comment considers both explanations that account for how the norm arose and explanations that characterize the purposes it may presently serve.

2. Indeed, at common law, “frequently exciting and stirring up quarrels and suits” was a criminal offense. 1 JOHN BOUVIER, *BOUVIER'S LAW DICTIONARY AND CONCISE ENCYCLOPEDIA* 327 (Francis Rawle ed., 1914) (defining “barratry”). And of course the very word “litigious” carries a negative connotation. See *OXFORD ENGLISH DICTIONARY* 1037 (2d ed. 1989) (listing contextual examples of the word “litigious,” including “litigious, or ful of stryf,” “litigious and malicious wives,” “They . . . are very litigious. . . . They will persevere in a law-suit till they are ruined,” and “litigious fool”).

3. See *infra* text accompanying notes 65 and 89.

are perceived to provide windfalls in response to sham injuries.<sup>4</sup> This Comment's concern, however, is not with these subcategories of norms against obviously problematic lawsuits; this Comment instead describes a broader pattern whereby some meritorious lawsuits, in general, might not be filed.

The Comment begins, in Part I, by describing the scope and extent of litigation in the United States and by characterizing the norm against litigation. Parts II and III analyze the norm against litigation in economic terms: Part II focuses on the possibility that the norm against litigation promotes social welfare generally, whereas Part III considers explanations that suggest that the norm derives from the manipulative efforts of concentrated, self-interested groups. Part IV considers noneconomic explanations for the norm; these accounts attempt to apply insights from psychology and from moral philosophy. Part V briefly considers the Comment's potential normative implications.

## I

### LITIGATION, AND THE NORM AGAINST IT, IN THE UNITED STATES

This Part characterizes the nature and scope of the American norm against litigation. To introduce the subject, Part I.A describes widespread criticisms of litigation in America. Part I.B uses evidence of these criticisms, as well as other evidence and analysis, to make the claim that there is an American *norm* against litigation—as opposed merely to a practice of criticizing litigation.

In discussing social norms, this Comment refers specifically to “obligational norms,” as Professor Eisenberg defines the term.<sup>5</sup> That is, I do not use the term “norm” to refer to mere behavioral patterns and practices that are not associated with social obligations, such as wearing warm clothes in cold weather.<sup>6</sup> Rather, the term “norm” in this Comment refers to practices that actors feel obliged to follow.

Some norms, even in this obligational sense, are trivial and not worth further analysis; for instance, many norms merely coordinate behavior,

---

4. *Cf. infra* note 49. Indeed, one very simple explanation for the existence of a general norm against litigation is that these specific sub-norms may bleed over into the general case because of the difficulties observers face in distinguishing meritorious lawsuits from nonmeritorious ones. *Cf. infra* text accompanying note 59 (suggesting that norms against a particular type of lawsuit may discourage lawsuits more generally).

5. See Melvin A. Eisenberg, *Corporate Law and Social Norms*, 99 COLUM. L. REV. 1253, 1257 (1999). Professor Eisenberg defines obligational norms as “rules or practices that actors not only self-consciously adhere to or engage in, but feel obliged in some sense to adhere to or engage in, although (by hypothesis) the rule or practice is neither a legal nor an organizational rule.” *Id.* A social norm is obligational if “a departure from the norm is likely to involve either self-criticism or criticism by others.” *Id.*

6. See *id.* at 1256.

providing a necessary focal point.<sup>7</sup> The norms that call for further explanation are those that cause people to act in ways that violate the rational-actor model of classical economics—that is, to act in ways that suggest the actor has forgone an opportunity to maximize his or her own utility.<sup>8</sup>

Under some accounts of social norms, norms are internalized, in which case they affect actors' preferences directly. Under other accounts, norms are enforced by external sanctions, in which case actors perform a cost-benefit analysis that includes potential social disapproval, loss of business opportunities, and so forth.<sup>9</sup> This Comment does not attempt to provide a new account for people's adherence to norms generally, nor does it depend exclusively on either an internal or an external account of norms.

### A. *Criticism of Litigation in America*

Criticisms of litigation are far more common than praise of it. As Marc Galanter has noted, "A battery of observers has concluded that American society is over-legalized."<sup>10</sup>

One does not need to look deeply into American political culture to find criticisms of litigation and discouragement from litigating. In 1982, Chief Justice Burger criticized the tendency of Americans to litigate by citing no less an authority than Abraham Lincoln, who said, "Discourage litigation. Persuade your neighbors to compromise whenever you can."<sup>11</sup> Burger continued:

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. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.<sup>12</sup>

---

7. See, e.g., *id.* at 1257 n.7 (noting that, even without a legal sanction, it may be in people's interest to drive on the customary side of the road).

8. See *id.*; Amir N. Licht, *Social Norms and the Law: A Social Institutional Approach* 22 (Mar. 2005) (unpublished manuscript), available at <http://ssrn.com/abstract=710621> (noting that compliance with social norms that reflects "direct self-interestedness" is "trivial"). As Eisenberg notes, "utility" sometimes appears to be confused with simple "wealth" in this context. Eisenberg, *supra* note 5, at 1257 n.7. Under a broader conception of "utility," parties may well be maximizing their own utility by following social norms. Broadening the concept of utility to include noneconomic factors such as guilt, however, adds no explanatory or predictive power to the rational-actor model; it simply changes a definition. The important point is that norms are nontrivial when they cause people to act in a way that does not appear to be in their self-interest *without the existence of the norm*.

9. See Eisenberg, *supra* note 5, at 1257-61; Licht, *supra* note 8, at 32-36.

10. Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 6 & n.4 (1983) (collecting numerous sources).

11. *Id.*

12. Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275 (1982).

Similarly, as recently as the third Bush-Kerry Presidential Debate of 2004, President Bush argued that “[w]e have a problem with litigation in the United States of America.”<sup>13</sup>

American popular culture, too, reflects a distrust of litigation. For instance, a recent movie depicts superheroes driven into hiding by lawsuits (including one filed by a “suicide victim irate that his life was saved”).<sup>14</sup> And according to a review, a self-help book published in 2004 advises readers to stop blaming others—and suing others—for “things . . . that are no one’s fault.”<sup>15</sup>

Even some practicing lawyers believe that courts are overused. The president of the Iowa State Bar Association said the following in a recent interview: “There is way too much litigation. But it reflects society. We are living in an in-your-face, contentious society that turns to the courts to resolve disputes. Until society calms down, this is going to continue.”<sup>16</sup>

Researchers of social norms have found many people who speak out against litigation. For example, Robert Ellickson’s influential work quotes several criticisms of litigation generally:

“I’m not that kind of guy;” “I don’t believe in it;” “I don’t like to create a stink;” “I try to get along.” . . . “I figure it will balance out in the long run.” . . . “I hope they’ll do the same for me.” . . . “My family believes in ‘live and let live.’”<sup>17</sup>

These beliefs—or beliefs similar in spirit—do not appear to be uncommon throughout the United States. Like the commentator who suggested that litigants need to “calm[] down,”<sup>18</sup> many critics of litigation suggest that litigants are childish or improperly socialized. For example, one editorial discusses a “recent incident [that] underscores some of American society’s current banes: a penchant for whining [and] excessive litigiousness.”<sup>19</sup> Similarly, some observers suggest that litigation is

---

13. President George W. Bush, Commission on Presidential Debates, The Third Bush-Kerry Presidential Debate (Oct. 13, 2004), available at <http://www.debates.org/pages/trans2004d.html>.

