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# FORECASTING CIVIL LITIGATION

*Richard Abel\**

## INTRODUCTION

Why might we want to forecast civil litigation? We usually are concerned with anticipating the future because we want to do something about it. We need to know tomorrow's weather in order to decide what to wear or do. Farmers and sailors need longer range forecasts. We need to understand climate change over decades or centuries in order to moderate its effects by reducing carbon dioxide emissions. We study pollution levels in order to limit them and we monitor reserves of natural resources so as not to exhaust them before we find substitutes. We track demographic changes that will affect the ability of the military to recruit or of the working population to support the retired. We need to predict recession and inflation in order to adjust interest rates. We try to coordinate levels of taxation and government spending. Businesses need to predict costs, demand, and competition. Investors bet on price trends. And government is concerned about the need for services: highways and mass transit can become congested, police and garbage collection overstretched, and schools and hospitals overcrowded.

But why should we care about litigation? If there is too much (there rarely seems to be too little, although specialized courts have atrophied from too few litigants), waiting time increases. That homeostatic mechanism makes litigation less attractive, reducing filings. If plaintiffs dislike the delay, defendants welcome it—indeed, they contribute mightily. And though justice delayed may be justice denied, we do not seem to care about quality very much. Look at the delays we already tolerate: plaintiffs have not seen a penny of the billions of dollars in damages awarded nearly twenty years after the Exxon Valdez disaster.<sup>1</sup> By contrast, half the cases were resolved in less than ten months in New Haven County in the 1920s;<sup>2</sup> most were concluded

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1. Linda Greenhouse, *Justices Take Up Battle Over Exxon Valdez*, N.Y. TIMES, Feb. 28, 2008, at A19; *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008).

2. CHARLES E. CLARK & HARRY SHULMAN, *A STUDY OF LAW ADMINISTRATION IN CONNECTICUT* 31 tbl.14 (1937).

in weeks in Kenya in the 1960s.<sup>3</sup> Or consider our state court judiciary, which is chosen by political patronage and increasingly through elections bought by special interests, paid little and respected less, and offered few prospects for advancement.<sup>4</sup>

Nevertheless, I will assume there is an interest in predicting litigation in 2020. What do we want to know? Gross numbers? Case type? Litigant characteristics? Process? Cost to litigants? Delay? Outcomes? Demands on the system? An uncontested divorce, default eviction, or debt collection consume insignificant resources compared with an IBM antitrust suit. And can we know any of this? Most forecasting simply extrapolates present trends; the real challenge is to predict the unpredictable. In this Article I build on our limited empirical and theoretical understanding of the past to offer some hunches about the future.

## II. LONGITUDINAL STUDIES

Longitudinal studies of litigation are expensive to conduct and difficult to interpret. Lengthy time-series data are scarce. Record keeping is imperfect, statistical categories constantly change, and there are many extraneous causes of variation. Nevertheless, we can draw a few lessons from these efforts. First, as a category of social action, civil litigation is even less meaningful than the crime rate, which includes such disparate behaviors as murder and jaywalking. One indication of the incoherence of litigation is the wide variation of rates within a single polity (American states or equivalent courts within other countries).<sup>5</sup> We need to distinguish among disputes over debt, divorce, personal injury, property, and contract (to mention only the categories that account for most of the civil caseload).<sup>6</sup> As Durkheim showed, even a behavioral category that superficially seems unitary, such as suicide, may contain different motivations.<sup>7</sup> A rise in litigation rates may be just a temporary blip, like name changes by second generation

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3. Richard L. Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in *THE IMPOSITION OF LAW* 167, 187 (Sandra Burman & Barbara E. Harrell-Bond eds., 1979).

4. Anemona Hartocollis, *New York's Top Judge Sues over Judicial Pay*, N.Y. TIMES, Apr. 11, 2008, at B3 (trial judges paid \$136,700 per year; no raise since January 1999).

5. Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?*, 140 U. PA. L. REV. 1147, 1206 tbl.4 (1992) (American states); June Starr & Jonathan Pool, *The Impact of a Legal Revolution in Rural Turkey*, 8 LAW & SOC'Y REV. 533, 544 (1974) (Turkey); Erhard Blankenburg, *Studying the Frequency of Civil Litigation in Germany*, 9 LAW & SOC'Y REV. 307, 310 (1975) (West and East Germany).

6. Craig Wanner, *The Public Ordering of Private Relations: Part One: Initiating Civil Cases in Urban Trial Courts*, 8 LAW & SOC'Y REV. 421, 422 (1974).

7. See generally EMILE DURKHEIM, *SUICIDE: A STUDY IN SOCIOLOGY* (1951).

immigrants in New York City in the 1930s. Once we have identified more coherent subcategories, we have to separate the underlying behavior from the decision to make that behavior the subject of litigation. Fluctuations in litigation rates are a composite of changes outside and inside the legal arena. Police and prosecutors pursue a much higher proportion of murders than crimes such as speeding or tax evasion; private individuals concerned with directing the disposition of their property after death are much more likely to consult lawyers than those who feel they have suffered employment discrimination.<sup>8</sup> And many different causes of action may be combined in a single case or fragmented in multiple filings.

Longitudinal studies across a wide variety of periods and places tend to support a few broad generalizations.

A. *As States Increase Criminal Prosecutions, There is a Concomitant Decline in Civil Litigation*<sup>9</sup>

Given a sufficiently long historical perspective, this is hardly surprising. The state is a relative newcomer, even more recent in many non-western societies. As it gains power, citizens relinquish responsibility for law enforcement to government officials who disapprove of vigilantism. Increasing individualism deprives a grievant of the group support necessary to seek redress without state power. When courts come to be seen as instruments of state regulation, they are less attractive as force for civil justice.

B. *Civil Litigation Rates Are Curvilinear*<sup>10</sup>

Litigation rates rise with economic growth and consequent social change, and then they decline as those processes persist. Like so many explanations for litigation, the relationship is overdetermined. Industrialization unsettles everything: property rights, relations of production, labor markets, causes of injuries, availability of consumer goods. Social relations are transformed by labor migration, the redefinition of gender roles, and paid employment outside the household, among other causes. Litigation is related to increases in social complexity, differentiation, and scale.<sup>11</sup> Litigation shifts from local to

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8. BARBARA A. CURRAN, *THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY* 139 fig.4.28, 196 fig.5.14 (1977).

9. Abel, *supra* note 3, at 181-82 (documenting litigation in Kenya).

10. See generally LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973).

11. See generally Austin Sarat & Joel B. Grossman, *Courts and Conflict Resolution: Problems in the Mobilization of Adjudication*, 69 AM. POL. SCI. REV. 1200 (1975).

more distant adversaries.<sup>12</sup> Litigation increases in rural areas but decreases in urban.<sup>13</sup> As new legal understandings are solidified, behavior conforms, and parties settle disputes because their litigated outcomes have become more predictable.<sup>14</sup>

*C. During this Period of Industrial Revolution, Urbanization, and Corporate Concentration, Property and Contract Litigation Decline While Tort and Divorce Litigation Increase*<sup>15</sup>

Property litigation declines outside major cities when capital displaces land as the principal factor of production.<sup>16</sup> Contracts are increasingly dictated by more powerful parties. Tort litigation rises as technology increases the capacity to inflict serious harm inadvertently. Marriages become more fragile as men serve in wars and women enter the workforce.<sup>17</sup>

### III. CHANGES IN THE SOCIAL ENVIRONMENT

Changes in the social environment can affect both the incidence of conflict and the likelihood that it will lead to litigation. I have distinguished changes in demography, social and economic relations, the state, and technology, although the categories often overlap.

