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Cover Page Footnote
The author wishes to thank Michael DeSimone and Lawrence J. La Sala for their invaluable contributions to this piece.
BOOK REVIEW

THE MYTH OF THE LITIGATION EXPLOSION

Randy M. Mastro*


"Lawyer bashing" is a time-honored tradition. For instance, the "first thing" they wanted to do in Shakespeare's day was "kill all the lawyers." That sentiment persists today. Indeed, recent surveys show that, of all professionals, lawyers are held in the lowest esteem.¹

Now, Walter Olson chooses to reiterate this tired theme in his book, _The Litigation Explosion._ One would expect such a treatise—"written primarily for the nonlawyer, and by one"—to fade into obscurity. This book, however, has not only made the rounds on the media circuit; it has won kudos from within the legal community. No less an authority than former United States Supreme Court Chief Justice Warren Burger praised it as "a valuable contribution to the public interest."²

I was intrigued. After all, this purported to be an objective look at

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4. Id. at 11.


7. Burger, _supra_ note 6, at 13, col. 3.
what I do for a living.\textsuperscript{8} It turned out, instead, to be a right-wing manifesto full of purple prose and misguided notions about how our legal system works and ought to work.

Olson starts from the defensible premise that the United States is experiencing a "litigation explosion" that is a "disaster."\textsuperscript{9} He then argues for a series of regressive and draconian changes—such as fee shifting,\textsuperscript{10} attorney liability,\textsuperscript{11} increased burdens of proof,\textsuperscript{12} and limited discovery—\textsuperscript{13} that would necessarily discourage and prevent plaintiffs from filing civil suits.\textsuperscript{14}

Olson makes little attempt to hide his ideological biases. He is unabashedly pro-business\textsuperscript{15} and pro-defendant.\textsuperscript{16} He views civil litigation as an evil because it is bad for business. Indeed, he waxes eloquently that the "unleashing" of litigation "clogs and jams the gears of commerce, sowing friction and distrust between the productive enterprises on which material progress depends and all who buy their products, work at their plants and offices, [and] join in their undertakings."\textsuperscript{17} Moreover, Olson derides those who consider litigation an opportunity to vindicate rights. In his view, "life would be intolerable if every man insisted on his legal rights to the full."\textsuperscript{18}

If Olson's pronouncements have a familiar ring, that is because we

\begin{footnotesize}
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\item \textsuperscript{8} See, e.g., Burger, supra note 6, at 12, col. 1 (while "some members of the legal profession may challenge [Olson's] qualifications to address this subject . . . a well-informed layman like [Olson], looking at the broad picture, can perhaps see what some of us within the profession do not see—or do not want to see"); Haspel, Book Review, N.Y.L.J., July 19, 1991, at 2, col. 3 ("The Litigation Explosion provides a valuable view from . . . outside of [the legal] system").
\item \textsuperscript{9} Litigation Explosion, supra note 3, at 1-2. Some studies and academics, however, have questioned whether the litigation explosion presumed by Olson has even occurred. According to a study by the National Center for State Courts, "total tort suit filings have barely out-paced the nation's rate of population growth." Siegal, Too Many Lawyers Too Much Litigation, Newsday, May 1, 1991, at 54, col. 1. Moreover, a Rand Corporation study has shown that 44\% of all product liability cases brought in federal courts in the 1980's concerned asbestos. See Guzzardi, Up In Arms Over the American Way of Law, Fortune, May 20, 1991, at 151; see also Galen, How the Courtroom Became a Casino, Bus. Week, May 13, 1991, at 12 (noting that "federal court records from 1985 to 1989 show that personal-injury product liability filings, with the exception of asbestos cases, decreased by 37.5\%"); Siegal, supra, at 54, col. 1 (noting that the General Accounting Office has found that, not including the asbestos, Dalkon Shield and benedectin cases, product liability filings in federal court have grown more slowly than consumer spending); Taylor, Thomas Henderson, Am. Law., Mar. 1989, at 136 (noting signs that "the current trend is against runaway imposition of tort liability"); cf. Margolis, Letter to the Editor, N.Y. Times, June 23, 1991, § 7, at 30, col. 2 (arguing that the "real surge in court business has come from criminal, not civil, cases").
\item \textsuperscript{10} See Litigation Explosion, supra note 3, at 329-38.
\item \textsuperscript{11} See id. at 326-29.
\item \textsuperscript{12} See id. at 345-46.
\item \textsuperscript{13} See id. at 314-15.
\item \textsuperscript{14} See infra notes 42-49, 80-97 and accompanying text.
\item \textsuperscript{15} See Litigation Explosion, supra note 3, at 2, 198, 200.
\item \textsuperscript{16} See id. at 108, 272, 293.
\item \textsuperscript{17} Id. at 2.
\item \textsuperscript{18} Id. at 223 (quoting F. Pollock, Jurisprudence, but not citing any specific page).
\end{itemize}
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have heard this all before from conservative politicians and jurists looking to close off the courts as an avenue of redress for individual rights.\(^1\) It is not at all surprising that Olson holds such views. The Manhattan Institute from which he hails is a conservative "think tank" founded by former CIA director William J. Casey.\(^2\) Some critics, in fact, have branded its position papers "skillfully publicized rehash of long-stated conservative positions."\(^2\)\(^1\)

This book falls well within that categorization. It would be easily dismissed as an uninformed layman's ranting and raving if not for the fact that it appears to reflect a growing sentiment, even within the legal profession, that we litigators are the cause, rather than the cure, of many of our society's ills.\(^2\)\(^2\) Moreover, the book warrants closer scrutiny because it propagates the myth that litigation is inherently bad and therefore needs to be curtailed.\(^2\)\(^3\)

Olson cavalierly proposes placing severe limitations on one of our society's most fundamental rights—namely, the right to have an impartial

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19. For example, United States Supreme Court Chief Justice William Rehnquist has cautioned: "We are in a position where we must think not about new causes of action, but of remitting to state courts some of the business now handled by the federal courts, and of revising the way of handling some of the business which is retained by federal courts." *Rehnquist Urges Limits on Burden of Federal Courts*, Manhattan Law., Feb. 14-20, 1989, at 16 (providing text of speech delivered by Rehnquist to the American Bar Association on February 6, 1989); see also Margolick, *Address By Quayle on Justice Proposals Irks Bar Association*, N.Y. Times, Aug. 14, 1991, at A1, col. 2 (reporting on Vice President Dan Quayle's speech to the American Bar Association in which Quayle endorsed many of the reforms that Olson urges in his book).