14. See James Berardinelli, Review: Incredibles, The (2004), available at <http://movie-reviews.colossus.net/movies/i/incredibles.html>.

15. Jacquelyn Mitchard, *The “Not-My-Fault” Generation Would Do Better to Live in “The Now,”* CHATTANOOGA TIMES FREE PRESS, Sept. 25, 2004, at E3 (reviewing HAMILTON BEAZLEY, NO REGRETS: A TEN-STEP PROGRAM FOR LIVING IN THE PRESENT AND LEAVING THE PAST BEHIND (2004)).

16. Santiago Frank, *Lawyer Says Public Needs Legal IQ Help*, DES MOINES REG., Nov. 9, 2004, at 2B. Senator John Edwards, a well-known trial lawyer, seems to agree. See Jon Robins, *A Pair of Lawyers Who Could Change the World*, THE TIMES (London), Nov. 2, 2004, at 3 (“‘We do have too many lawsuits,’ Edwards told the American public. ‘And the reality is there’s something that we can do about it. John Kerry and I have a plan to do something about it.’”)

17. Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 681-82 (1986).

18. Frank, *supra* note 16, at 2B.

19. Editorial, *Only a Game; Holden Soccer Episode Sign of Times*, TELEGRAM & GAZETTE (Mass.), Nov. 15, 1996, at A10.

generally unsportsmanlike: “Turning a sports venue into an arena for litigiousness is demoralizing,” says John Hoberman, an Olympic historian at the University of Texas in Austin. “It erodes the meaning of what the [Olympic] Games are supposed to be.”<sup>20</sup>

### B. *The Norm Against Litigation*

What motivates these criticisms? One possibility is that they are simply empty speech, unrelated to behavioral patterns. Indeed, despite the widespread criticism of litigation, America is still commonly regarded as one of the most litigious countries in the world. For instance, it is widely reported that 70% of the world’s lawyers work in the United States.<sup>21</sup> Similarly, some observers claim that there are thirty times more lawsuits per year, per person in the United States than in Japan.<sup>22</sup> Professors Cooter and Ulen report that in 2002, there were twenty million civil cases in the United States.<sup>23</sup> Though some commentators question the claim that there has been a recent “litigation explosion” in the United States,<sup>24</sup> it is clear that litigation is not uncommon here.

To put this differently, many individuals who believe they can profit by litigating make the decision to litigate, even if it means they will be criticized as “whining,” unsportsmanlike, or uncooperative. Indeed, litigating represents a common behavioral pattern: many people, when injured, will sue. The existence of this pattern is not surprising; it is in a potential plaintiff’s interest to file a lawsuit with a positive expected value.<sup>25</sup> Accordingly, to the extent that there is a behavioral practice of litigating in the United States, it is a practice of the “trivial” variety;<sup>26</sup> it is not particularly puzzling and does not demand further explanation.

There are several reasons, however, to believe that many individuals adhere to a countervailing norm *against* litigating—that is, that the various criticisms of litigation are *not* empty speech but reflect a tendency by some people to refrain from suing despite having suffered a legally compensable

20. Mark Sappenfield, *Athletic Prowess, Fallible Judging*, CHRISTIAN SCI. MONITOR (Boston), Aug. 25, 2004, at 2.

21. See Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 733-37 (1998). Note that Galanter is skeptical of the claim he reports.

22. See, e.g., David Gergen, Editorial, *America’s Legal Mess*, U.S. NEWS & WORLD REP., Aug. 19, 1991, at 72; see also Kirk W. Dillard, *Illinois’ Landmark Tort Reform: The Sponsor’s Policy Explanation*, 27 LOY. U. CHI. L.J. 805, 811 n.27 (1996) (noting that each year “[t]here are 70,000 product liability lawsuits in the United States . . . and only 200 in the United Kingdom”). Dillard also notes that “American companies have been paying liability insurance premiums 20 to 50 times higher than those paid by foreign firms.” *Id.* (citing PRESIDENT’S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 3 (1991)).

23. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 442 (4th ed. 2004).

24. See, e.g., Galanter, *supra* note 10.

25. For an economic model that shows how the expected value of lawsuits can be computed, see COOTER & ULEN, *supra* note 23, at 392-96.

26. See *supra* notes 6-8 and accompanying text.

injury. (Such individuals may not sue even when presented with an opportunity to file a lawsuit with a positive expected value.) The following Section considers the evidence for this proposition.

### 1. *Comparing the Number of Lawsuits and the Number of Injuries*

Though many lawsuits are filed in the United States, it is important to consider the number of lawsuits in relation to the number of legally compensable injuries that occur. Of course, this latter number is not easily identifiable by empirical methods; for example, it is likely very difficult to accurately count all instances of compensable property damage that result in no legal action. Nonetheless, it is important to keep in mind that a large number of lawsuits does not imply that most injuries result in lawsuits; even with 20 million lawsuits per year,<sup>27</sup> there might be a large number of uncompensated injuries. It is logically *possible* that while there are many lawsuits, there are nonetheless many people who adhere to a practice of not litigating.

Moreover, there are two reasons to believe that many compensable injuries *actually*—rather than just *possibly*—remain uncompensated in the United States.

First, speaking mathematically, even with twenty million lawsuits per year, most people do not file lawsuits most of the time. The “20 million lawsuits” figure comes from 2002;<sup>28</sup> in this year, the United States population was about 280 million.<sup>29</sup> Based on a simple mathematical model that uses these figures and makes assumptions that overestimate the likelihood that an individual chosen at random will file a lawsuit, it still takes ten years for a majority of the population to have filed a single lawsuit.<sup>30</sup>

Second, sociological research adds support to the claim that many compensable injuries are not in fact compensated.<sup>31</sup>

---

27. See COOTER & ULEN, *supra* note 23, at 442.

28. *Id.*

29. See U.S. Census Bureau, Population Change: July 1 2001 to July 1, 2002, <http://www.census.gov/popest/states/files/NST-EST2004-POPCHG2002.csv> (last visited Sept. 29, 2005).

30. My model makes the following assumptions: (1) each suit is filed by an individual, not a corporation; (2) the population and number of lawsuits do not change from year to year; and (3) the likelihood that an individual files a suit is independent of his or her previous filing history. These assumptions are not meant to be realistic; they are meant only to enable a simple model that demonstrates the rough likelihood that any particular individual will file a lawsuit in a given year.