#### A. Demography

The growth and contraction of the population obviously can influence litigation, as can changes in its composition. Litigation is related to age and therefore to the age structure of the population.<sup>18</sup> Because women are postponing child bearing and are having fewer children,

12. See generally FRANCIS LAURENT, *THE BUSINESS OF A TRIAL COURT: 100 YEARS OF CASES* (1959); cf. Richard L. Abel, *Case Method Research in the Customary Law of Wrongs in Kenya, Part II: Statistical Analysis*, 6 E. AFR. L.J. 20, 26 tbl.2 (1970) (parties in rural Kenya living close in proximity to each other).

13. Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 297-99 (1976); Abel, *supra* note 3, at 183 tbl.10.6.

14. Friedman & Percival, *supra* note 13, at 296. See generally Stephen Daniels, *Trial Courts of Spoon River: Patterns and Changes, 1870-1963* (June 11-14, 1981) (paper prepared for the 1981 Meeting of the Law and Society Association in Amherst, Massachusetts) (on file with author).

15. See generally LAURENT, *supra* note 12 (Wisconsin); THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS (Jethro K. Lieberman ed., 1984); Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577.

16. See generally Stephen Daniels, *Caseload Dynamics and the Nature of Change: The Civil Business of Trial Courts in Four Illinois Counties*, 24 LAW & SOC'Y REV. 299 (1990).

17. See generally MAX RHEINSTEIN, *MARRIAGE STABILITY, DIVORCE, AND THE LAW* (1972).

18. CURRAN, *supra* note 8, at 188 fig.5.2.

and life expectancy is increasing, the population is aging.<sup>19</sup> Since we know that litigation is related to race,<sup>20</sup> it is likely to be related to ethnicity and immigration. Although immigrant families tend to have more children, many immigrants (especially the undocumented) are single men.<sup>21</sup> The aging (but shrinking) native-born population may litigate more, the younger (and growing) immigrant population less. Of course, all these differences in litigation rates could change.

Despite growing prosperity, increased life expectancy and rising costs for medical care at the end of life tend to deplete estates especially if the elderly spend down to qualify for Medicaid. Both nuclear and extended families are smaller. Beneficiaries who also are older when they inherit may have less need for the property. All this may mean fewer inheritance disputes; however, the growing number of wealthy may have intensely bitter inheritance disputes. Because much elder care is provided through the informal sector by undocumented workers, labor conflicts in that sector are unlikely to be addressed through litigation.<sup>22</sup> Although health care for the elderly may be lower in quality, damages for malpractice will be much lower, making such lawsuits less attractive.

Patterns of marriage and procreation have been changing rapidly. Youth are sexually mature and active earlier; access to contraception and abortion affects the number of children born out of wedlock. Unmarried mothers are more likely to be on welfare.<sup>23</sup> As the age of marriage rises, marriages may become more stable. At the same time, combat duty, which has increased during the wars in Afghanistan and Iraq, historically has threatened marriage. High rates of divorce and remarriage create melded families, with complex intra- and inter-generational rights and obligations to children, income, and property.<sup>24</sup> Later marriage means lower fertility. Same-sex relationships are increasingly recognized. Both older infertile and same-sex couples who want children have turned to surrogate mothers, artificial insemination, and adoption, all of which can create new legal issues regarding rights to and responsibilities for children.

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19. See generally Bali Ram, *Fertility Decline and Social Change: New Trends and Challenges*, 30 CAN. STUD. IN POPULATION 297 (2003).

20. CURRAN, *supra* note 8, at 188 fig.5.3.

21. See Alfred Tella, *The Costs of Immigration*, WASH. TIMES, Aug. 18, 2005, at A15.

22. See Barry Newman, *Who Will Care for U.S. Elderly if Border Closes?*, WALL ST. J., July 26, 2006, at B1.

23. Abigail Trafford, *A Poor Excuse for Marriage*, WASH. POST, Mar. 26, 2002, at F01.

24. See Margorie Engel, *Do I Have an Obligation to Support My Stepchildren?*, NAT'L STEPFAMILY RES. CTR. (2000), <http://www.stepfamilies.info/education/Articles/finance/obligation.php>.

### B. Social Relations

Donald Black hypothesized that the likelihood of resort to law varies directly with the social distance between the parties.<sup>25</sup> Studying Kenya in the 1960s, I found that litigation varied directly with tribal heterogeneity, urbanization, and population density.<sup>26</sup> Max Gluckman argued that parties were less likely to litigate if bound by multiplex rather than simplex ties because of the greater cost of rupture.<sup>27</sup> Therefore, the transition from traditional to modern society usually exhibits an increase in litigation. But this process may be self-limiting and it may even reverse direction (providing one possible explanation for the curvilinear pattern of longitudinal litigation rates). Just as people fight those they love,<sup>28</sup> they sue those they know. Strangers have fewer occasions and reasons for litigation.<sup>29</sup> Traditional face-to-face societies without significant material inequalities are structured in terms of status and respect. Litigation serves to defend honor.<sup>30</sup> Accidental misfortune is blamed on human emotions manifested through beliefs in witchcraft and sorcery.<sup>31</sup> Modern mass societies composed of strangers differentiated by wealth commodify all experience, assigning money values to physical injury, psychic distress, and impaired relationships. Because intentional wrongdoers rarely can pay for the harm they inflict, contemporary tort law stretches notions of proximate cause to hold responsible deep-pocket defendants whose negligence may have permitted or facilitated the injury (e.g., premises liability for crimes against tenants or shoppers). The result is less conflict over intentional torts and more conflict over negligence.

Honor persists in enclaves of modern societies, as shown by our undiminished passion for gossip, especially among adolescents (now

25. DONALD BLACK, *THE BEHAVIOR OF LAW* 41-42 (1976). See generally CAROL J. GREENHOUSE, BARBARA YNGVESSON & DAVID M. ENGEL, *LAW AND COMMUNITY IN THREE AMERICAN TOWNS* (1994).

26. Abel, *supra* note 3, at 183 tbl.10.6.

27. MAX GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* 20-23 (1955). See generally MAX GLUCKMAN, *CUSTOM AND CONFLICT IN AFRICA* (1955).

28. OSCAR WILDE, *Ballad of Reading Gaol*, in *PLAYS, PROSE WRITINGS AND POEMS* 404 (Guernsey Press Co. Ltd. 1988) (1930) ("Yet each man kills the thing he loves"). See generally E.E. EVANS-PRITCHARD, *THE NUER* (1940).

29. M.P. BAUMGARTNER, *THE MORAL ORDER OF A SUBURB* 11 (1988).

30. See generally Richard L. Abel, *The Rise of Capitalism and the Transformation of Disputing: From Confrontations over Honor to Competition for Property*, 27 *UCLA L. REV.* 223 (1979) (review essay of JUNE STARR, *DISPUTE AND SETTLEMENT IN RURAL TURKEY: AN ETHNOGRAPHY OF LAW* (1978)).