22. For example, in a recent speech to the American Bar Association, Vice President Dan Quayle—himself a law school graduate—raged that lawyers and the legal system were responsible for placing the United States at a competitive disadvantage in world industrial markets. *See Margolick, supra note 19, at A1, col. 2; see also American Competitiveness, Wall St. J., Aug. 14, 1991, at A8, col. 1 (editorial supporting position taken by Quayle); Less Litigation, More Justice, Wall St. J., Aug. 14, 1991, at A8, col. 3 (reporting proposals made by the President's Council on Competitiveness, working group on Federal Civil Justice Reform, to counter current "use and abuse of the legal system"); Fields, Curing Litigious Preyers of Pain, Wash. Times, May 16, 1991, at G1 (Commentary) (blaming lawyers for, among other things, the rise of children dying from whooping cough); Brimelow & Spencer, The Plaintiff Attorneys' Great Honey Rush, Forbes, Oct. 16, 1989, at 197, 202-03 (labelling plaintiffs' lawyers as "the real champions of the great American greed game" and blaming lawyers for crisis in the insurance industry).

23. On numerous occasions, the United States Supreme Court has expressly rejected and attempted to dispel this myth. *See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 643 (1985) (“we cannot endorse the proposition that a lawsuit, as such, is an evil”); Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1977) (“we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action”).*
jury resolve our disputes with each other and with our government.\textsuperscript{24} Our courts have long been a vehicle for necessary social reform when the executive and legislative branches, whether by choice or by cowardice, have failed to act.\textsuperscript{25} Olson sees this virtue as a vice.

The retrenchment that Olson urges has already begun. Over the past decade the judiciary has unquestionably become more conservative.\textsuperscript{26} Right-wing politicians now derisively dub courts doing what they are supposed to do as "judicial activism,"\textsuperscript{27} while arch-conservatives like Ol-

\textsuperscript{24} See Litigation Explosion, \textit{supra} note 3, at 1-11, 292-93, 297-16, 339-48.

\textsuperscript{25} See generally Miranda v. Arizona, 384 U.S. 436 (1966) (establishing minimum procedural safeguards to secure the Fifth Amendment's right against self-incrimination for persons taken into custody); Brown v. Board of Educ., 347 U.S. 483 (1954) (finding school segregation to be unconstitutional); Southern Burlington County NAACP. v. Township of Mount Laurel, 67 N.J. 151, 336 A.2d 713 (establishing that municipalities' land use regulations must provide realistic opportunity for building of low or moderate income housing), cert. denied, 423 U.S. 808 (1975); see also Coyle, \textit{A Final Victory Marks the End of a Career}, Nat'l J., Aug. 13, 1990, at S4 ("the fundamental purpose of the Constitution [is] 'the protection of the human being and the recognition that every individual has fundamental rights which the government cannot deny him,'" (quoting Justice William Brennan)).

\textsuperscript{26} As one commentator has noted, "the [Reagan] administration's methodology in choosing [federal judges] represented a sharp break with tradition. No longer was loyalty to the party, or trial and litigating experience, as important as was well-documented fidelity to conservative ideology." Freiwald, \textit{The Mission: Stock Bench}, Am. Law., May/June 1988, at 6, 7 (special supplement); see also Wermiel, \textit{Full-Court Review of Panel Rulings Becomes Tool Often Used By Reagan Judges Aiming to Mold Law}, Wall St. J., Mar. 22, 1988, at 70, col. 1 (noting that en banc review "has become a weapon for some Reagan appointees seeking to steer federal courts in a more conservative direction"); Brimelow, \textit{Judicial Imperialism}, Forbes, June 1, 1987, at 109, 112 (noting that "several studies have shown that Reagan judges are more likely to support the 'conservative' side in a variety of areas than Carter or Nixon appointees"). Furthermore, because both the Reagan and Bush administrations have been able to appoint so many federal judges, a conservative legacy will long remain with the federal courts. \textit{See} Neal, \textit{Reagan to Have Lasting Legacy on Courts}, Proprietary to UPI, Sept. 4, 1988 (LEXIS, Nexis library, Omni file). Simply at the federal appellate level, the Reagan administration appointed nearly half of the active federal circuit court judges. \textit{See} Note, \textit{The Politics of En Banc Review}, 102 Harv. L. Rev. 864, 865 n.4 (1989) (citing H. Schwartz, Packing the Courts: The Conservative Campaign to Rewrite the Constitution 150 (1988)). In fact, among non-senior judges, Reagan and Bush appointees now hold majorities in every Circuit except the Fourth and Eleventh Circuits. \textit{See} 929 F.2d VII, VII-XXVII (1991) (listing federal judiciary and dates of appointment); \textit{see generally Reagan Justice: A Conservative Legacy on the Appellate Courts}, Am. Law., May/June 1988, at 1-54 (special supplement) (reviewing each federal circuit and discussing how former President Reagan stocked the appellate bench with conservative appointees).

son stoke the fires of public discontent with selective accounts of litigation abuses.

These few abuses, however, do not warrant wholesale changes in our judicial system. Let us not be fooled. This attack on litigation is part of a larger political agenda. Olson and his ilk want to bar the courthouse door precisely because litigators have succeeded in using the courts as a vehicle for social reform.

While it is true that our courts currently have more cases than they can efficiently handle, the answer is surely not to chop plaintiffs at the knees and effectively prevent them from being able to stand in court. Rather, the answer is to increase our commitment to the judicial branch and thereby ensure greater access. We deserve no less. Sadly, we may only realize that fact after the axe has fallen.

I. LAWYERS AS LITIGANTS

At the outset of his book, Olson argues that “we changed the rules in our courtrooms to encourage citizens to sue each other” and that “the changes amount to a unique experiment in freeing the legal profession and the litigious impulse from age-old constraints.”

Looking at another way, one could say that we simply relaxed rigid procedural and substantive rules to permit potential litigants the opportunity to have their disputes resolved by an impartial tribunal. That approach, however, is far too reasonable for Olson’s liking.