31. William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claming . . .*, 15 LAW & SOC. REV. 631, 636 (1980) (“We know that only a small fraction of injurious experiences ever mature into disputes . . . . [E]xperiences are not perceived as injurious; perceptions do not ripen into grievances; grievances are voiced to intimates but not to the person deemed responsible.”). Note that if individuals do not even *recognize* an injury, they are not following a norm against litigation by not seeking compensation for it; recall that the definition of “norm” I use requires self-conscious adherence. See *supra* note 5. Nonetheless, even perceived injuries may not mature into disputes. See Felstiner et al., *supra*, at 639-49.



## 2. *The Internalization of Uniform Signals*

Moreover, it is unlikely that pervasive criticisms of a practice have no effect on people's behavior—even if people do recognize their injuries.

Consider Professor Cooter's analysis of consensus obligations—that is, of situations in which most people profess to agree about a behavioral obligation. Of course, it is important to keep in mind, as Cooter notes, that “[a]n analysis of consensus obligations must distinguish between what people say and what they do. Everyone may say that people ought to do something that they do not do.”<sup>32</sup>

Thus, suppose, for a moment, that criticism of litigation begins as merely empty speech, for the ordinary person has little incentive to *say* that he or she favors filing lawsuits as a matter of course. To be sure, some individuals may—as Cooter also notes—wish to develop a reputation for sternly or harshly enforcing their rights; such a reputation may discourage other individuals from wronging them.<sup>33</sup> Similarly, the plaintiff's bar—and those who promote consumer protection—may publicly promote litigation.<sup>34</sup> But a typical, individual citizen is likely to see a lawsuit as a failure to cooperate; indeed, every lawsuit represents a failure to settle, and settlement is a form of bargaining. Therefore, public criticism of litigation might simply be a way for people to promote themselves to potential bargaining partners. Criticizing failures to negotiate is like criticizing lying; in Cooter's terms, it demonstrates an “admiration for” a virtue that facilitates cooperation.<sup>35</sup> And people can express admiration for values they do not really admire.<sup>36</sup>

In this sense, the practice of criticizing litigation may represent a straightforward “uniform signaling equilibrium” as described by Cooter.<sup>37</sup> But if this is true, then Cooter's own analysis suggests that some people will internalize the values that the consensus articulates; this, in turn, will affect behavior:

Moral consensus is a kind of beneficial rat race. Like a rat race, people compete with each other to proclaim their admiration for, and commitment to, morality. The result, however, is beneficial, because the consensus causes some people to internalize morality,

---

32. Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947, 954 (1997).

33. *See id.* at 970 (positing “the benefit of gaining a stern reputation, which deters future injuries”).

34. *See, e.g.,* Amy Kaslow, *Nader Remains Unbowed by Volley of Criticism*, THE CHRISTIAN SCI. MONITOR (Boston), Jan. 25, 1994, at 14 (“Nader counters that there is not enough litigation. ‘We file fewer suits per capita than we did in 1930,’ repeating one of the facts he often draws on. ‘Law and order means using the law against disorder. Not only in the streets but in the corporate suites.’”).

35. Cooter, *supra* note 32, at 964-65.

36. *See id.* at 964.

37. *See id.* at 954 (defining a uniform signal as “a situation in which everyone transmits an identical signal”).

which shifts the evolutionary equilibrium toward more cooperation and production.<sup>38</sup>

Accordingly, the mere presence of widespread criticism of litigation—a uniform, or nearly uniform, signal—is likely to decrease the amount of litigation in the United States. More specifically, it is likely to cause some potential plaintiffs who have an injury not to file a lawsuit—at least some of the time.

### 3. *The Nature of the Criticism Against Litigation*

Other evidence suggests that the widespread criticisms of litigation are associated with a behavioral practice of forgoing the opportunity to litigate.

First, according to a recent—though partisan—study, “Businesses file about four times as many lawsuits as individuals represented by trial lawyers.”<sup>39</sup> Because criticism of litigation appears to be aimed mostly at individuals, the study’s evidence is consistent with (though, of course, does not establish) the proposition that this criticism affects individual behavior.

Second, criticisms of litigation tend to have moral overtones, as if they were spoken to punish those who violate a norm. Criticisms of litigation could easily be expressed in morally neutral terms. Litigation need not be “demoralizing,” nor need it be compared to “whining”; it might simply be called “inefficient” or “irritating.” That the criticism is moral suggests—particularly to those who believe that social norms are enforced primarily by social rewards and punishment—that it serves to enforce a norm.

Third, Ellickson’s research of dispute resolution in Shasta County uncovered a norm of not litigating, not merely a practice of speaking out against litigation. Indeed, Ellickson’s study documents a “norm against the invocation of formal legal rights” that is “strongly established.”<sup>40</sup> And there is no reason to suppose that Shasta County is unique or that the norm there arises from cultural values different from those prevalent in the rest of the United States.<sup>41</sup>

---

38. *Id.* at 965. For a list of psychological sources that attempt to explain the *mechanisms* by which this internalization of morality proceeds, see *id.* at 956 n.48 (citing Freud, Piaget, Sherif, Cialdini, and Kohlberg).

39. Congress Watch, Public Citizen, *Frequent Filers: Corporate Hypocrisy in Accessing the Courts* 4 (Oct. 2004), available at [http://www.citizen.org/documents/Frequent\\_Filers\\_FINAL.pdf](http://www.citizen.org/documents/Frequent_Filers_FINAL.pdf).

40. Ellickson, *supra* note 17, at 680-81. For a more comprehensive presentation of Ellickson’s research, see generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

41. On the relationship between cultural values and social norms, see generally Licht, *supra* note 8.

#### 4. *Puzzles Surrounding the Criticism Itself*

Even putting aside the norm against litigation, the criticism itself is still curious (and raises a puzzle similar to the one that the norm raises). That is, if a society values justice and efficiency, it seems consistent for its members to proclaim, “I value my rights and intend to redress wrongs,” rather than to express an aversion to litigation. Indeed, someone who refuses to pursue a financially advantageous lawsuit could appear to be financially ignorant or insufficiently vigilant, both of which would *decrease* his or her attractiveness as a business partner. Furthermore, while litigation does represent a failure to bargain, it does not necessarily represent an *unreasonable* failure to bargain. We don’t criticize *all* such failures; for example, Americans are likely to praise a potential crime victim who attempts to prevent the crime unilaterally without negotiation, and it is common to express support for national leaders who refuse to “negotiate with terrorists.”<sup>42</sup>

## II

### EXPLANATIONS OF THE NORM IN TERMS OF SOCIAL WELFARE

As I noted *supra*, Chief Justice Burger attributed the following advice to Abraham Lincoln: “Discourage litigation. Persuade your neighbors to compromise whenever you can.”<sup>43</sup> Lincoln’s quotation comes with a specific justification, for it continues: “Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time.”<sup>44</sup> Of course, this justification is a straightforward economic argument: litigation can be wasteful, and lawsuits may leave even successful plaintiffs worse off.