31. See generally *WITCHCRAFT AND SORCERY IN EAST AFRICA* (John Middleton & E.H. Winter eds., 1963); E.E. EVANS-PRITCHARD, *WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE* (1976).

through cell phones, texting, and the Internet) and co-workers, as well as the widespread obsession with celebrities. Gangs fight over turf in defense of honor. And status competition thrives among collectivities defined by gender, race, religion, sexual orientation, nationality, ethnicity, and physical difference.<sup>32</sup>

Albert Hirschman distinguished three responses to conflict: exit, voice, and loyalty.<sup>33</sup> By lowering the cost of exit from families, neighborhoods, associations, and work (the settings where conflict is most likely to occur), modern societies diminish the relative attractiveness of the other two alternatives: loyalty (lumping it)<sup>34</sup> and voice (litigation).<sup>35</sup> Contrary to Maine's generalization, the history of human societies has not always been the movement from status to contract.<sup>36</sup> Stuart Macaulay found that businesses with ongoing contractual relationships (such as automobile manufacturers and dealers) were very reluctant to litigate.<sup>37</sup> Litigation in traditional societies pits equal against equal, which may be one source of its attraction. Uncertain outcomes encourage litigation, whereas certainty facilitates settlement. Furthermore, the process can be the outcome (e.g., by defending one's honor in traditional societies or by impoverishing one's adversary in contemporary litigation by attrition).<sup>38</sup> Even though the pediment of the U.S. Supreme Court promises "Equal Justice Under Law," most contemporary litigation is by unequals. Marc Galanter, building on Craig Wanner, has shown that one-shot versus one-shot cases generally concern divorce, and repeat player versus repeat player cases are rare.<sup>39</sup> Furthermore, repeat players sue one-shot defendants (generally in contract, especially to enforce debts) much more often than the reverse (tort claims).<sup>40</sup>

American law has withdrawn protection from some relationships, abolishing actions for breach of promise of marriage and alienation of

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32. See generally RICHARD L. ABEL, *SPEAKING RESPECT, RESPECTING SPEECH* (1998).

33. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970).

34. William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63, 81-82 (1974) (referring to the process of avoiding a dispute as "lumping it").

35. BAUMGARTNER, *supra* note 29, at 11-12, 127-28.

36. See generally HENRY SUMNER MAINE, *ANCIENT LAW* (1873).

37. See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963); STEWART MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* (1966).

38. See generally MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

39. See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC'Y REV.* 95 (1974); Craig Wanner, *The Public Ordering of Private Relations: Part Two: Winning Civil Court Cases*, 9 *LAW & SOC'Y REV.* 293 (1975).

40. Wanner, *supra* note 39, at 294.



affections. The law also has extended protection to new relationships: heterosexual cohabitants, same-sex partners, grandparents and grandchildren, fathers of children born out of wedlock, and adopted children (with regard to access to information about birth parents).

Societies differ in who may assert legal rights. American law has eliminated many exclusions based on race, gender, age, and mental illness. Citizenship and legal residence remain the single largest obstacles to legal personhood; their elimination could significantly increase litigation over employment, housing, education, health care, injuries, divorce, and inheritance.

### C. *Economic Relations*

Natural persons are not the only legal actors whose demographic fluctuation can affect litigation. The nineteenth century creation of artificial persons—corporations—transformed the landscape of disputing.<sup>41</sup> There is reason to believe that small dispersed economic actors litigate more than large ones which have the power to achieve their objectives outside of litigation. If business corporations are proliferating and expanding, other collectivities may be declining, such as voluntary associations, churches, and trade unions.<sup>42</sup> That reduces the number of collective actors that might litigate while increasing the propensity of individual members to do so since they can no longer pursue their goals collectively.

State action can significantly influence the propensity to litigate. On one hand, state intervention into the market—i.e., regulation—has provoked a great deal of litigation: controls of prices (both anti-inflationary caps and agricultural price supports), wages, and rents; rationing of supply; controls of land use, labor, and immigration; conscription into the military; prohibition or regulation of alcohol, drugs, gambling, and prostitution; antitrust efforts to limit concentration; and the protection of property rights (especially intellectual property). On the other hand, state displacement of market actors can dramatically reduce occasions for litigation in many areas, including public pensions, housing, education, transportation, and policing. A single-payer health care plan would eliminate the debt collection efforts of health care providers (hospitals, clinics, and doctors), as well

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41. See generally JAMES WILLARD HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* (1977).

42. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 87–92 (2000).

as many malpractice claims (since the state would care for those injured).<sup>43</sup>

#### D. Polity

Government may participate in litigation as both plaintiff and defendant.<sup>44</sup> It may use courts to increase tax revenues or structure taxes so that evasion is more difficult and enforcement less necessary. For instance, it may substitute a value-added tax for an income tax, which depends on individuals truthfully reporting revenue and deductions. The weight of the tax burden will affect levels of voluntary compliance and hence the need for judicial enforcement. Government may enforce regulations in court (e.g., worker or consumer safety, wages and hours, price controls, environmental protection) or seek to negotiate compliance.<sup>45</sup> Public housing can lead to litigation over unpaid rent, damage to property, or eviction.<sup>46</sup> Social welfare benefits are more likely to generate litigation if the pie is contracting rather than expanding and benefits are rule-based rather than discretionary.<sup>47</sup> Litigation can also be a means of private governance, as in efforts to gain control over corporations, unions, and churches.<sup>48</sup>

#### E. Technology

The technological revolution that began in the nineteenth century enormously increased mankind's capacity to do harm, both accidentally and intentionally. Warfare, including weapons of mass destruction, genocide, massive disasters like Bhopal, Chernobyl, and Exxon

43. Hospitals filed eleven percent of the claims brought by organizations in trial courts in the early 1970s; that proportion has almost certainly increased. Wanner, *supra* note 6, at 425 tbl.3.

44. See generally Wolf Heydebrand, *Government Litigation and National Policymaking: From Roosevelt to Reagan*, 24 LAW & SOC'Y REV. 477 (1990); WOLF HEYDEBRAND AND CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* (1990).

45. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001); ROBERT A. KAGAN & EUGENE BARDACH, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* (1982); KEITH HAWKINS, *LAW AS LAST RESORT: PROSECUTORIAL DECISION-MAKING IN A REGULATORY AGENCY* (2002); ENFORCING REGULATION (Keith Hawkins & John Thomas eds., 1984). The federal government has greatly increased the use of "deferred prosecution" of corporate defendants. Lawrence D. Finder & Ryan D. McConnell, *Annual Corporate Pre-Trial Agreement Update—2007* (2008), <http://ssrn.com/abstract=1080263>.

46. See generally Richard Lempert, *Docket Data and "Local Knowledge": Studying the Court and Society Link over Time*, 24 LAW & SOC'Y REV. 321 (1990).

47. See generally Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

48. Consider recent struggles within the Episcopal Church over ordination of gays and lesbians. Gustav Niebuhr, *Episcopal Bishop Absolved in Gay Ordination*, N.Y. TIMES, May 16, 1996, at 1.