According to Olson, these changes have ushered in an era where lawyers themselves function as litigants. In support of this proposition, he first points to the lifting of the ban on attorney advertising and client solicitation. This, he says, amounted to the “deregulation of the busi-
ness of litigation.\textsuperscript{31}

With lawyers permitted to "pound the pavement" for business, they have propagated what Olson considers to be a pernicious evil: the class action.\textsuperscript{32} Olson contends that class actions are nothing more than "glorified clientless litigation" for the "aspiring drummer-up of litigation" who solicits "not just by ones and twos, but by carloads and counties."\textsuperscript{33}

In reality, however, class actions serve the interests of similarly situated plaintiffs, whose individual claims may be too small to justify the expense of filing an otherwise meritorious lawsuit but whose aggregate claims more than justify suit.\textsuperscript{34} Moreover, plaintiffs' counsel in such

\textsuperscript{31} Litigation Explosion, supra note 3, at 1. It is ironic that Olson decries the "deregulation of the business of litigation" when those who share his conservative political views ordinarily urge the deregulation of business. See, e.g., Mandel, Education Reform Movement Pushes Choice, Investor's Daily, Feb. 22, 1991, at 36, col. 6 (Manhattan Institute's Director of Educational Innovation supporting public school choice movement); Rubenstein, Why Rich New York is So Poor, N.Y. Times, Feb. 10, 1991, § 3, at 13, col. 1 (Manhattan Institute fellow criticizes New York State welfare system); Passell, Perestroika For Renters, N.Y. Times, Jan. 2, 1991, at D2, col. 1 (Manhattan Institute's Peter Salins argues for the deregulation of rent control); Moderate-Priced Housing: Must City Be Forever Short of Affordable Living Space?, N.Y. Times, May 1, 1988, § 4, at 6, col. 1 (same); Page, Let's Get Small, Says Social-Policy Guru Charles Murray, Chi. Trib., Dec. 11, 1988, § 14, at 8, cols. 3-4 (reviewing book by Manhattan Institute fellow calling for dismantling of federal welfare system). See generally From the Right, supra note 20, at 51, col. 3 (Manhattan Institute's Peter Salins discusses the institute's free market philosophy); McClenahen, supra note 20, at 72 (describing Manhattan Institute's philosophy as "the government that governs best governs least").

\textsuperscript{32} See Litigation Explosion, supra note 3, at 56-66.

\textsuperscript{33} Id. at 57, 66. Olson is not the first author to chronicle class action abuses. See, e.g., Macey & Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 7-8 (1991) (arguing that class actions are dominated by "entrepreneurial' plaintiffs' attorneys" who "operate largely according to their own self-interest"); Cofee, The Regulation of Entrepreneurial Litigation: Balancing Fairness & Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 883-89 (1987) (discussing conflict of interest between entrepreneurial class attorneys and class members as an "agency cost" problem of class actions); Kane, Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer, 66 Tex. L. Rev. 385, 390-96 (1987) (discussing potential conflicts of interest and the need for improved management in class actions); Rhode, Class Conflicts in Class Actions, 34 Stan. L. Rev. 1183, 1205 & n.87 (1982) (while "many individual attorneys have proved highly conscientious" in their class representation, "prudential and ideological" motivations play a dominant role in shaping class attorneys' conduct); Note, Abuse in Plaintiff Class Action Settlements: The Need For a Guardian During Pretrial Settlement Negotiations, 84 Mich. L. Rev. 308, 314-16 (Nov. 1985) [hereinafter Note, Abuse in Class Action Settlements] (discussing potential conflicts of interest between class attorney and class members). But see Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem", 92 Harv. L. Rev. 664, 665-67 (1979) (recognizing "instances of undesirable or unprofessional conduct" but disputing claims of widespread class action abuse).

\textsuperscript{34} This basic fact has been recognized by the United States Supreme Court in a majority opinion by no less a critic of the legal system than Chief Justice Rehnquist. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (Rehnquist, J.) (class actions "permit the plaintiffs to pool claims which would [otherwise] be uneconomical to litigate
suits do not “wag[e] litigation purely and openly on their own behalf,” as Olson suggests. Indeed, their actions are subject to rigorous scrutiny by the judges who preside over such suits and by the class members who must receive notice of seminal events in the litigation. Hence, far from running their own shows, plaintiffs’ counsel in class action suits assume added legal and ethical obligations to protect the interests of the class.

individually. For example, [because] this lawsuit involves claims averaging about $100 per plaintiff[,] most of the plaintiffs would have no realistic day in court if a class action were not available”); accord Deposit Guar. Nat’l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980); see also Miller, supra note 33, at 665 n.3 (endorsing this view and contending that “the alleged deficiencies of the class action have been overstated”).

35. Litigation Explosion, supra note 3, at 66.

36. See Fed. R. Civ. P. 23(d) (allowing court in class action suit to “make appropriate orders . . . for the protection of the members of the class or otherwise for the fair conduct of the action”); Fed. R. Civ. P. 23(e) (requiring that “a class action shall not be dismissed or compromised without the approval of the court”). Furthermore, in the vast majority of jurisdictions, a plaintiffs’ class cannot be certified until the judge determines that all the prerequisites of a class action are met. See Phillips Petroleum, 472 U.S. at 809; General Telephone Co. v. Falcon, 457 U.S. 147, 160-61 (1982); East Texas Motor Freight Sys. v. Rodriguez, 431 U.S. 395, 405-06 (1977). In most cases, this means that a judge must first determine that an adequately defined class exists, see Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982), and that (i) the class is so numerous that joinder would be impractical, (ii) questions of law or fact are common to the class, (iii) the claims or defenses of the representative party are typical of the class, and (iv) the representative party will adequately protect the class’ interests. See Fed. R. Civ. P. 23(a); see also 3 H. Newberg, On Class Actions 16-19 (2d ed. cum. supp. 1990) (noting that 40 states, the District of Columbia, and the Virgin Islands have adopted class action rules similar or identical to the federal rules).