However, in cases where a plaintiff is indeed a “real loser,” no social norm is necessary to prevent litigation. That is, a rational-actor model is sufficient to explain why people forgo litigation in cases where a lawsuit will yield a net expected loss (in terms of fees, waste of time, and so forth). The norm against litigation is of interest only because it influences the behavior of those potential plaintiffs who face a net expected *gain* from litigation.<sup>45</sup>

In general, there are at least three economic reasons that a social norm might discourage an individual from engaging in a practice that is individually profitable. First, abstention from the practice may serve as a signal

---

42. See, e.g., Pam Belluck, *Unrepentant Shoe Bomber is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13 (quoting a federal judge who said to a defendant, “You are a terrorist, and we do not negotiate with terrorists. We hunt them down one by one and bring them to justice.”), quoted in Kyle M. Medley, Note, *The Widening of the Atlantic: Extradition Practices Between the United States and Europe*, 68 BROOK. L. REV. 1213, 1218 n.27 (2003).

43. Burger, *supra* note 12, at 275.

44. *Id.*

45. See *supra* notes 6-8 and accompanying text.

to other individuals; in the aggregate, society may benefit from people's ability to distinguish themselves from differently situated parties by using signals. Second, the individually profitable practice may impose external costs on third parties, and the norm can, through social disapproval, cause parties to internalize some of these costs. Third, people may at times be motivated to act irrationally, and a social norm can help correct irrational tendencies. This Part applies these general explanations to the norm against litigation; Part II.A considers the first possibility, and Part II.B considers the second two possibilities.

#### A. *The Norm as a Signal*

Whenever parties engage in activities against their own interests, one possible explanation is that they are signaling their ability to incur a cost that other, differently situated parties cannot afford to incur. This conspicuous-consumption model of social norms, which Eric Posner has advanced,<sup>46</sup> suggests that parties might signal their wealth (or their discount rate) by choosing to forgo an advantageous opportunity to vindicate their rights in court.

For Posner, signals work as follows:

To avoid the possibility that [others] will not cooperate with them, high types [i.e., those able to incur a particular cost] try to provide credible evidence of their type by sending a signal to the receivers. A signal is any costly action that, if successful, reveals the type of the sender. A signal can distinguish [different types] only if [one type] can afford to issue the signal and the [other] cannot.<sup>47</sup>

A signal in Posner's model is only effective if it communicates information about the way a party perceives costs. A potential plaintiff's choice not to litigate, however, will typically fail to send this kind of information for several reasons.

First, the expected value of lawsuits is widely variable; a potential plaintiff might sue for—and may have the legal right to recover—a small sum, a large sum, or anything in between. However, the norm against litigation does not carefully distinguish between cases based on their value; plaintiffs in both small cases<sup>48</sup> and large cases<sup>49</sup> are routinely criticized, and plaintiffs seem to suffer social disapproval without regard for the precise

---

46. See Eric A. Posner, *Symbols, Signals, and Social Norms in Politics and the Law*, 27 J. LEGAL STUD. 765 (1998).

47. *Id.* at 768.

48. For instance, see *supra* text accompanying notes 18-20.

49. See, e.g., *Liebeck v. McDonald's Rests., P.T.S., Inc.*, No. CV-93-02419, 1995 WL 360309 (N.M. Dist. Aug. 18, 1994) (the famous case in which a jury awarded the plaintiff \$2.7 million in punitive damages after she was burned by hot coffee).

value of their lawsuits.<sup>50</sup> If the norm against litigation represents merely an opportunity to signal wealth or discount rate, however, we would expect the norm to be sensitive to the amount of money a potential plaintiff forgoes. Because it is not, it is hard to see how the norm can successfully differentiate “high types” from “low types.”

Second, the value of a lawsuit is often unknown to third parties—particularly if the lawsuit is never filed. Many injuries occur in private, and the extent of many injuries typically involves private costs (such as those associated with “pain and suffering,” medical bills, and so forth). A signal is ineffective, however, if it conveys no information—or if it exposes only ambiguous information—about the sender’s wealth or discount rate.

Thus, forgoing an opportunity to litigate sends no clear signal; potential receivers of such a signal cannot deduce much information about the sender. Moreover, Posner admits that people might engage in behavior for different reasons;<sup>51</sup> even if a practice can act as a signal, further analysis may be necessary to explain the practice fully.

### B. *The Norm as a Way to Decrease Dispute-Resolution Costs*

The norm against litigation may promote social welfare more directly—by decreasing the overall costs of dispute resolution. This Section considers two ways in which the norm might have this efficient effect: (1) it may serve to bolster other social norms that attempt to provide just compensation in small cases, and (2) it may counteract inefficient incentives and psychological tendencies that decrease the likelihood of reasonable cooperation.

#### 1. *Social Norms and Compensation for Small Injuries*

As a matter of policy, the law typically gives no remedy to small injuries. An old common-law maxim reads *De minimis lex non curat*—the law does not care about trifles.<sup>52</sup> For example, as Professor Eisenberg notes, “most lawyers would probably believe that cutting in line, although a moral wrong, is not in itself a legal wrong.”<sup>53</sup> A major reason for this policy is that the law represents expensive machinery; lawsuits take time, involve high-paid lawyers and judges, incur other administrative costs, and

---

50. *But see infra* text accompanying notes 60-61. The point here, however, is that the norm against litigation is not sensitive to a particular, narrow range of values, as would appear necessary for the practice of abstaining from valuable litigation to communicate useful information under Posner’s model.

51. Posner, *supra* note 46, at 768-69 (“It should be emphasized that signals may be ambiguous: gift giving, for example, may reflect a person’s generosity or altruism rather than his discount rate.”).

52. 2 BOUVIER, *supra* note 2, at 2130.

53. MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 29 (1988).

can result in adjudicative errors. Consequently, the law cannot address every wrong effectively or fairly.

Nonetheless, small wrongs can still decrease social utility and ideally call for redress; the law's limitations result from practical incapacities, not from theoretical limitations. For instance, if a hot-dog stand or the Department of Motor Vehicles could costlessly but perfectly prevent people from cutting in line, we would probably want it to do so.

Small wrongs—even some for which the law does in fact provide a remedy—might systematically be redressed or deterred more efficiently by informal institutions than by formal ones. This increased efficiency comes from two sources. First, because social norms are decentralized rather than centralized, they can adapt to changing circumstances more readily. Professor Cooter makes this point as follows:

[T]he urgency of bottom-up law increases with economic and social complexity. As society diversifies and businesses specialize, state officials struggle to keep informed about the changing practices of people, and people struggle to make lawmakers respond to changing practices. To loosen these constraints on information and motivation, law must decentralize. Decentralized law requires guidance from a theory of social norms . . . .<sup>54</sup>

Though this characteristic of social norms applies both to large and to small injuries, it may apply with more force to small injuries—that is, to those that lie outside the attention of the legislature and the political process. Second, as Professor Cooter also notes, norms are efficient because they don't require formal enforcement by the state.<sup>55</sup>

Thus, norms can probably address small cases more efficiently than courts can. This is true both for *de minimis* injuries (such as cutting in line) and for small harms for which the law *does* provide a remedy (such as minor property damage).<sup>56</sup>

Consider a system of such norms—for instance, of norms that provide for just compensation of small property injuries among neighbors in a small community.<sup>57</sup> (As an example, such a system of norms might include a specific norm like paying for damage caused by one's children even if the law does not require this.) Members of the community may value this normative system because of its overall efficiency and fairness. Lawsuits

---

54. Cooter, *supra* note 32, at 948.

55. See, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1664 (1996) ("By dispensing with the need for state enforcement, internalization of norms is the ultimate decentralization of law.").