Valdez, and environmental degradation are only the most dramatic examples. With the rise of mass transit—trains, ships, buses, and planes—individual collisions and crashes can kill or maim hundreds, even thousands. The displacement of railroads by cars multiplied the number of accidents. Huge variation in the size of automobiles, from two-seater fuel savers to Hummers, greatly increases the likelihood of injuries or fatalities in smaller cars. Mass production and consumption allows negligently designed products to harm huge numbers of victims. The telegraph enormously improved communication but also allowed miscommunication, transmitting death notices to the wrong recipient.

When I studied torts in Kenya in the 1960s, the only examples of negligence were cattle trespass and accidental fires.<sup>49</sup> Pangas (machetes) were much less likely to kill than guns. By 1900, industrial accidents in the United States were killing 35,000 a year and injuring two million, disabling 500,000 of them for a week or more.<sup>50</sup> During the same period, level-grade crossing accidents were killing 10,000 a year—a higher proportion of the population than die annually in car accidents today. Although the elimination of such crossings—and then of railroads—largely ended this problem, the proliferation of automobiles in countries with inadequate roads and regulation of drivers and automobiles has wreaked havoc.<sup>51</sup>

Technology also can greatly enhance safety. Airplane crashes have become much less frequent. Automobile designs, including mandatory seat belts and air bags, have reduced traffic fatalities; helmets have reduced bicycle and motorcycle head injuries. Smart cars and automated highways might prevent many collisions. If congestion, fuel costs, and concern about global warming lead to more public transportation, the number of road accidents will further decrease. A variety of simple technological fixes could significantly reduce medical malpractice.<sup>52</sup> Advances in medicine have greatly increased our ability to save the lives of trauma victims, transforming death cases into claims for injury, where damages perversely are higher. Greater life expectancy, a product of diet, lifestyle, health care, safer work, and fewer accidental injuries, also increases the damages of those who are injured. Both of these trends encourage more litigation.

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49. See generally Abel, *supra* note 12, at 26 tbl.2.

50. FRIEDMAN, *supra* note 10, at 422.

51. Posting of Daniel McDermott to The New York Times Wheels Blog, <http://wheels.blogs.nytimes.com/2007/12/07/in-india-more-cars-going-faster> (Dec. 7, 2007, 13:18 EST).

52. See generally ATUL GAWANDE, BETTER: A SURGEON'S NOTES ON PERFORMANCE (2007).

## IV. CHANGES IN THE LEGAL ENVIRONMENT

A. *Substantive Law*

Academics have occasionally convinced courts to recognize new legal rights. For example, courts created the right to privacy following Warren and Brandeis<sup>53</sup> and provided protection from sexual harassment in response to Catherine MacKinnon.<sup>54</sup> Rights have been won through the struggles of social movements on behalf of racial and religious minorities, women, sexual minorities, the disabled, children, prisoners, consumers, and environmentalists. The extension of rights to immigrants would greatly increase the potential for litigation. The tentative and partial shifts from negligence to strict liability and from contributory negligence and assumption of risk to comparative fault permitted claims by negligent plaintiffs and against non-negligent defendants. Insofar as those shifts also increased safety, however, they reduced injuries and claims. Courts have extended protection to emotional distress, loss of consortium, wrongful birth, and pure economic loss. Contracts can ground tort claims against insurers for bad faith denial of coverage. Courts have eliminated the legal immunities of husbands, parents, charities, and governments. Each time courts have recognized a new mass tort claim, victims filed a huge number of lawsuits, especially as courts have grown more hostile to class actions. Examples include asbestos, the Dalkon shield, Agent Orange, tobacco, lead, mold, drugs and medical devices, guns, and clergy sexual abuse. Lawyers have also invoked treaty rights by litigating under the Alien Tort Statute<sup>55</sup> (recently against American corporations for complicity with apartheid). Litigation might increase significantly if injuries that are not presently legally cognizable became actionable, such as global warming and warfare.

Changes in substantive law can also contract or eliminate rights. Actions for breach of promise of marriage and alienation of affections have been abolished. Courts and legislatures have created qualified immunities for those charged with defamation or invading the privacy of public figures.<sup>56</sup> Backlash has curtailed some new rights (e.g., to sue for discrimination or to sue under a theory of strict liability) and restricted older rights (of workers and trade unions). Defendants have invested heavily in electing state supreme court judges who will

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53. See generally Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

54. See generally CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

55. See 28 U.S.C. § 1350 (2000).

56. *New York Times Co. v. Sullivan*, 376 U.S. 254, 281–82 (1964).

limit liability. Product manufacturers and service providers have lobbied legislatures, often successfully, to reverse judicial impositions of liability on tobacco, guns, airplanes, bartenders, cap damages, and limit joint and several liability.<sup>57</sup> Defendants held liable in state courts have persuaded federal regulators to protect them by preempting state remedies. Regulation intended to safeguard consumers—such as the U.S. Surgeon General's warnings on cigarette packages—has been perverted to defeat the claims of injured smokers. The imperial Bush presidency has invoked doctrines of executive privilege, state secrets, and sovereign immunity to defeat efforts to expose and punish its illegal acts.<sup>58</sup> It has insisted on immunizing the telecommunications industry against suits for warrantless wiretapping of citizens.<sup>59</sup> Conspiracies of silence—by doctors, police, the military, and the executive—can defeat lawsuits.

### B. Remedies

Rights are worth little without remedies. For over a century, remedies have generally expanded. Contemporary tort litigation, which seeks money rather than honor, is driven by the search for a deep pocket. Juries are more likely to find liability and award higher damages against wealthy defendants.<sup>60</sup> The same market concentration that allows an enterprise to do more harm also makes it better able to compensate the victims. Contemporary tort law is the creature of liability insurance, which emerged in the nineteenth century. Insurers and insureds have different incentives to defend. Vicarious liability makes solvent employers strictly liable for the negligence of impecunious employees and insured car owners strictly liable for those who drive negligently with their permission. Many states require registered car owners and licensed drivers to carry liability insurance. However, there are many unregistered owners and unlicensed drivers, liability limits are low, and insurance may be cancelled.

Requiring doctors and lawyers to carry malpractice insurance would permit additional claims by patients and clients. Liens ensure that those who provide goods or services on credit can collect if they sue. The proximate cause doctrine allows victims to sue solvent negligent

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57. Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 533–58 (1999).

58. *White House of Mirrors*, N.Y. TIMES, June 24, 2007, at 13.