37. In addition, lawyers have little practical incentive to “drum up” frivolous class action litigation.

On the one hand, the cost of maintaining class action suits can be enormous, with that cost frequently borne by the class attorney. See Lynch, Ethical Rules in Flux: Advancing Costs of Litigation, 7 Litig. 19, 20 (Winter 1981); Note, Abuse in Plaintiff Class Action Settlements, supra note 33, at 314 & n.34; Note, Due Process and Equitable Relief in State Multistate Class Actions After Phillips Petroleum Co. v. Shutts, 63 Tex. L. Rev. 415, 444 (1989) [hereinafter Note, Due Process and Equitable Relief]; see also Cooper & Kirkham, Class Action Conflicts, 7 Litig. 35, 36 (Winter 1981) (explaining that the claim that lawyers create class actions simply to generate fees “rests on some false pretenses and ignores hard realities,” given the economic burdens borne by class counsel); Taylor, supra note 9, at 132 (noting that plaintiffs’ lawyer Thomas Henderson personally spent $250,000 in assisting in the Agent Orange litigation). For example, in Eisen v. Carlisle & Jacquelin, the case in which the Supreme Court ruled that a plaintiffs’ class representative must bear the cost of notice to all class members, notice to identifiable class members cost $225,000, and additional expenses were required for the publication of notice designed to reach the four million non-identifiable class members. See 417 U.S. 156, 167 (1974). Similarly, in the Agent Orange toxic tort litigation, plaintiffs’ class expenses exceeded ten million dollars. See Note, Due Process and Equitable Relief, supra, at 445-46.

On the other hand, the risk of potential sanctions under Federal Rule 11 serves as a deterrent to frivolous or meritless suits. See Fed. R. Civ. P. 11; see also infra note 89 (explaining provisions of Rule 11); Vairo, Rule 11: A Critical Analysis, 118 F.R.D. 189, 200 (1988) (noting that plaintiffs’ counsel have been particularly affected by Rule 11). As one study has documented, plaintiffs were the targets in 78.8% of the cases in which Rule 11 sanctions were requested, and plaintiffs were actually sanctioned in 59.6% of the cases in which they were the targets of a Rule 11 motion. See id. at 200. Moreover, Rule 11 has been disproportionately invoked in types of litigation that are typically brought as class actions—namely, in suits involving civil rights, employment discrimination, securi-
Olson's attack on class actions in the context of a "litigation explosion" is puzzling. Olson says that the ultimate problem lies in too much litigation for our society's own good. He then contradicts himself by attacking class action litigation, which is a primary vehicle for consolidating like cases and conserving judicial resources. Its efficiencies, however, permit ready redress for the misconduct of businesses or governments whose transgressions injure whole classes of people. In one suit, many wrongs can be righted that would likely never have been righted otherwise. That is sufficient reason for Olson to object to class actions. It should be reason enough for the rest of us to want to pre-

38. See General Tel. Co. v. Falcon, 457 U.S. 147, 155 (1982); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339-40 (1980); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 555-56 (1974); Guthrie v. Evans, 815 F.2d 626, 629 (11th Cir. 1987); Piel v. National Semiconductor Corp., 86 F.R.D. 357, 374 (E.D. Pa. 1980); Elster v. Alexander, 76 F.R.D. 440, 443 (N.D. Ga. 1977), appeal dismissed, 608 F.2d 196 (1979); see also Note, Abuse in Plaintiff Class Action Settlements, supra note 33, at 311 (noting that "society as a whole benefits [from class actions] because class action litigation can ensure greater compliance with society's laws and regulations and promote efficient use of scarce judicial resources"); Taylor, supra note 9, at 136 (commenting that class actions and consolidating the trial of common issues represent "the most realistic hope for more fair and efficient processing of mass toxic tort claims," specifically because such consolidation gives judges the power to "hold [down] the plaintiffs' lawyers' fees"); see generally Proposed Rules of Civil Procedure, Advisory Committee's Note to Rule 23, 39 F.R.D 69, 100-03 (1966) (discussing purpose of class action rule and recognizing that class actions are intended to "achieve economies of time, effort and expense").

39. As one commentator has stated in arguing for the class treatment of mass tort claims:

Class treatment . . . would enable attorneys to achieve the same economies of scale that defendants already enjoy. Vast savings in systemic resources could result from the avoidance of redundant adjudication of currently marketable claims. The cost-spreading effect of class actions would also provide previously unmarketable claims access to the system. Thus, by aggregating mass exposure claims, class actions would enable mass exposure victims to litigate both in the numbers and with the adversarial strength necessary to achieve the tort system's utilitarian and rights-based deterrence objectives as well as its compensation goals.


40. Olson writes of class actions: "Now a new ideology had been cobbled together that glorified clientless litigation as somehow cleaner, nobler, more disinterested, than litigation on behalf of someone who had actually been hurt badly enough to want to sue." Litigation Explosion, supra note 3, at 66. This analysis simply begs the question. As one commentator has noted in the area of products liability, before toxic tort litigation began to "unsettle the legal system and capture the imagination of tort reformers, asbestos, the Dalkon Shield, and other products had ravaged the lungs, reproductive organs, and other tissues of thousands of Americans." Taylor, supra note 9, at 130. If not for plaintiffs' class lawyers, "who would police dangerous activities and products to ferret out evidence about such matters," and how else "would the internal company documents, depositions, and other evidence showing some major asbestos companies' willingness to put workers and consumers at risk for the sake of business ever come to light?" Id. at 136. Indeed, to give federal regulatory approval conclusive effect would "ignore a long history of regula-
II. FORM OVER SUBSTANCE

Olson next assaults the procedures for initiating and prosecuting civil cases. He criticizes notice pleading, which he calls “suing without explaining.” Instead, Olson favors the ancient “writ” method, although even he admits that historically “writs set many traps for even the well-trained lawyer and generated technicalities that seemed to have so little to do with actual justice that many judges were tempted just to ignore them.” He then attacks civil discovery, which he says is governed by the “general rule that revelation is everything and privacy nothing.” In the alternative, Olson favors the virtual elimination of pre-trial discovery, even though he acknowledges that such “discovery” is the only means available for “garnering data relevant to a client’s case.”

Of course, without notice pleading and discovery, a plaintiff would somehow have to obtain all of the information necessary to prove his or her claim before even filing suit. This would be a remarkable and probably impossible feat in the vast majority of cases.

Instead of imposing such an extraordinary burden on plaintiffs, our legal system permits them to proceed on general allegations that afford notice of the nature of the action, and then enables them to collect information from adversaries and witnesses to flesh out those allegations.

41. As Justice Douglas once wrote: “The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.” Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 186 (Douglas, J., dissenting) (footnote omitted); see also Miller, supra note 33, at 693 (“[g]iven the emotional tone and misdirection of the class action debate during recent years, the ideological orientation of some of the proposals, and the indications of increased stabilization in the field, this is an inopportune time to attempt a major revision of class action practice”).