56. Indeed, this proposition may be true for some larger injuries too, but as I suggested, it is more likely to be true for smaller injuries because (1) politicians spend little time thinking about the best way to resolve small cases, and (2) the costs of the legal system are, in the case of small injuries, proportionally larger when compared to the extent of the injury.

57. See, e.g., Ellickson, *supra* note 17.

filed in response to small injuries, however, threaten the system; they discourage cooperation, often require a defendant to spend money to hire a lawyer, and so forth. Speaking more formally, they threaten to move the community to a less efficient equilibrium.<sup>58</sup> Potential plaintiffs may therefore refrain from suing in response to small injuries not because they see litigation as a bad thing by itself; lawsuits may simply, when used to resolve small cases, threaten an independent system of efficient norms from which the community benefits.<sup>59</sup>

This analysis leads to an empirically testable proposition: if the norm against litigation derives from or promotes a system of social norms that efficiently addresses *small* injuries, then individuals and groups that subscribe to the norm against litigation should be particularly unwilling to file small lawsuits and more willing to file large lawsuits.<sup>60</sup> Systematic empirical data on this point is unavailable, but it is interesting to note that some critics of litigation do level their complaints more sharply at small lawsuits. For instance, a Japanese professor has suggested that lawsuits are too common in the United States because “Americans ‘use courts and lawyers for very insignificant things. To them, it is an everyday affair, whereas we think of it as a last resort.’”<sup>61</sup>

## 2. *The Norm as a Counterbalance to Inefficient Incentives and Psychological Tendencies*

The norm against litigation might encourage efficient cooperation more generally. It may achieve this result (1) by facilitating “reasonable” bargaining and (2) by causing parties to internalize the social costs of the judicial system.

### a. *Reasonable Bargaining*

Other writers have described mechanisms by which social norms facilitate efficient cooperation in general. For instance, according to Robert Cooter and Thomas Ulen, social norms encourage two bargaining parties to

---

58. See generally Cooter, *supra* note 32.

59. Even if this explanation of the norm against litigation is correct, potential plaintiffs with large injuries might still be discouraged somewhat from filing suit. For one thing, the boundary between “small” and “large” might be vague, and potential plaintiffs might err on the side of caution. More generally, large lawsuits—just like small lawsuits—might threaten an efficient system of cooperative norms, if only by familiarizing parties with formal legal procedures and getting them into a legalistic mind-set.

60. Note that by “small lawsuits” and “large lawsuits,” I refer specifically to the extent of the injury, not to the net expected value of the lawsuit (in view of litigation costs and the probability of failure). Even a fully rational actor will be more likely to file suits with higher expected values; my hypothesis here, instead, is that individuals will be particularly unlikely to file a lawsuit in response to a small injury. Theoretically, this effect could be detected independently from the correlation between the expected value of a lawsuit and the probability that the suit will be filed.

61. John C. Lindgren & Craig J. Yudell, *Protecting American Intellectual Property in Japan*, 10 SANTA CLARA COMPUTER & HIGH TECH. L.J. 1, 13 (1994).

settle on a “reasonable” way to split the surplus that their cooperation creates. Though both parties may rationally wish to maximize their own share of the surplus, most parties are unsatisfied with—and may well refuse—a deal in which the other party appropriates an unfairly large share.<sup>62</sup>

In some contexts, the norm against litigation may represent a specific instance of the general norm in favor of reasonable bargaining. Litigation presents a “bargaining game” of the form described by Cooter and Ulen:<sup>63</sup> that is, two parties have a choice either to cooperate (by settling) or to pursue an expected “threat value” (by suing). The norm against litigation may discourage parties from attempting to extract unreasonable settlements in this bargaining game.

First and most obviously, the norm against litigation may discourage parties from filing a lawsuit merely to increase another party’s costs strategically. In a bargaining game, decreasing the other party’s threat value—for example, by increasing the noncooperative costs (such as litigation costs) for the other party—increases one’s ability to extract a settlement on favorable terms.<sup>64</sup> In the context of litigation, a “nuisance lawsuit” designed to increase a defendant’s costs can increase a plaintiff’s bargaining power even if the plaintiff expects to lose at trial (or to win an insignificant sum).<sup>65</sup> A rational, self-interested party therefore has an incentive to file nuisance lawsuits, even though such lawsuits can result in inefficient—and unfair—transfers of wealth.

The norm against litigating may discourage parties from engaging in this kind of profitable but socially inefficient behavior. Indeed, consistent with this analysis, “nuisance lawsuits” seem to incite particular social disapproval, as their name suggests.

Under the view of litigation as a “bargaining game,” the norm against litigation may also serve a more specific role: it may counteract two particular psychological biases that decrease the likelihood of efficient settlement.

First, plaintiffs’ behavior may be affected by a characteristic known as *loss aversion*. A plaintiff typically sues because she has experienced a loss; however, psychological and econometric research suggests that individuals value losses more highly than perfectly rational actors would.<sup>66</sup> For example, a shopper might spend time to return a defective \$2 product but would probably not accept \$2 from a stranger to drive to a store and return a defective product; more generally, people will exert more effort to avoid a loss than to garner an equivalent gain. Because a wronged plaintiff may

---

62. See COOTER & ULEN, *supra* note 23, at 80 n.5.

63. See *id.* at 78-80, 415-22.

64. See *id.*

65. See *id.* at 418-21.

66. See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991); see also COOTER & ULEN, *supra* note 23, at 410.



irrationally weigh the dollar value of her loss more heavily than, say, the cost of her lawyer, she may be excessively inclined to sue for compensation.<sup>67</sup>

Second, a *self-serving bias* may encourage plaintiffs to litigate when a rational party would instead settle. Psychological research suggests that parties systematically fill informational gaps with self-serving guesses:

[W]hen people rate their chances for personal and professional success, most unrealistically believe that their chances are better than average. In one study, Weinstein asked college students whether they believed their chances of experiencing certain favorable or unfavorable life events differed from the average chances of all other students of the same sex at the same college. Six times the number of students optimistically thought they were more likely than their average classmate to own their own home than pessimistically thought they were less likely. Seven times as many students thought they were less likely than their average classmate to have a drinking problem than thought they were more likely. . . . Similarly, actors tend to be overconfident of their ability to resolve uncertain factual issues and are particularly likely to be overconfident where the judgments are difficult.<sup>68</sup>

If parties systematically overestimate the likelihood of favorable outcomes, they are likely to overestimate their odds of winning at trial. Because of this bias, they may have a natural tendency to avoid settlement and to pursue litigation vigorously.

