

The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America

Lawrence M. Friedman

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [Legal History, Theory and Process Commons](#)

Recommended Citation

Lawrence M. Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 Md. L. Rev. 661 (1980)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol39/iss4/2>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Maryland Law Review

VOLUME 39

1980

NUMBER 4

©Copyright Maryland Law Review, Inc. 1980

THE SIX MILLION DOLLAR MAN: LITIGATION AND RIGHTS CONSCIOUSNESS IN MODERN AMERICA

LAWRENCE M. FRIEDMAN*

America, we are told, is in the midst of a legal crisis. The courts are jammed. An epidemic of litigation has the nation in its grip. This ugly trait seems to be getting worse all the time. There is talk about an explosion of lawsuits. Much of the trouble lies, it is said, with Congress and the legislatures. In any event, we are suffering from "hyperlexis," a new and dread disease that has "overloaded" all "legal circuits," including the courts.¹ In short, too many people are suing too many people and the results are somehow hazardous. At any rate, scholars and public figures are spreading this word.² The courts are flooded; justice is poisoned; our legal system is ruined. Obviously, we must cure this disease by hook or by crook.

In this essay, I want to take a closer look at the problem (hyperlexis, or court congestion, or excess litigation, or whatever). I will try to sift out what is real, and what is false, about the issue: where the problem comes from and, perhaps, where it is going. In the end, I will argue for an attitude of cool restraint. It is not at all clear to me that anything going on deserves the shrill whoops of alarm that we hear. Indeed, some trends which seemingly hurt the courts may be good for

* Marion Rice Kirkwood Professor of Law, Stanford University, B.A. 1948, J.D. 1951, M.L.L. 1953, University of Chicago. This essay is based on the Pearl and Lawrence I. Gerber Memorial Lecture delivered October 30, 1979, at the University of Maryland Law School. Professor Friedman wishes to thank Anne Doolin for her help in preparing this essay.

1. Manning, *Hyperlexis: Our National Disease*, 71 Nw.U. L. Rev. 767 (1977).
2. One recent government report warns:

The federal courts . . . now face a crisis of overload, a crisis so serious that it threatens the capacity of the federal system to function . . . This is not a crisis for the courts alone. It is a crisis for litigants who seek justice, for claims of human rights, for the rule of law, and it is therefore a crisis for the nation.

DEPT' OF JUSTICE, THE NEEDS OF THE FEDERAL COURT 1 (1977). See generally H. ZEISEL, H. KALVEN & B. BUCHHOLZ, *DELAY IN THE COURT* (1959).

society. In any event, there are powerful social forces which create these trends in litigation; we cannot simply wave a wand, or pass a law, and make them disappear.

The "problem" of the courts has been described as having at least three aspects. First, there is the idea that litigation, of all sorts, is rising rapidly in sheer numbers — growing faster than population grows, faster than the ability of courts to cope.³ Second, there is the idea that courts are awarding absurd, inflated amounts. Small injuries are blown out of proportion. The sky is the limit for recovery. In tort cases — malpractice and products liability cases especially — millions and millions of dollars are handed out like candy. Helped along by inflation (and by generous juries), tort law truly has achieved the six-million dollar man. The third problem is one of doctrine. The proverbial floodgates are open. Every month or so some novel cause of action is born. Liability appears unlimited, and not only in amount. A bodyguard of doctrine used to shield business from consumers and other victims; an army of rules used to guard government against citizen complaints. These protectors have melted away. Today there are no boundaries to legal action. Here too, the sky is the limit.

Two of these problems are real; at least there is *something* to them, although one wonders how much. The first problem is more doubtful. Are litigation rates going up? It is a vexed subject, but I will try to dispose of it briefly. To put matters bluntly, we have little idea whether rates are rising, falling or staying the same over time. People talk about litigation explosions but they have very few facts to back up their assertions. Judicial statistics, until now, have been absolutely wretched; things have improved a bit in recent years, but there is still a long way to go.⁴ Historical statistics are almost entirely worthless. Hence, it is hard to say *anything* about long-term trends.

One thing is clear: litigation, and litigation rates, are rising in federal courts⁵ (which keep, on the whole, better records than state

3. Maurice Rosenberg writes: "more people [are] constantly litigating more frequently with more intensity about more issues of familiar kinds . . ." Rosenberg, *Let's Everybody Litigate?*, 50 TEX. L. REV. 1349, 1350 (1972). Judge Henry Friendly complains of a "law flood." Friendly, *Should We Be Turning Back the Law Flood*, Legal Times of Washington, Oct. 8, 1979, at 7. In his comment on the flood of legislation and administrative rules, Judge Friendly notes that "the federal courts . . . have been taking over more and more aspects of our national life." *Id.*

4. See U.S. DEP'T OF JUSTICE, STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART (1978). The Department of Justice is trying to develop a national data base of state court caseload statistics. See generally U.S. DEP'T OF JUSTICE, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1975 (1979).