42. Litigation Explosion, supra note 3, at 89.

43. Id. at 95.

44. Id. at 126. What Olson fails to appreciate is that protective orders are commonly granted to protect the privacy interests of litigants. See Schroeter, Privacy Rights Can Limit Discovery, Trial, Nov. 1990, at 49-54; see also Fed R. Civ. P. 26(c) (Advisory Committee Note to 1970 Amendment) (noting that courts have “always freely exercised” their power to regulate discovery through protective orders).

45. Litigation Explosion, supra note 3, at 120. Olson misses another crucial point—namely, that discovery “is not a one-way proposition.” Hickman v. Taylor, 329 U.S. 495, 507 (1947). It is available to all parties and “may work to the disadvantage as well as to the advantage of individual plaintiffs.” Id.

Implicit in this approach is the assumption that a plaintiff cannot possibly know all of the facts without discovery.\textsuperscript{47} For this reason, our system permits the disclosure of any information that "appears reasonably calculated to lead to the discovery of admissible evidence."\textsuperscript{48}

Civil discovery is a truth-seeking device. Olson wants none of that. He would prefer to end the process before it even begins. In essence, he values expedition over "actual justice."\textsuperscript{49}

To bolster his case for procedural reform, Olson claims that courts favor plaintiffs in choice of forum\textsuperscript{50} and law.\textsuperscript{51} The case law, however, does not support his claim.\textsuperscript{52}

First, Olson cites the "long-established constitutional right not to be sued except at home."\textsuperscript{53} But no such constitutional right ever existed.\textsuperscript{54}

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\item and develop facts to support established or reasonable extensions of established legal theories"
\end{itemize}

\textsuperscript{47} As the Supreme Court noted in \textit{Hickman v. Taylor}, discovery now serves "as a device for ascertaining the facts, or the information as to the existence or whereabouts of facts, relevant to those issues. Thus, civil trials in federal courts no longer need be carried on in the dark. The way is now clear . . . for the parties to obtain the fullest possible knowledge of the issues and facts before trial." 329 U.S. at 500-01; \textit{accord} Dollar v. Long Mfg., N. C., Inc., 561 F.2d 613, 616 (5th Cir. 1977), \textit{cert. denied}, 435 U.S. 996 (1978); FDIC v. Cherry, Bekaert & Holland, 131 F.R.D. 202, 204 (M.D. Fla. 1990); American Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n., 107 F.R.D. 258, 260 (N.D. Ill. 1985); Hoffman v. Delta Dental Plan, 517 F. Supp. 574, 575 (D. Minn. 1981); Goss v. Crossley (In re Hawaii Corp.), 88 F.R.D. 518, 523-24 (D. Haw. 1980); Pierson v. United States, 428 F. Supp. 384, 390 (D. Del. 1977); Zucker v. Sable, 72 F.R.D. 1, 3 (S.D.N.Y. 1975); \textit{see also} Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 314, 323-24 (C.D. Cal. 1980) (discovery rules are designed to prevent "trial by ambush").

\textsuperscript{48} Fed. R. Civ. P. 26(b)(1). Contrary to Olson's contention, discovery is by no means a "free-for-all." Federal Rule 26(c) authorizes the court, upon the motion of a party from whom discovery is sought, to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that the discovery not be had." Fed. R. Civ. P. 26(c); \textit{see also} Fed. R. Civ. P. 26(b)(1) (authorizing court \textit{sua sponte} to limit "burdensome" or "duplicative" discovery). Furthermore, under the Federal Rules of Civil Procedure, as well as under state procedural rules, courts can dismiss meritless or defective claims without allowing any discovery. \textit{See}, e.g., Fed. R. Civ. P. 12(b) (providing for motion to dismiss based on the pleadings); Fed. R. Civ. P. 56 (providing for summary judgment, which has res judicata effect); N.Y. Civ. Prac. L. & R. 3211 (McKinney 1970) (providing for motion to dismiss prior to the filing of a responsive pleading); N.Y. Civ. Prac. L & R. 3212(a) (McKinney Supp. 1991) (providing for summary judgment at any time after the "issue has been joined").

\textsuperscript{49} \textit{Litigation Explosion, supra} note 3, at 95; \textit{see also} Kirsch, Book Review, \textit{A Closing Argument on the Legal System}, L.A. Times, Apr. 17, 1991, at E6, col. 5 (noting that Olson "is a classicist who frankly prefers the good old days when the practice of law was so rule-bound that many claims and claimants were simply excluded from the courts").

\textsuperscript{50} \textit{See} \textit{Litigation Explosion, supra} note 3, at 69-88.

\textsuperscript{51} \textit{See id.} at 178-96.

\textsuperscript{52} \textit{See infra} notes 53-61 and accompanying text.

\textsuperscript{53} \textit{Litigation Explosion, supra} note 3, at 87.

\textsuperscript{54} Even under the Supreme Court's now-overruled and highly restrictive decision in \textit{Pennoyer v. Neff}, 95 U.S. 714 (1877), the Court recognized that states could subject a non-resident to jurisdiction and service of process if that non-resident entered into a partnership or business association within a foreign state or entered into a contract enforceable in a foreign state. \textit{See id.} at 735-36.
While a defendant is, of course, subject to personal jurisdiction in the defendant’s home state and may be sued there, it simply has never been the rule that a defendant can only be sued in his home state. Moreover, a plaintiff’s choice of forum is not automatically controlling. As a matter of constitutional law, it has been the rule for more than 45 years that a defendant must have “minimum contacts” with a forum for that court to exercise personal jurisdiction.\(^{55}\) Several states have since imposed even stricter standards for the exercise of personal jurisdiction.\(^{56}\)

Having misapprehended the law of personal jurisdiction, Olson then claims that courts have become so pro-plaintiff that they now apply to disputes whatever state’s law is “better” for the plaintiff.\(^{57}\) In this way, Olson contends, plaintiffs get “the two advantages” of “suing at home” and “getting the court to apply the other state’s stricter law.”\(^{58}\)

Olson’s observation would be appalling if it were true. It is not.\(^{59}\) In-

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\(^{55}\) See International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945); accord Burnham v. Superior Court, 110 S. Ct. 2105, 2110 (1990); Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-09 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72 (1985); Shaffer v. Heitner, 433 U.S. 186, 207-12 (1977); see also World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (minimum contacts, as guaranteed by the Due Process Clause, provides “a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit”). Moreover, as the Supreme Court noted in Hanson v. Denckla, 357 U.S. 235 (1958), jurisdiction over a non-resident defendant will not attach unless “the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” Id. at 253 (citations omitted). This “purposeful availment” requirement “ensures that a defendant will not be haled into a jurisdiction solely as a result of ‘random,’ ‘fortuitous,’ or ‘attenuated contacts,’” Burger King, 471 U.S. at 475 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)), or because of the “‘unilateral activity of another party or a third person.’” Id. (quoting Helicopteros Nacionales de Columbia, S.A. v. Hall, 466 U.S. 408, 417 (1984)).