The norm against litigation may thus help, at a wholesale level, to correct the irrational judgment of individual people. A party may feel confident in his ability to win at trial, for instance, but may decide not to sue because of the social disapproval that he would suffer if he initiates a lawsuit (or because he has internalized a norm against litigating).

---

67. For an opposing view that emphasizes the plaintiff's *gain* from litigating rather than the prior *loss* associated with the injury that gives rise to litigation, see Jeffrey J. Rachlinski, *Gains, Losses, and the Psychology of Litigation*, 70 S. CAL. L. REV. 113, 129 (1996) (footnote omitted):

When deciding whether to settle a case, plaintiffs consistently choose between a sure gain by settling and the prospect of winning more at trial. This closely resembles a gains frame, although losing at trial may entail the loss of one's attorney's fees and may therefore be a mixed loss/gain prospect. Conversely, defendants choose between a sure loss by settling and the prospect of losing more at trial. This is a choice made in a loss frame. Hence, cross-claims aside, litigation presents a fairly consistent frame.

Rachlinski does note, however, that "plaintiffs may have [an] interest in pursuing litigation as a means of avenging or publicizing a personal grievance." *Id.* However, he does not suggest that loss aversion may cause plaintiffs to assign excessive weight to a *prior* loss.

In general, loss aversion reflects the way in which a party "frames" a change in utility, so both alternative explanations (mine and Rachlinski's) may be plausible on a theoretical level; empirical testing would be required to decide which account more accurately describes potential plaintiffs.

68. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 217 (1995) (footnote omitted); see also COOTER & ULEN, *supra* note 23, at 407-12 (discussing "relative optimism" in litigation).

b. *Externalities*

One party's decision to litigate also imposes external costs on other parties—specifically, on her opponent and on the judge and potential jurors in her case. The norm against litigation may, because of the social punishment or guilt it engenders, help parties internalize the social costs they impose when they decide to initiate a lawsuit.

However, it is important not to overlay the externalized costs of litigation. Society chooses to fund the judiciary rather than to require parties to bear the costs of the judge, jury, and judicial system generally.<sup>69</sup> Moreover, a public judiciary yields the public good associated with publicly available precedent.<sup>70</sup> Still, particularly in small cases, the norm against litigation may help parties to consider the effects of their decisions on others.

### III

#### EXPLANATIONS OF THE NORM IN TERMS OF PRIVATE INTERESTS

As David Charny has suggested, norms are not necessarily efficient; they may “favor the members of . . . concentrated interest groups, at the expense of more diffuse members.”<sup>71</sup> Certainly, some members of society—those who are particularly likely to be sued, such as manufacturers and doctors—may benefit more from the social norm against litigation than others.<sup>72</sup> Indeed, it appears that manufacturers, doctors, and those who represent them have attempted, through political and lobbying organizations, to strengthen the norm against litigation.<sup>73</sup>

In general, it is not puzzling that a group that stands to benefit from a norm would invest resources in promoting the norm. The puzzle is why others accept the norm even despite their own interests. In an article on corporate law and social norms, Professor Eisenberg suggests two reasons that parties might adopt norms that don't appear to benefit them: first, they

---

69. For considerations behind this decision, see COOTER & ULEN, *supra* note 23, at 435.

70. *See id.* at 439.

71. David Charny, *Illusions of a Spontaneous Order: “Norms” in Contractual Relationships*, 144 U. PA. L. REV. 1841, 1848 (1996). *See also* Geoffrey P. Miller, *Norms and Interests*, 32 HOFSTRA L. REV. 637 (2003) (discussing social norms from the perspective of public-choice theory).

72. Though manufacturers and service providers can spread litigation costs among their customers, doing so will result in higher prices and may thus decrease demand. Moreover, litigation can often impose unpredictable costs, which are difficult to spread in advance.

73. For instance, the Republican Party generally tends to advocate “tort reform.” *See supra* note 13 and accompanying text. *See also* *Group Says Companies Sue More Often Than Individuals*, NAT'L J. CONGRESS DAILY, Oct. 5, 2004 (“[T]here are unscrupulous trial lawyers out there who are clogging our courts with frivolous lawsuits that are driving doctors out of business. . . . They're sending employers into bankruptcy and, in the end, raising prices on consumers.”) (quoting a vice president of the U.S. Chamber of Commerce Institute for Legal Reform).

may need the support of those whom the norm *does* benefit; second, they may internalize the norm.<sup>74</sup>

In the situation Professor Eisenberg discusses, parties adopted a harmful norm because they were members of an establishment—a powerful, concentrated group—whose *other* members benefited from the norm.<sup>75</sup> This situation does not apply to the norm against litigation, however. Instead, members of the public may internalize the norm against litigation—even if it is promoted by parties with opposing interests—because it resonates with their own moral propositions. As I will discuss in Part IV, people’s moral values may counsel against stern, legalistic adversarialism and in favor of forgiveness and informal procedures.

Moreover, *bounded rationality* may explain, in psychological terms, why people internalize even harmful norms. When faced with complicated situations and limited information, people apply heuristics and generally try to make “satisfactory substantive decisions” instead of “optimal substantive decisions.”<sup>76</sup> Thus, people may come to believe—particularly if they are told by politicians with whom they may share other values—that litigating is not really in their interests; they may, for instance, accept Abraham Lincoln’s advice merely on Lincoln’s word, not on an independent cost-benefit analysis.

The recent empirical study suggesting that corporations engage in more suits than individuals represented by trial lawyers<sup>77</sup> is consistent with this explanation of the norm against litigation for two reasons. First, the managers of corporations will hardly feel bound by a norm if they have deliberately promoted it only for self-interested reasons. Second, corporations are less likely than individuals to be limited by bounded rationality.<sup>78</sup>

#### IV

##### NONECONOMIC EXPLANATIONS OF THE NORM

This Part considers noneconomic purposes that the norm against litigation might serve. Specifically, it attempts to provide accounts for the

---

74. See Eisenberg, *supra* note 5, at 1288 (discussing the historical norm against corporate hostile takeovers and noting that “investment banks, commercial banks, and law firms adhered to the norm partly because they were concerned that they would lose corporate business if they were perceived as norm-violators, and partly because as members of the establishment they internalized the norm”). Note that even if one *internalizes* a norm unconsciously, one may *follow* the norm consciously. Such norms therefore still satisfy the definition of “norm” I use. See *supra* note 5.

75. See *id.*

76. Eisenberg, *supra* note 68, at 214-16.

77. See *supra* note 39 and accompanying text.

78. However, because corporations are probably also less likely to experience other human biases, such as loss aversion and self-serving heuristics, the norm against litigation may be less relevant to them anyway; that is, it may be efficient for the norm to affect the behavior of corporations less than that of individuals.

norm in terms of (1) moral philosophy and (2) psychological observations that are unrelated to economic efficiency.