59. Scott Shane, *Agency and Bush Are Sued Over Domestic Surveillance*, N.Y. TIMES, Sept. 19, 2008, at A13.

60. VALERIE P. HANS, BUSINESS ON TRIAL: THE CIVIL JURY AND CORPORATE RESPONSIBILITY 178 (2000).

defendants for facilitating torts committed by more culpable but insolvent or unknown tortfeasors (e.g., bartenders for serving alcohol to those who cause injuries while driving drunk or landlords for inadequate safety precautions that result in assaults and robberies).<sup>61</sup> Joint and several liability makes a minimally culpable solvent tortfeasor liable for damage inflicted by other, more culpable but insolvent tortfeasors. Market share theory allows victims to sue manufacturers of identical products even though plaintiffs cannot identify the causal agent.<sup>62</sup> Legislatures have tolled statutes of limitations until victims could reasonably have known of their injuries.<sup>63</sup>

Just as rights have been pushed back, however, remedies have been curtailed. Potential defendants can choose not to insure and hide their assets.<sup>64</sup> Rental car agencies, for example, have sought exemption from vicarious liability for their drivers. Employers (such as hospitals) seek to turn employees (such as doctors) into independent contractors.<sup>65</sup> Legislatures have restricted joint and several liability, excluding non-pecuniary damages for defendants less than fifty percent at fault, and they have capped damages (pecuniary and non-pecuniary, compensatory and punitive) for some or all cases.<sup>66</sup> The U.S. Supreme Court has found that the Constitution limits punitive damages to less than ten times compensatory damages.<sup>67</sup> Legislatures have shortened statutes of limitations. Market share theory can be narrowly construed by focusing on local markets, letting manufacturers exculpate themselves, or making liability several rather than joint and several. Some wrongs must go unredressed because our remedies are inadequate. For example, we cannot compensate the deceased (or comatose) for the loss of their lives or consciousness.<sup>68</sup> The existence and adequacy of other remedies, such as private loss or social insurance, may reduce the incentive to litigate, and those insurers may or may not seek subrogation and litigate. Judicial hostility to class actions may perversely increase the number of individual lawsuits.

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61. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 441, 444 (1999).

62. *Hall v. E.I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 374 (E.D.N.Y. 1972); *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980).

63. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 185–87 (1997).

64. Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 4 (1996).

65. *Roessler v. Novak*, 858 So. 2d 1158, 1162 (Fla. Dist. Ct. App. 2003).

66. *See* 42 U.S.C. § 1981a(a)(3) (2000).

67. *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

68. *McDougald v. Garber*, 536 N.E.2d 372, 374–75 (N.Y. 1989).

### C. *Legal Consciousness*

The decision to sue is private, except when government is the plaintiff.<sup>69</sup> A variety of factors may encourage plaintiffs to bring a lawsuit. Just as capitalism extends the commodity form from goods to labor, tort law commodifies all experience. Tort law requires juries to assign monetary values to pain, loss of enjoyment, emotional distress, relationships (both those that are damaged or destroyed and those that are involuntarily created, as in wrongful birth), death, life, and perhaps even spiritual harms (caused by errors in performing rituals relating to circumcision, marriage, or death). The prospect of monetary recovery may encourage victims to view themselves as commodities and seek damages *ex-post* even though they would not insure themselves *ex-ante*. However, some victims may be more interested in eliciting an apology, inflicting retribution, or changing risky behavior. Unfortunately, lawyers discourage apology as an admission of liability. In another setting—divorce—there is evidence that lawyers act as a reality check, discouraging clients from fruitlessly seeking emotional vindication by persuading them to accept what the law offers, namely money.<sup>70</sup> Seeing others receive damage awards may encourage victims to name an experience as a wrong. For example, miners no longer accept emphysema as a fate suffered by every other miner they know; rather, they view it as a preventable workplace disease. Attribution theory helps us understand when victims blame themselves (assumption of risk) or others for a wrong.<sup>71</sup> Examples include spousal abuse, road accidents, and injuries in the home or workplace. The culture of the American frontier idealized self-sufficiency and, therefore, personal responsibility for one's fate, a mindset that has survived in rural communities.<sup>72</sup>

Victims who name an experience as a "wrong" and blame others still must choose among exit, voice, and loyalty; if they decide to voice their concerns, they must then choose between litigation and other forms of complaint, all of which may be a distasteful acknowledge-

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69. See *supra* note 44 and accompanying text.

70. AUSTIN SARAT & WILLIAM L.F. FELSTINER, *DIVORCE LAWYERS AND THEIR CLIENTS: POWER AND MEANING IN THE LEGAL PROCESS* 53–56 (1995).

71. See generally Sally Lloyd-Bostock, *Fault and Liability for Accidents: The Accident Victim's Perspective*, in *COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY* 139 (Donald Harris et al. eds., 1984).

72. David M. Engel, *The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community*, 18 *LAW & SOC'Y REV.* 551 (1984).

ment of vulnerability and dependence.<sup>73</sup> Defendants may be able to discourage lawsuits by apologizing promptly and perhaps offering nominal compensation.<sup>74</sup> There are many enclaves in American society that prefer to resolve conflict internally: residential, racial, ethnic, and religious communities; dyads of producers and consumers; and occupations.<sup>75</sup> There are significant demographic differences in the belief that resort to the law will produce justice.<sup>76</sup> Cultures differ in their tolerance and encouragement of overt conflict.<sup>77</sup> All of these choices are open to external influence: naming, blaming, and claiming are learned behaviors.<sup>78</sup> Victims may be encouraged to pursue litigation by seeing others sue for sexual harassment, racial discrimination, or bullying. Litigation can be emulative, as when mass tort victims sue, or a woman who testified in a friend's divorce proceeding decides to seek divorce herself.<sup>79</sup> Potential plaintiffs can also be persuaded not to litigate: the tort reform campaign by insurers and defendants sought, with apparent success, to convince Americans that many tort claims are frivolous and damages excessive. Employers, fellow workers, members of immigrant or ethnic communities, and police can guide victims to or away from law.

Just as the consciousness that rights have been violated can affect litigation, so does its obverse: law-abidingness. Suppose we make assumptions about law analogous to those that economists make about perfect markets: laws are unambiguous and comprehensive (the pandectist ideal); they are universally known; enforcement is automatic; and penalties are sufficiently high to deter violations. Under such circumstances, there would be no litigation. Potential deviants would anticipate enforcement and choose to comply. In the rare instances when transgressions occurred by mistake, violators would immediately settle any claims to avoid the costs of litigation, whose outcome would be certain. Relaxing each assumption allows us to see its influence on litigation. Legal uncertainty, loopholes, and public ig-

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73. See generally Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701 (1977).

74. Adam Davidson, *Working Stiffs*, *HARPER'S MAG.*, Aug. 2001, at 48, 53-54 (Schneider National, largest trucking company, has wholly owned insurance subsidiary which practices "empathetic adjusting").

75. See generally GREENHOUSE et al., *supra* note 25; MACAULAY, *supra* note 37.

76. CURRAN, *supra* note 8, at 251-52 fig.6.6, 252 fig.6.7.

77. See generally *THE DISPUTING PROCESS: LAW IN TEN SOCIETIES* (Laura Nader & Harry F. Todd Jr. eds., 1978).

78. See generally William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 *LAW & SOC'Y REV.* 631 (1981).

79. See generally *DIVORCE AND AFTER* (Paul Bohannon ed., 1970).



norance encourage deviance. So does the ability to conceal the violation, beat the rap, corrupt the courts, or escape with a slap on the wrist. The massive resistance of southern states to *Brown v. Board of Education*,<sup>80</sup> the indifference of prison systems and police departments to lawsuits for abuse of prisoners and suspects, and the determination of tobacco companies to avoid liability are examples. Tortfeasors pay a premium to settle the first claims for a potential mass tort in order to buy plaintiffs' silence by sealing the record, thereby denying similarly situated victims the information they would need to "name, blame, and claim." Conspiracies of silence about medical malpractice by doctors or abuse by police officers can make litigation fruitless. Resistance by defendants initially increases litigation, by foreclosing settlement, but stonewalling by sufficiently powerful defendants can ultimately discourage litigation by convincing potential plaintiffs that litigation is futile or not cost effective.