\(^{57}\) See Litigation Explosion, supra note 3, at 193.

\(^{58}\) Id.

\(^{59}\) In fact, the Supreme Court has recognized that a “plaintiff’s desire for forum law is rarely, if ever, controlling,” Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 820 (1985), because “[i]f a plaintiff could choose the substantive rules to be applied to an action . . . the invitation to forum shopping would be irresistible. Moreover, it would permit the defendant’s reasonable expectations at the time the cause of action accrues to be frustrated . . . .” Allstate Ins. Co. v. Hague, 449 U.S. 302, 337 (1981) (Powell, J. dissenting). Thus, as a matter of constitutional law, the Court has held that for a state’s substantive law to apply, “that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” Id. at 313. As the Court noted in Phillips Petroleum, “[e]ven if a plaintiff evidences his desire for forum law by moving to the forum, we have generally accorded such a move little or no significance.” 472 U.S. at 820. The Phillips Court refused to apply Kansas law to a nationwide class action, even though Kansas law was far
deed, as confirmed by a review of "conflict of law" issues decided last year, New York courts far more often chose state law favorable to the defendants.60

What Olson seems to forget is that most courts really do try to dispense justice. They are not so easily swayed in deciding issues of law by the mere domicile of the parties. Litigants deserve a fair fight, and most courts will permit one. It therefore is absurd for Olson to suggest that defendants as a class no longer get fair treatment.61

III. SUBSTANCE WITHOUT FORM

Olson also bemoans what he calls "legal uncertainty."62 He chastises courts for failing "to spell out clear, definite lines of responsibility."63 This "uncertainty," he says, "'breeds litigation.'"64 Yet the primary examples Olson cites of this supposedly pervasive practice—products liability and contract law—provide no support for his premise.

In the products liability area, the law could not be clearer. Olson more favorable to the plaintiffs. See id. at 815-18, 821-22; see also John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178, 182 (1936) (when plaintiff brought suit in Georgia on insurance contract between New York resident and Massachusetts corporation, Court rejected application of Georgia law); Home Ins. Co. v. Dick, 281 U.S. 397, 408 (1930) (Court rejected application of Texas law to suit over insurance policy issued in Mexico and by a Mexican insurer to a Mexican citizen, despite fact that plaintiff-assignee was a Texas resident).


61. In fact, when fashioning constitutional rules regarding personal jurisdiction, the United States Supreme Court has specifically recognized that fairness to defendants is an important concern. See, e.g., Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 113-16 (1987) (barring California's exercise of personal jurisdiction over foreign defendant and noting that "[t]he burden is not upon one who must defend himself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders"); Phillips Petroleum, 472 U.S. at 807-08 (examining the burdens faced by non-resident defendants and noting that because "[t]hese burdens are substantial...the minimum contacts requirement of the Due Process Clause prevents the forum State from unfairly imposing them upon the defendant"); Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476-78 (1985) (noting that courts may consider "the burden on the defendant" in determining jurisdiction and that "jurisdictional rules may not be employed in such a way as to make litigation 'so gravely difficult and inconvenient' that a party unfairly is at a 'severe disadvantage in comparison to his opponent'" (citations omitted)).

62. Litigation Explosion, supra note 3, at 151.
63. Id. at 3.
64. Id. at 151 (citing Epstein, Simple Rules For a Complex World, Wall. St. J., June 27, 1985, at 30, col. 3).
claims that "lawsuits against manufacturers over injuries in the use of products, one of the biggest growth areas in litigation, is handled through one of the most amorphous balancing tests yet invented." He is simply wrong. Products liability cases are uniformly governed by a strict liability standard. Thus, as provided in the Restatement (Second) of Torts, "one who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused," regardless of whether the "seller has exercised all possible care in the preparation and sale of his product" or has "entered into any contractual relation" with the user or consumer.

It is apparent that what Olson actually deprecates is not the ambiguity of products liability law but the result. Today, because manufacturers are strictly liable for the injuries their defective products cause, it is easier for plaintiffs to sue manufacturers successfully for product defects. That result may be bad for business, but it is good, unambiguous protection for consumers.

Similarly misguided is Olson's attack on contract law. Olson protests that courts have eroded "freedom of contract" by recognizing such legal "loopholes" as unconscionability and adhesion. Olson would have the reader believe that contracts are routinely struck down as unconscionable. In reality, however, it is extremely rare that a court refuses to enforce a contract on grounds of unconscionability or adhesion. Indeed, a review of reported decisions last year reveals that no New York court