### A. Explanations Rooted in Moral Philosophy

The New Testament has harsh words for those who pursue lawsuits: "Now therefore there is utterly a fault among you, because ye go to law one with another. Why do ye not rather take wrong? why do ye not rather suffer yourselves to be defrauded?"<sup>79</sup> That is, even if someone experiences a wrong, there might be virtue in simply accepting it—or in addressing it using personal, friendly means—rather than in contesting it adamantly.<sup>80</sup>

Indeed, many moral philosophers—even, of course, those whose scholarship does not depend on the Bible—have discussed the role that "mercy" and related values can play in human affairs and in the law.<sup>81</sup> For instance, Jeffrie Murphy discusses mercy in the private law as follows:

[T]he virtue of mercy is revealed when a person, out of compassion for the hard position of the person who owes him an obligation, waives the right that generates the obligation and frees the individual of the burden of that obligation. People who are always standing on their rights, indifferent to the impact this may have on others, are simply intolerable. Such persons cannot be faulted on grounds of justice, but they can certainly be faulted. And the disposition to mercy helps to check these narrow and self-involved tendencies present in each of us.<sup>82</sup>

Thus, Murphy makes a moral claim that is parallel to an instrumental claim that this Comment made earlier. That is, just as the norm against litigation may, from an instrumental perspective, help correct inefficient tendencies that result from self-serving biases, the disposition toward mercy might

79. 1 *Corinthians* 6:7 (King James). This moral criticism of litigation is found outside Western religion as well. See, e.g., F.S.C. NORTHROP, *THE COMPLEXITY OF LEGAL AND ETHICAL EXPERIENCE; STUDIES IN THE METHOD OF NORMATIVE SUBJECTS* 184-85 ("The moral man, Confucius teaches, does not indulge in litigation."). As Northrop notes, "Codes there may be, but they are to be used only as a last resort, and even then recourse to them brings shame upon the disputants." *Id.*

80. This is particularly true in most noncommercial contexts. Cf. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 847-50 (1997) (arguing that some personal interactions—such as gifts motivated by "love, affection, friendship, gratitude, and comradeship"—would "be impoverished if [they] were to be collapsed into the world of [legally enforceable] contract").

81. See, e.g., Martha Nussbaum, *Equity and Mercy*, PHIL. & PUB. AFF., Spr. 1993, at 83; Jeffrie Murphy, *Mercy and Legal Justice*, in JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 162 (1988). To understand the role of mercy, it is important to keep in mind that *justice* is not necessarily the only moral value that individuals care about; similarly, it is not necessarily the only deontological goal of the law. For a general discussion of moral norms and the law, see EISENBERG, *supra* note 53, at 14-26.

82. Murphy, *supra* note 81, at 176.

help correct “narrow and self-involved tendencies”<sup>83</sup> that are inappropriate or morally impoverished.

In view of this understanding of mercy, an individual who initiates a lawsuit may be seen—and may see himself or herself—as inappropriately “narrow” or “self-involved” or as lacking in “compassion.” We may want to “fault” such individuals for “standing on their rights,”<sup>84</sup> even if we recognize that individual utility (or even the general welfare) might be enhanced by a strict application of justice.

This moral criticism of those who exercise their rights too vigorously may, of course, bolster a norm against using *courts* to press rights. The norm against litigation may thus represent not a norm against using courts *per se* but a norm against attempting to effect harsh justice without regard for another person’s “hard position.” This sort of moral criticism may help explain the public’s general disapproval of lawsuits like those initiated by the Recording Industry Association of America (RIAA) against individuals who may have shared music illegally.<sup>85</sup> Commentators may argue that even if the RIAA has the *right* to recover damages from individuals, it is unseemly or “self-involved” for the RIAA to sue individuals—often young individuals whose resources are relatively modest—to pursue this right.<sup>86</sup>

Mercy and related values are sometimes alternatively expressed in terms of an actor’s *motives*. For instance, Gregory W. Trianosky discusses cases in which someone

expresses a narrowly legalistic attitude toward morality by asserting his rights . . . . It is not that what he *does* is wrong, considered independently of its motive; for our common-sense principles of moral obligation *are* narrow and legalistic here. Nevertheless, the agent reveals a genuinely vicious motivation in his coldly calculated insistence on what is rightfully his.<sup>87</sup>

Trianosky notes that “what is impermissible [in these cases] is something like ‘doing-what-one-has-a-right-to-do-for-cold-hearted-reasons.’”<sup>88</sup> Trianosky’s conception of cold-hearted justice might apply to so-called nuisance lawsuits—lawsuits that are legal but implemented for selfish motives, rather than to address a genuine wrong. It would certainly apply to

83. *Id.*

84. *Id.*

85. See generally Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685 (2005) (citing individual lawsuits by the RIAA).

86. More generally, this mercy-based explanation for the norm against litigation generates an empirically testable proposition: plaintiffs will be less likely to sue defendants who are in what Murphy calls a “hard position.” Of course, defendants who are in financial trouble are less likely to be solvent, so plaintiffs may have other reasons to avoid suing them. Still, an empirical analysis should be able to demonstrate a separate effect based specifically on conditions we associate with mercy.

87. Gregory W. Trianosky, *Supererogation, Wrongdoing, and Vice: On the Autonomy of the Ethics of Virtue*, 83 J. PHIL. 26, 34-35 (1986).

88. *Id.* at 35 n.9.

situations in which one party uses a legal loophole to exploit another, or in which parties—as in some cases of divorce—use courts to pursue cruel or vindictive motives.<sup>89</sup>

This analysis of the morality of mercy cuts through the central puzzle raised by the norm against litigation—why seeking justice through lawsuits violates a social norm. That is, the answer to the question may simply be that justice and efficiency are not the only important values. To pursue justice out of “narrow and self-involved tendencies”<sup>90</sup> is not virtuous, and to exercise a formal right out of cruelty may positively represent a vice.<sup>91</sup>

However, the law is not always sensitive to the circumstances of both parties. For instance, courts are not typically able (and may appropriately be unwilling) to determine the motives of the plaintiff or to detect the “hard position” of the defendant, so law alone cannot easily prevent the exercise of poor motives or the implementation of harsh “justice.” The norm against litigation may be a way for our society to curb selfish motives and socially unacceptable harshness; if law cannot deter such cases, perhaps social punishment or an internalized norm can.

### B. *Explanations Rooted in Perceptions of the Legal Process*

Separately, the norm against litigation might result simply from criticism of the existing legal process, or it might result from a mismatch between people’s intuitions about fairness and the nature of common-law adjudication.<sup>92</sup>

The details of the American legal process may be imperfect, and criticism of these details may inspire distrust of the legal process generally.<sup>93</sup> This distrust, in turn, may give rise to a norm against litigating. People might not want to take part in a system they don’t think is fair—or they

89. More generally, pursuing a lawsuit may reflect, in many people’s judgment, a tendency toward greed or opportunism—or simply an excessive concern with money or an insufficient concern with the communitarian ideal. Cf. *supra* text accompanying note 12 (suggesting an association between the “decline of the church, family and neighborhood unity” and the increase in the role of courts).