## V. CHANGES IN THE STAKES

I suggested earlier that socio-cultural variables shape whether conflict concerns position in a status hierarchy (honor, respect) or control over material goods. Both kinds of resources can yield power, public and private. Societies differ in what can be owned, with what rights, and by whom. Hunting and gathering economies have few property rights except in relationships, profane knowledge about where to find food, and sacred knowledge about how to live in the world. Pastoralists own livestock, which can be pledged, loaned, given, sold, inherited, stolen, and killed. Agriculturalists own land, in which similar transactions are possible, except for destruction. Land endures forever, creating a fertile source of disputes, since in the absence of written records memories are unreliable and subject to manipulation. Unlike livestock, land cannot be hidden, but it can be appropriated through occupation or destruction of crops, structures, and boundary markers. It is possible to subdivide interests in livestock (milk, meat, and offspring—all of which can be concealed) and even easier to subdivide interests in land. Land, unlike livestock, is often held collectively, perhaps increasing conflict among members but reducing it with outsiders, who can claim no rights. Tension arises between pastoral and agricultural economies when livestock damages crops, creating disputes about the obligation to fence in or out. Industrialization

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80. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); see *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299-300 (1955).

transforms the value of land and invests value, and thus property rights, in natural resources and capital.

Pastoral, agricultural, and industrial economies each value labor differently, creating different kinds of disputes between employers and employees. Agricultural and industrial economies may conflict when each pollutes the commons. Residential property may be rented or owned, as individual houses, condominiums, or cooperatives, each of which creates different kinds and amounts of disputes. Post-industrial service economies increase the value of skilled labor and intangible property. Because intellectual property cannot be physically possessed, conflict over its ownership is likely to increase. Some question whether there should be any property rights in information (e.g., open source computing, copying of music, text, and images).

Conflict over property is a function of scarcity or abundance. Resources tend to be abundant (even free goods) when each new economy first emerges, and then they become scarce. The Internet initially was free for all users, then it was free for just some but increasingly financed through advertising, and now it is near the limit of its capacity, forcing it to ration by price or some other mechanism. Greater freedom to contract also increases the potential for conflict. At the same time, carefully drafted wills and contracts (including liquidated damage clauses, leases, prenuptial agreements and agreements not to sue in tort) can anticipate and avoid conflict.

Because litigation is so expensive, property disputes are more likely to be litigated if the amount in controversy is substantial. That condition is usually satisfied within commercial enterprises, which themselves aggregate the interests of many, and among the wealthy. We can distinguish the occasions when most non-wealthy individuals accumulate sufficient property to make litigation worthwhile. For the vast majority who do not begin life with trust funds, birth does not generate legal disputes, though paternity may be contested. Disputes over birth were common, however, when office was inherited. By contrast, death requires transmission of accumulated wealth. Legal systems that rigidly prescribe that distribution permit conflict only about the identity of beneficiaries (usually defined by kinship), but the tendency has been to increase testamentary freedom and with it the potential for conflict.

All but the wealthiest, who negotiate prenuptial agreements, enter marriage with little property, though this may be changing as people marry later and remarry after divorce or death. Divorce, by contrast, always requires a division of property and often rights in children. The enormous inflation in housing prices in recent decades, before the

collapse fueled by sub-prime loans,<sup>81</sup> led to higher stakes, greater investment in divorce lawyering, and inevitably increased litigation.<sup>82</sup> Divorce itself has been increasing for a century. Because short-term residential leases have relatively little value at the outset, few tenants invest legal resources in drafting them, although landlords may pay for boilerplate language they can use repeatedly.

The investment in a residence increases over time as residents place their children in local schools, make friends with neighbors, learn about local amenities, and find nearby employment, making it worthwhile to resist eviction. Rent stabilization and vacancy decontrol can increase the stakes of such contests for both tenant and landlord. The acquisition of a home or apartment is the largest purchase most people ever make and is thus worthy of a significant investment of legal resources. It almost always is financed by a mortgage, which aggregates future savings over twenty-five to thirty years. Loss of a home through foreclosure can be catastrophic, as the current sub-prime crisis demonstrates. Our credit economy (a post-World War II phenomenon, which the English evocatively call buying on the “never never”) permits many purchases that otherwise would never have been made and will be paid for over months or years.<sup>83</sup> Educational loans are the latest, and often the most onerous, form of consumer debt. Although lawyers often facilitate business formation through partnership agreements and incorporation, conflict is rare at the inception. But dissolutions, reorganizations, and especially bankruptcies are usually contested. Shareholder derivative actions aggregate the interests of all shareholders who have been affected by the misconduct of corporate officers. In tort actions, general damages capitalize past and future medical expenses as well as earning capacity, while general damages do the same for experience general damages.

Law lets us not only assert rights over property but also control risk.<sup>84</sup> Changes in social structure, economy, political organization, and technology have allowed humankind to reduce many risks while increasing others, such as global warming, war, and environmental degradation. Some economic changes increase exposure to risk, which is often seen as opportunity. Executory contracts are an exam-

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81. David Cho & Neil Irwin, *Lawmakers Split on Merits of Mortgage Bailout*, PITT. POST-GAZETTE, Dec. 7, 2007, at A1.

82. See generally LYNN MATHER, CRAIG A. McEWEN & RICHARD G. MAIMAN, *DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE* (2001).

83. *Pay Your Cards Right*, THE SUN (U.K.), Nov. 8, 2008, at 33.

84. See generally LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* (1985); ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* (Mark Ritter trans., 1992); *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY* (Tom Baker & Jonathan Simon eds., 2002).

ple. The movement from a goods-based to a service-based economy increases executory contracts, since there is almost always a time difference between payment for and performance of a service. In a barter economy there is little risk, other than the possibility of misvaluing what one is exchanging. Our credit economy enormously increases both our buying power and our risk. Parties may seek to control that risk by making it reciprocal: purchasers of package tours may reduce the chance of bad accommodations by withholding part of the payment until they return. Creditors may reduce the risk of default by keeping borrowers permanently in debt. Lenders use more sophisticated methods for calculating credit worthiness, although banks clearly did not do so in the sub-prime meltdown.<sup>85</sup> Potential plaintiffs may reduce risk through loss insurance for earning capacity, property against theft or accidental destruction, title to real property, and medical care. Social insurance for injury or illness, loss of employment, or natural disasters, is another alternative to litigation. The larger an economic disaster, the less likely it is to produce litigation because government will rescue the failing enterprise: Chrysler, Lockheed, the savings and loan industry, and now Bear Stearns and sub-prime mortgages.<sup>86</sup>

## VI. CHANGES WITHIN THE FORUM

The relative advantages of courts and their functional alternatives influence which of them litigants choose. Courts are shaped by a variety of incentives. Judges may be under pressure to clear their dockets because of backlog and inadequate resources or to maximize their caseloads in order to secure more funding. Courts may expand their capacity to process cases by appointing masters, referees, and magistrates when they cannot increase the number of judges. Courts may accelerate the disposition of cases by default (because defendants fail to appear) or dismissal (because plaintiffs fail to prosecute) or press both sides to settle (what Galanter calls litigotiation).<sup>87</sup> This may make courts more or less attractive depending on whether plaintiffs want a full hearing, an adjudicated victory, or leverage in negotiations.<sup>88</sup>

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85. See Cho & Irwin, *supra* note 81.