65. Id. at 143-44.
66. See, e.g., Cantu, Reflections on Section 402A of the Restatement (Second) of Torts: A Mirror Crack'd, 25 Gonz. L. Rev. 205, 207 (1990) (noting that "the concept of strict liability and its elements have been clearly established and universally accepted"); W. Prosser & P. Keeton, The Law of Torts § 97-98, at 690-94 (5th ed. 1984) (noting that "nearly all states" have adopted some theory of strict products liability as enunciated by the Restatement (Second) of Torts § 402A).
68. In the view of some recent commentators, even the notion that products liability law is bad for business may be misguided because the current trend in products liability law favors defendants. Henderson & Eisenberg, The Quiet Revolution in Products Liability: An Empirical Study of Legal Change, 37 UCLA L. Rev. 479, 480-81 (1990).
69. See Litigation Explosion, supra note 3, at 197-219.
70. Even Olson admits that "[t]here is no need to overstate the case. Every day even the judges most distrustful of markets still enforce contracts that they themselves would never have signed, and even those most driven by sentiment continue to sigh and let the less sympathetic side win many cases." Litigation Explosion, supra note 3, at 217; see also T.P.K. Constr. Corp. v. Southern Am. Ins. Co., 752 F. Supp. 105, 110 (S.D.N.Y. 1990) (it is the "exceptional case where a commercial contract may be found [to be] unconscionable and against public policy"); Gillman v. Chase Manhattan Bank, N.A., 135 A.D.2d 488, 491, 521 N.Y.S.2d 729, 732 (2d Dep't 1987) ("doctrines of unconscionability have little applicability in the commercial setting"), aff'd, 73 N.Y.2d 1, 534 N.E.2d 824, 537 N.Y.S.2d 787 (1988); State v. Wolowitz, 96 A.D.2d 47, 68, 468 N.Y.S.2d 131, 145 (2d Dep't 1983) (cases that "warrant a finding of unconscionability ... are the exception"). Cf. First Nat'l Stores v. Yellowstone Shopping Center, Inc., 21 N.Y.2d 630, 638, 237 N.E.2d 868, 871, 290 N.Y.S.2d 721, 725 (1968) ("[s]ubject of contract obligations must not be undermined by judicial sympathy") (emphasis omitted).
voided any contract on grounds of unconscionability or adhesion.\footnote{71} The mere existence of these doctrines, however, is a comfort to those in the free market who, because of the inferiority of their bargaining positions, are not truly free to reject certain terms and conditions and therefore are not truly free to contract.\footnote{72} For those rare occasions, we can all be thankful that such doctrines exist.

At bottom, Olson dislikes any legal standard that permits trial by jury. Olson argues that through our system we are "railroading defendants to punishment under conditions in which no one can be sure they are guilty."\footnote{73} He distrusts juries as anti-defendant,\footnote{74} yet the very authorities on which he relies reveal precisely the opposite. For example, Olson cites a new Harvard study documenting that, in four out of five medical malpractice actions, the care given the patient was not in fact negligent.\footnote{75} He later acknowledges, however, that "[b]y far the majority of doctors who go to trial on malpractice charges win their cases."\footnote{76} Thus, as imperfect as it is, our jury system seems to work. In any event, it is far preferable to Olson's alternative, which is no justice at all.


73. Litigation Explosion, supra note 3, at 293.

74. See id. at 282-84, 292-93.

75. See id. at 6 (citing Huber, Malpractice Law—A Defective Product, Forbes, Apr. 16, 1990, at 154).

76. Id. at 164.
IV. Remedies for Reform

Olson places the blame for the "litigation explosion" squarely on the lawyers who bring cases. Like Shakespeare, he too wants to "kill all the lawyers"—or at least their business. Olson aims to "make litigation an exception, a last resort, a necessary evil at the margins of our common life." This, he vows, will not be an easy fight, for:

[n]o great abuse was ever ended without a struggle. The industry that has sprung up around contention and accusation is powerful. It will not lightly give up its control of the machinery of judicial compulsion, any more than other powerful classes will lightly give up the control of tanks in countries where wars are carried on by means less subtle than words.

Underlying this strong rhetoric, however, is a series of sinister proposals that, by design, would undermine a plaintiff's ability to sue successfully. Olson proposes, among other things: (i) fee shifting so that the losing party must pay the prevailing party's attorney's fees; and (ii) attorney liability so that the winning party can sue the losing party's attorney over the conduct of the case. These proposals share a common purpose—namely, to raise the stakes of defeat so that fewer people will sue.

Our system of civil justice has never been predicated on the notion that one should be penalized just for having tried a case and lost. For instance, our courts have repeatedly rejected the so-called "English rule" that requires the losing party to pay the legal costs of the winner.

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77. W. Shakespeare, supra note 1, act IV, scene II, lines 82-85.
78. Litigation Explosion, supra note 3, at 348.
79. Id.
80. See id. at 329-38.
81. See id. at 326-29.
82. See Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) ("since litigation is at best uncertain, one should not be penalized for merely defending or prosecuting a lawsuit"); Note, The Dynamics of Rule 11: Preventing Frivolous Litigation By Demanding Professional Responsibility, 61 N.Y.U. L. Rev. 300, 305 (1986) (hereinafter Note, The Dynamics of Rule 11) (noting that the "American rule" of no fee shifting "reflects an equitable principle that penalizing a party for merely defending or prosecuting a lawsuit is unfair" (citations omitted)).
83. The Supreme Court first rejected the "English rule" as early as 1796 and has continued to adhere to that view in the almost two hundred years since then. See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 249-50 (1975); see also Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306, 306 (1796) (first denying shifting of attorney's fees and stating "[t]he general practice of the United States is in opposition [sic] to it"); F.D. Rich Co. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116, 126-31 (1974) (rejecting "English rule"); Fleischmann Distilling, 386 U.S. at 717-18 (same); Stewart v. Sonneborn, 98 U.S. 187, 197 (1878) (same); Flanders v. Tweed, 82 U.S. (15 Wall.) 450, 452-53 (1872) (same); Oelrichs v. Spain, 82 U.S. (15 Wall.) 211, 230 (1872) (same). In Alyeska, the Court reaffirmed the "American rule" that each party in a lawsuit bear its own attorney's fees and overturned the lower court's award of attorneys' fees. See Alyeska, 421 U.S. at 247. Moreover, the American rule continues to be followed by lower federal courts. See Mihalik v. Pro Arts, Inc., 851 F.2d 790, 793-94 (6th Cir. 1988); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820, 830-31 (7th Cir. 1984); Omega World Travel, Inc. v. Omega
Yet many commentators find it perfectly reasonable to "fee shift." Indeed, Vice President Dan Quayle recently endorsed that approach, and The Wall Street Journal agreed, saying: "This is fair since there is no redress in 'winning' a lawsuit only to be saddled with huge legal bills."

In reality, however, fee shifting simply increases the burden on the plaintiff, who must cope with the prospect of having to pay the defendant's fees even in the event of a loss in a close case. Such an approach would surely cripple civil rights litigation. One wonders, for example, whether Thurgood Marshall could have afforded to bring Brown v. Board of Education—by no means a clear winner at the outset—if he had to fear that he and his client might be assessed the defendant's litigation costs in that uphill battle. Indeed, the "chill" that Rule 11 sanctions are already having on creative advocacy would be magnified dramatically in an "English rule" system.