It is possible that the norm against litigation is weaker for lawsuits seeking injunctive relief than for those seeking damages. Money’s inability to compensate fully for intangible harms may contribute to the skepticism of a lawsuit’s virtue. For instance, one might advise a friend that a lawsuit won’t eliminate the pain she suffers from an accident.

90. Murphy, *supra* note 81, at 176.

91. Consider Inspector Javert, the famous policeman of *Les Misérables* who is widely known as one who pressed justice too harshly. Describing Javert, Victor Hugo suggests that “[i]ntegrity, sincerity, honesty, conviction, the sense of duty, these are qualities which, being misguided, may become hideous” and sees in Javert “all the evil in what is good.” VICTOR HUGO, *LES MISÉRABLES* 267-68 (Norman Denny trans., Penguin Books 1982) (1862).

92. Thomas Tyler draws a distinction between “evaluations of the enactment of decision-making procedures” and “evaluations of the procedures themselves.” THOMAS TYLER, *WHY PEOPLE OBEY THE LAW* 111-12 (1990). By referring to criticisms of the “existing legal process,” I refer to the latter; by referring to the mismatch between people’s familiar intuitions about justice and the nature of common-law adjudication, I refer to the former.

93. See *id.* at 109-12.

might be criticized for doing so—even if they stand to gain from an individual transaction with the system.

Thomas Tyler summarizes literature on dissatisfaction with the legal system and suggests avenues for further research:

Past treatments of public dissatisfaction with the courts and the law have emphasized public dissatisfaction with the outcomes that the courts produce. Examples of this focus on outcomes include concerns about the failure of the courts to dispose of cases quickly, or to give sentences of adequate length. According to a perspective based on justice, citizens' concerns should be viewed as part of their general view about fairness of procedure and fairness of outcome. It may be that procedural irregularities, such as criminals being let free on "technicalities," are particularly important in feeding public dissatisfaction with the courts.<sup>94</sup>

Though this discussion focuses on criminal law, a general dissatisfaction with the legal system might translate to a personal refusal—or to social encouragement to refuse—to deal with the legal system, even despite personal economic interest. An individual wronged by a court in the past—either because she faced a delay or other administrative problem, because she disagreed with a prior outcome, or because she experienced a procedure that she judged to be unfair—may, out of distaste for the legal system, be disinclined to initiate a lawsuit.

Tyler also distinguishes formal from informal legal proceedings, and he notes that "informal legal procedures may correspond more closely than trials to people's intuitions about what is a fair procedure."<sup>95</sup> Tyler suggests several reasons that ordinary citizens might intuitively prefer informal procedures. First, informal procedures may offer "greater opportunities for direct participation than formal trials do and may allow the decision maker more flexibility to be sensitive to people's interpersonal concerns."<sup>96</sup> Second, ordinary citizens may not have direct experience with the sorts of problems that legal procedures are designed to protect them from.<sup>97</sup> For example, they might not understand why a particular rule of evidence or civil procedure is fair. Instead, they might apply heuristics concerning justice or efficiency that are suitable for the situations they typically face but unsuitable for a national or even a statewide legal system. As a result, they may think that the legal process is arcane, impersonal, or generally insensitive to their values. They might therefore be less inclined to initiate a lawsuit than they would otherwise be, and they might presume that others who initiate lawsuits do not share their values. Indeed, one recent commentator

---

94. *Id.* at 109-10.

95. *Id.* at 155.

96. *Id.*

97. *See id.*

criticizes the adversarial legal system by drawing an interesting historical parallel with “trial by battle”:

[T]rial by combat and trial by [legal argument] suffer from similar defects as a means of determining the truth: the inherent inaccuracy of the adversary method, the reliance on professional representatives, and conscious antiquarianism. . . . The defects of trial by argument are more severe because this mode of trial is less justifiable *according to our beliefs* than trial by battle was according to the beliefs of people in the Middle Ages. In other words, the *fit between the theory and the practice that it justified* was better for medieval trial by battle than for modern trial by argument.<sup>98</sup>

In short, individuals may not wish to initiate lawsuits because they simply don't like the legal system—either because it presents particular operational faults or because its fundamental design does not match commonly workable notions of fairness or efficiency.

## V

### NORMATIVE IMPLICATIONS

The persuasiveness (or lack thereof) of this Comment's teleological justifications for the norm against litigation should affect the way we understand the norm. For instance, if we cannot find—despite our earnest searches—a plausible justification for the norm, we have no reason, short of sentiment or fear of change, to continue to accept it; we should instead consider rejecting it, as Richard Abel does.<sup>99</sup>

On the other hand, if we find a plausible explanation, then we need to look to the basis of the explanation to gauge our appropriate level of support or skepticism for the norm. For example, if the norm promotes social welfare—and if it is consonant with our moral values—we should support it. If the norm comes from the manipulative efforts of a self-interested group, we should either—if we are rational and purely selfish—determine whether we are part of the group that benefits from the norm or—if we intend to promote social welfare—determine whether the norm results in an aggregate gain or loss. Alternatively, to the extent that the norm arises because of people's distrust of the legal process, we should either address courts' perceived problems or educate citizens about their unavoidability.

Our decision, as Abel suggests, affects the tort-reform debate.<sup>100</sup> It also can affect the scope and extent of attorney sanctions for frivolous

---

98. Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 280 (2003) (emphasis added).

99. See generally Richard L. Abel, *The Real Tort Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443, 467 (1987) (“To assert a legal claim is to perform a vital civic obligation.”).

100. See *id.* (arguing that characterizations of Americans as litigious “are unsubstantiated and false” and that tort reform should focus on “responding to a higher proportion of victims”).



lawsuits, and it can influence the rules by which attorneys operate more generally. For instance, to serve their clients properly, attorneys should make sure to account for all of their clients' economic costs and benefits—and perhaps their social costs and benefits as well.<sup>101</sup>

#### CONCLUSION

This Comment has advanced several accounts of the American norm against litigation—that is, of the practice of forgoing an opportunity to file a lawsuit with a positive net expected value. Some accounts suggest that the norm serves to promote social welfare or morality. Another account suggests that the norm instead has a manipulative quality. Still others, such as Eric Posner's signaling theory, make no value judgment.

Some of the accounts developed in this Comment suggest empirical tests; others appeal only, at this stage, to intuition. Either way, reaching a consensus on the nature and function of the norm—a consensus that might ultimately merge several of the independent accounts this Comment offers—can inform lawyers and other policymakers who promote or oppose the norm.

---

101. The American Bar Association's Model Rules of Professional Conduct allow attorneys to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004).