86. See *id.*

87. Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984).

88. See generally TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002).

There are numerous functional alternatives to generalist courts. Specialist courts have been created for tax, patents, customs, juveniles, small claims, family, immigration, bankruptcy, mental illness, probate, and more recently drugs and other crimes. Cases may move among local, state, national, regional, foreign, and international courts. Cases may be framed as civil or criminal.<sup>89</sup> A domestic dispute, for instance, may provoke a call to the police, a tort claim, or a divorce. Parties may choose among a variety of alternative dispute processes, including direct negotiation (which resolves the vast majority of disputes), mediation (in divorce), and arbitration (of labor disputes). Dominant parties increasingly require arbitration of conflicts arising out of agreements about employment, health care, and investment; individuals have little choice but to sign these adhesion contracts. Sometimes the law itself mandates arbitration, as in medical malpractice. Revenge may be dictated by codes of honor. Even when it is not, self-help may be the only alternative if other venues are unavailable or powerless. Some grievants just find it more effective to appeal to a patron with political influence. Self-help often is secret<sup>90</sup>: sorcery in tribal societies, for instance, or hiring Anthony Pellicano in Hollywood.<sup>91</sup> Sometimes self-help serves to make an adversary litigate: destruction of boundary markers to provoke a lawsuit over title, defamation to force the victim to contest its truth.

Because litigation is costly and slow, governments have sought to construct administrative alternatives.<sup>92</sup> Workers' compensation is the classic example of substituting administration for law by eliminating issues of fault, creating a schedule of damages, and severely capping fees for lawyers, whom it hoped to render unnecessary.<sup>93</sup> This was only partly successful. Issues of fault have returned, for instance when employees abuse substances or get into fights, or employers deliberately violate safety rules or concealed risks. Causation has become a fertile source of litigation, not just at the physical, temporal, and psychic margins of work (going and coming, frolic and detour) but

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89. See generally SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* (1990).

90. See generally JUNE STARR, *DISPUTE AND SETTLEMENT IN RURAL TURKEY: AN ETHNOGRAPHY OF LAW* (1978).

91. David M. Halbfinger & Allison Hope Weiner, *In Court Files, Hollywood's Mr. Fix-It at Work*, N.Y. TIMES, May 21, 2007, at A1.

92. Marxist legal theoreticians like Pashukanis maintained that by ending class conflict, communism would substitute administration for law, thereby taking the first step on the path toward the withering away of the state. EVGENY BRONISLAVOVICH PASHUKANIS, *THE GENERAL THEORY OF LAW AND MARXISM* 61, 175-76 (Barbara Einhorn trans., Transaction Publishers 1978).

93. PHILIPPE NONET, *ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY* 24, 29-30 (1969).

also with respect to the many occupational illnesses whose etiology is obscure (e.g., stress, heart disease, and cancer). Scheduled damages leave uncompensated gaps, such as the loss of sensory perception or procreative or sexual ability or heightened sensitivity to chemicals. And schedules never keep pace with inflation.

Nevertheless, there have been efforts to emulate workers' compensation in no-fault compensation for automobile accidents in the United States<sup>94</sup> and medical malpractice in Sweden.<sup>95</sup> No-fault divorce was intended to simplify the termination of marriages, shifting conflict over property and children from courts to mediators, assisted by social workers and psychologists.<sup>96</sup> No-fault compensation funds have been created for victims of crime,<sup>97</sup> workplace illnesses such as black lung,<sup>98</sup> the consequences of government programs such as vaccinations,<sup>99</sup> and national tragedies such as the 9/11 attack<sup>100</sup> and the Virginia Tech shootings.<sup>101</sup> Social insurance transforms issues that might be litigated into administrative matters: the distribution of health care, income maintenance, disaster relief, veterans' benefits, and pensions. But badly administered programs can create as much litigation as they eliminate, as when the Reagan Administration engaged in wholesale withdrawals of Social Security Insurance.<sup>102</sup> Today a very substantial portion of the dockets of United States Courts of Appeals is consumed by immigration because the performance of the administrative law judges is so poor.<sup>103</sup> The Bush Administration's determination to keep the trials and habeas corpus petitions of Guantanamo detainees out of court has led to repeated judicial criticism of the Combatant Status Review Tribunals and Military Commis-

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94. Michelle M. Mello et al., *Policy Experimentation with Administrative Compensation for Medical Injury: Issues Under State Constitutional Law*, HARV. J. ON LEGIS., Winter 2008, at 59, 78.

95. Michael M. Weinstein, *No-Fault System May Be Rx For HMO's Malpractice Worries*, DENV. POST, July 26, 1998, at J-01.

96. Kit R. Roane, *The State of Disunion*, N.Y. TIMES, Dec. 1, 1996, at 13NJ.

97. Josh Mitchell, *U.S. Cuts Funding for Crime Victims; Nonprofits, State, and Local Agencies Might Curtail Services*, BALTIMORE SUN, Jan. 14, 2008, at 1B.

98. Paul J. Nyden, *Workers' Comp OK's New Black Lung Regulations*, CHARLESTON GAZETTE, Oct. 20, 2004, at 6A.

99. Susan Edelman, *Payout Fund for Vaccines Nearly Shot*, N.Y. POST, Sept. 28, 2008, at 15.

100. David W. Chen, *Striking Details in Final Report on 9/11 Fund*, N.Y. TIMES, Nov. 18, 2004, at B1.

101. Anita Kumar, *Judge Agrees to Va. Tech Payout; Some Families Remain Unhappy With State, School*, WASH. POST, June 18, 2008, at B01.

102. See generally JACQUELINE VAUGHN SWITZER, *DISABLED RIGHTS: AMERICAN DISABILITY POLICY AND THE FIGHT FOR EQUALITY* 54 (2003).

103. Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at 1.

sions and multiple appeals to the District of Columbia Court of Appeals and the U.S. Supreme Court.<sup>104</sup> The errors of the Bureau of Indian Affairs have inflicted enormous burdens on federal courts.<sup>105</sup> Federal courts have repeatedly been forced to correct administrative agencies politicized by the Bush Administration.<sup>106</sup>

Private decisions to litigate are influenced by calculations of benefit and cost. Newspaper headlines about large jury verdicts, which are rarely followed by equal coverage of reduction through remittitur or appeal, mislead potential plaintiffs about the rewards of litigation and reinforce popular misconceptions about the "litigation crisis." The press also is more likely to report wins than losses. Changes in success rates can influence litigants' willingness to use the tribunal: unfair labor practice complaints doubled every decade through the 1980s,<sup>107</sup> but such complaints declined after Republican presidents packed the NLRB with members hostile to labor.<sup>108</sup> Filing fees and bonds can discourage the initiation of lawsuits and the pursuit of appeals. The Supreme Court recognized this by ruling that the Constitution mandated filing fee waivers for indigents when the state has a monopoly, as in divorce.<sup>109</sup> Jury trials routinely take many years to schedule; appeals can easily extend the wait for a final judgment to a decade or more. Some jurisdictions have devised abbreviated jury trials to reduce the delay.<sup>110</sup> The same obstacles that may discourage plaintiffs from initiating litigation or persevering may persuade defendants to settle rather than wage a costly war of attrition.