84. See, e.g., Save Our Cumberland Mountains, Inc. v. Hodel, 857 F.2d 1516, 1525-26 (D.C. Cir. 1988) (Starr, J., dissenting) ("[w]e shall perhaps in the fullness of time advance back to where we began . . . [to] the sensible proposition that the winner should be made whole, including the recovery of attorney's fees"); Less Litigation, supra note 22, at A8, cols. 4-5 (President's Council on Competitiveness, working group on Federal Justice Reform, recommends fee shifting to "encourage . . . settlements and impose market discipline on the litigation process"); Bork, supra note 6, at F1 (endorsing Olson's fee shifting proposal).
85. See Margolick, supra note 19, at A14, col. 1.
86. American Competitiveness, supra note 22, at A8, col. 2.
88. For example, in an article published while Brown v. Board of Education was pending before the Supreme Court, Professors LeFlar and Davis hypothesized that there were eleven different possible approaches for the Supreme Court to take in deciding the case, and that more than half of those would have upheld the "separate but equal" doctrine. See LeFlar & Davis, Segregation in the Public Schools—1953, 67 Harv. L. Rev. 377, 387-92 (1954); see also Plessy v. Ferguson, 163 U.S. 537, 544 (1896) (upholding "separate but equal" doctrine and specifically condoning use of the doctrine in public schools); Bell, Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523-24 (1980) (noting that Brown represented a "sudden shift . . . away from the separate but equal doctrine and towards a commitment to desegregation" because the question of school desegregation had come before the Supreme Court as early as 1850 in the case of Roberts v. City of Boston, 59 Mass. (5 Cush.) 198 (1849), and for the next hundred years the Court consistently adhered to the "separate but equal" doctrine).
89. Rule 11 allows for the imposition of sanctions upon attorneys and the parties they represent when a court finds that a party lacked a "good faith" basis for filing a "pleading, motion or other paper." Fed. R. Civ. P. 11. In other words, a court may impose sanctions whenever it finds that the filing is not "well grounded in fact and . . . existing law," is not "a good faith argument for the extension, modification, or reversal of existing law," or is "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Id. The sanctions available under Rule 11 may include "the amount of reasonable expenses incurred by [the other party or parties] because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Id.
90. See supra note 37.
91. See Vairo, supra note 37, at 197.
Just as importantly, fee shifting favors the "haves" and penalizes the "have nots." Under fee-shifting, the well-heeled party—more often than not the defendant—could better afford to take litigation risks. The financially strapped party, in contrast, could ill afford defeat and would therefore have to capitulate on terms favorable to the defendant or, worse yet, refrain altogether from bringing suit, no matter how meritorious the claim.

Proponents of the "English rule" have this clear aim: to provide powerful disincentives to sue. They claim, as Vice President Quayle recently put it, that "[o]ur system of civil justice" puts the United States at a "self-inflicted competitive disadvantage." In other words, lawsuits are bad for business and should be eliminated. Yet the Japanese, whose business acumen we alternatively admire and envy, follow the "American rule" to no apparent competitive disadvantage. Thus, in one commentator's view, "the case for English-style general indemnity has appeared surprisingly weak."

In short, as one leading bar spokesman recently explained, fee shifting would have a "chilling effect on individuals enforcing their legal rights." We have long erred on the side of permitting parties at least the opportunity to have an impartial judge or jury determine their legal rights. It would be a truly regressive step to impose so severe a tax on


93. Margolick, supra note 19, at A14, cols. 2-3.


95. Id. at 679. Olson's argument for fee-shifting is further undercut by the fact that the "time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose substantial burdens for judicial administration." Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718 (1967) (citation omitted); accord Note, The Dynamics of Rule 11, supra note 82, at 305.

96. Margolick, supra note 19, at A14, col. 3. (comments by John J. Curtin, Jr., American Bar Association President); see also Galen, supra note 9, at 12 (noting that fee shifting "doesn't work when the playing field is uneven, as when an individual opposes a corporation," that fee shifting is unwarranted because "even suits with merit can be lost on technicalities," and that fee-shifting "would simply scare away many plaintiffs who have in fact been wronged").

97. As one commentator has eloquently stated in defense of the "American Rule":

The American Rule has been perpetuated because it represents a democratic ideal. Unfettered access to the courts for all citizens with genuine legal disputes has become a cornerstone of the American concept of justice. All persons are entitled to their day in court, however poor they may be and however rich their opponents. The courts fear that injured parties, particularly those of modest means, would be discouraged from invoking the judicial system if the cost of losing an action included payment of one's opponent's legal bills.

Note, The Dynamics of Rule 11, supra note 82, at 304-05 (citations omitted); see also Mihalik v. Pro Arts, Inc., 851 F.2d 790, 793 (6th Cir. 1988) ("the American Rule emphasize[s] equal access to justice").
that right as the imposition of attorney's fees if the jury were to rule against the party seeking redress.

CONCLUSION

Instead of penalizing people for litigating (as Olson would like to do), we should be taking positive steps to protect litigants' rights. Olson may be correct that we are experiencing a "litigation explosion." Nevertheless, his solution to make wholesale and arbitrary cuts in litigants' rights could not be more wrong. To cope with this "explosion" and yet preserve fundamental rights, we must devote more resources to the judicial branch. We need more judges, more magistrates, and more courthouses. For indigent civil plaintiffs, we need more court-appointed counsel to assess in the first instance the merits of the claim and then to provide proper representation.98

Most importantly, we must resist the temptation to solve our courts' congestion problems by the "quick fix" method of closing the courthouse door. If we severely limit access to our courts, we will inflict the greatest harm upon the very people who need our courts the most. And, in the process, we will lose a most precious right—the right to be heard, to be vindicated, to be made whole.

As this freight train of "reform" rumbles toward what may now be its inevitable destination, I am reminded of a scribe's words about an earlier time and a different debate: "There is more fear in this country than the facts warrant. Beset by doubt, the nation listens to those who seem to offer a cure, even though the medicine be more harmful than the disease."99

98. It is true that pro se litigation now clogs court dockets with sometimes frivolous and often incomprehensible claims. We therefore do ourselves a disservice as a matter of public policy by failing to recognize the vital role that court-appointed counsel can play in civil cases to insure the orderly and coherent presentation of claims.