Lawyers are by far the largest litigation expense. Legal aid schemes vary in terms of financial eligibility and substantive coverage. Since the creation of federal legal services in 1965, the government has excluded more and more substantive areas, clients, and strategies in a deliberate attempt to curtail litigation. The quality of legal aid may be affected by whether it employs lawyers or reimburses private practitioners and by the gap between the salaries and prestige of legal aid lawyers and those in the private sector. Contingent fees can finance

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104. See generally David Luban, *Lawfare and Legal Ethics in Guantanamo*, 60 STAN. L. REV. 1981 (2008).

105. See generally Stu Watson, *Tribes Win Court Battle Over Timber Harvest*, OREGONIAN, May 21, 2001, at D02.

106. Jim Landers, *Court Blocks FCC's Media Decision—Agency Told It Must Offer Better Reason for Erasing Ownership Rules*, DALLAS MORNING NEWS, June 25, 2004, at 1D.

107. ROBERT J. FLANAGAN, *LABOR RELATIONS AND THE LITIGATION EXPLOSION* 24 (1987).

108. Jonathan Tasini, *Why Labor is at Odds with the N.L.R.B.*, N.Y. TIMES, Oct. 30, 1988, at 14.

109. *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971).

110. Steven Croley, *Summary Jury Trials in Charleston County, South Carolina*, 41 LOY. L.A. L. REV. 1585 (2009).

litigation where a lump sum judgment is possible but generally only if success is virtually certain. The United Kingdom reluctantly authorized conditional fees, which are similar, but not identical to contingent fees, in order to deny legal aid to such cases.<sup>111</sup> At the same time, legislation may cap contingent fees in an effort to curtail litigation, as the Medical Injuries Compensation Reform Act did in California.<sup>112</sup> Caps on other fees, such as workers' compensation and veterans' claims, may affect the quality and quantity of lawyer effort. Fee shifting statutes allow successful plaintiffs to make defendants repay the cost of litigation. Some jurisdictions require liability insurers to pay for independent counsel if the insured's exposure exceeds the policy limits. Legal expenses insurance is widespread in Germany and increasing in the United Kingdom. Economic changes may make litigation more affordable: the dramatic inflation in house prices in recent decades financed sophisticated divorce litigation; the bursting of the housing bubble may ration the effort lawyers are willing to invest. Pro bono services may be available, although only for some plaintiffs or cases.<sup>113</sup> The U.S. Supreme Court has found a constitutional obligation to provide counsel in criminal cases, but efforts to extend such a right to civil matters have been largely unsuccessful.<sup>114</sup> Both parties and lawyers can borrow money, the repayment of which is contingent on success, but this is only available in promising cases, and interest rates are very high.<sup>115</sup> Some have argued that potential plaintiffs should be able to sell causes of action to others, who might be better able to pursue litigation, perhaps by aggregating the claims.<sup>116</sup>

An old joke tells of the newly admitted lawyer who chose to hang his shingle in a town with no other lawyers, in order to minimize competition, and starved—until a second lawyer moved in. They lived happily ever after suing each other. The legal analogy of Roemer's Law—that hospital beds are the best predictor of hospitalization rates

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111. *Legal Aid Axed for Personal Injury Claims*, BBC News, Mar. 4, 1998, <http://news.bbc.uk/1/uk/61882.stm>.

112. CAL. CIV. CODE § 3333.2 (West 2007).

113. See generally Philip R. Lochner, Jr., *The No-Fee and Low-Fee Legal Practice of Private Attorneys*, 9 LAW & SOC'Y REV. 431 (1975); Scott Cummings, *The Politics of Pro Bono*, 52 UCLA L. REV. 1 (2004).

114. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1962); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 10, 31 (1981).

115. Richard L. Abel, *How the Plaintiffs' Bar Bars Plaintiffs*, 51 N.Y.L. SCH. L. REV. 345, 364–72 (2007).

116. Maurice Rosenberg, *Devising Procedures That Are Civil to Promote Justice That Is Civilized*, 69 MICH. L. REV. 797, 814 (1971).



for patients<sup>117</sup>—may be that lawyers are the best predictor of litigation rates. Even though the U.S. Supreme Court allows states to prohibit solicitation, it has extended constitutional protection to most forms of lawyer advertising.<sup>118</sup> Professional associations engage in collective efforts to promote lawyer use, for instance by encouraging individuals to get wills drafted or have an annual legal checkup.

Many variables influence the size and growth of the legal profession. Since the 1970s, the entry of women has been the principal source of expansion, but we have now achieved approximate gender parity in law students and new qualified lawyers. As a result, the profession may actually shrink because a much higher proportion of women than men leave work to raise children, and some women return only part time or not at all. Educational and financial barriers limit access to legal education by racial minorities and the less wealthy. The ABA still restricts the growth of the profession by its rules for accreditation, which have discouraged for-profit law schools and inhibited experiments in distance learning via computers.<sup>119</sup> State bar examiners manipulate pass rates in order to regulate numbers.<sup>120</sup> Other factors affect the kind of work qualified lawyers choose to do. Income disparities continue to grow between private and public sector work, especially public interest work. Educational indebtedness magnifies the influence of salary differences on career choices. Firms enlarge and shrink departments to reflect the relative profitability of different kinds of work.

Although lawyers vigorously defend and seek to expand their legally protected monopoly, non-lawyers are eager to perform many of the protected functions. Insurance company claims adjusters seek to persuade tort victims not to litigate by offering settlements.<sup>121</sup> In the United Kingdom, claims assessors can aggressively solicit injury victims, counsel them about their legal rights, negotiate settlements, and offer lawyer referrals to those unwilling or unable to settle.<sup>122</sup> Notarios and other non-lawyers advise non-citizens about their legal

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117. Milton I. Roemer, *Bed Supply and Hospital Utilization: A Natural Experiment*, HOSPITALS, Nov. 1, 1961, at 36.

118. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978); *Fla. Bar v. Went For It, Inc.*, 505 U.S. 618, 620 (1995).

119. Karen Sloan, *Online Law Schools Gain Popularity, Not Accreditation*, BROWARD DAILY BUS. REV., Nov. 12, 2008, at 9.

120. *Hoover v. Ronwin*, 466 U.S. 558, 562 (1984) (plaintiff alleged that bar passage procedures constituted an antitrust violation).

121. H. LAURENCE ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* 18 (1970).

122. RICHARD L. ABEL, *ENGLISH LAWYERS BETWEEN MARKET AND STATE: THE POLITICS OF PROFESSIONALISM* 230-33 (2003).

rights and help them regularize their status, which can lead to litigation in immigration court and appeals to United States courts of appeals. Companies like Nolo and Quicken sell both hard copy and online forms, enabling parties to litigate *pro se* in divorce and bankruptcy proceedings, for instance. Paralegals help parents seek Individual Educational Plans under the Individuals with Disabilities Education Act, which can lead to litigation with school districts.

#### VII. SO WHAT'S THE WEATHER GOING TO BE?

It would be foolhardy to make specific predictions about litigation in 2020. It is a composite of diverse behaviors. The known variables are too numerous and volatile, and unpredictable influences might emerge. I hope, nevertheless, that my overview suggests some of the ways in which we might shape the civil docket or estimate the resources it will require.