5. See Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 L. & SOC'Y REV. 321 (1975). "In 1902 there were 19.9 cases filed per 100,000

courts). But it would be rash to assume that the same holds for state courts, in our peculiar double system. Most litigation is state litigation — perhaps as much as 95% of it.⁶ Until someone puts state court statistics into better shape, we are in the dark about trends in the states.⁷ I suspect that any real rise in litigation rates (I am not convinced there is one.) began very recently; and if one exists at all, it is probably more modest than the weeping and wailing would suggest.⁸

Why is this simple statistic so elusive? A litigation rate means the number of cases measured against some population figure — 5 per 1,000, or 10 per 1,000, or whatever. But there are choices to be made before we start measuring: should we count the number of cases filed (begun) in court, or just the number of cases disposed of? Should we count everybody as part of the population, or just adults (on the theory that babies do not litigate)? There is a much more fundamental problem: what is a case anyway? Most states, for example, have adopted no-fault

persons; in 1972 43.9 cases per 100,000, an increase over the period of 120 percent. On the other hand, the absolute number of cases filed rose nearly 500 percent [over the same time period]." *Id.* at 333.

6. According to one survey with 44 states reporting, 6,699,378 cases (civil, criminal, and juvenile) were filed in state courts of general jurisdiction in 1975. U.S. DEP'T OF JUSTICE, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1975 at 41 (1979). In that same year, there were less than 170,000 cases (civil and criminal) filed in federal district courts. 1975 ADMIN. OFF. U.S. CTS. ANN. REP. 189. These figures, of course, are very rough and probably inaccurate. The state figures do not include, generally speaking, probate and traffic matters. But it is clear that the volume of federal litigation is dwarfed by the volume of state litigation, however one counts.

7. A few studies have tried to measure litigation rates over time. One such study looked at civil cases in two California counties, one rural and one urban, in the period between 1890 and 1970. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 L. & Soc'y REV. 267 (1976). The figures on this point were inconclusive. Wayne V. McIntosh studied rates in St. Louis. W. McIntosh, *Litigation in the St. Louis Trial Courts of General Jurisdiction: the Effects of Socio-Economic Change* (unpublished paper, 1978 Ann. Meeting, Am. Pol. Sci. Ass'n.).

8. It is, for example, commonly accepted that the United States Supreme Court is terribly overworked and that its burden gets worse and worse. *See generally* A. BICKEL, *THE CASELOAD OF THE SUPREME COURT AND WHAT, IF ANYTHING, TO DO ABOUT IT* (1973). Many believe that without some radical improvement, the Court may die of some terrible disease — perhaps infectious hyperlexis. Anyone who takes these moans and groans seriously should read G. CASPER & R. POSNER, *THE WORKLOAD OF THE SUPREME COURT* (1976), in which the authors rather persuasively demolish the argument that the workload of the Supreme Court is too heavy for the good of the Court and the legal system.

In California, *filings* in the Superior Court (the basic trial court) increased 55.4% between 1967-68 and 1977-78. But whether this increase represented more "litigation" remains unexplained. Almost half of the total increase consisted of civil cases classified unhelpfully as "other." Surprisingly, criminal filings had increased *less* than 1% — a rate of growth much slower than population. 1979 ANN. RPT. ADMIN. OFFICE, JUDICIAL COUNCIL OF CALIF. 63. On the rise in *filings* in Los Angeles County, see also Hufstедler, *New Blocks for Old Pyramids — Reshaping the Judicial System*, 44 SO. CALIF. L. REV. 901 (1971).

divorce laws. Even before this reform, most divorces were cut-and-dried. Now they have become even more so, and cheaper too. Still, to get a divorce, a person has to file papers in court. The "case" gets a file number. As the divorce rate goes up, so do the number of "cases." But is this "litigation"? Furthermore, what about adoptions, name changes, uncontested probate proceedings or traffic and parking matters disposed of by the millions? What about tort cases filed but settled out of court?

Each state has its own way of counting these various pieces of paper. Aggregate state statistics usually make no distinction between contested and uncontested cases. They do not sift out routine matters — rubber-stamp affairs — from genuine contests. Raw numbers do, of course, tell us something (what is the divorce rate, after all, but a count of court cases?) but they tell us little or nothing about dispute settlement or conflict resolution.⁹ Hence, I repeat, we do *not* know whether everybody really is suing everybody. It might even turn out that the true litigation rate (if by "litigation" we mean disputes that go to court and are settled *in court*) is lower than it was in 1850 or 1900. We are simply in the dark.

Still, we cannot ignore the idea of an explosion of cases. Where there is smoke, there is usually fire. Something may be exploding; though it may not be what critics think. They may be misled by an eruption of cases that are few but mighty — cases with an uncommon impact on society, or which reach uncommonly costly results. And indeed, the two other "problems" have firm bases in reality. An invisible cap has popped off the bottle; there is now no limit, apparently, on the dollar amounts that juries (and judges) award. Moreover, the concept of liability itself seems to have lost its grip. Notions of restraint seem to be dying. Rules to hold down or monitor recovery are fast becoming extinct.

Glaring examples of both processes can be found in tort law. Top awards in tort actions — the ones that make the newspapers — have climbed much faster than inflation (which has made quite a climb itself). In 1954, a painter, a married man with five children, lost both legs, an arm, and part of his second hand in a terrible accident in a railroad yard.¹⁰ He sued, and finally won \$420,000. This amount was called a record at the time: no court in the United States had, apparently, ever awarded so much money to one person for personal

9. Of course, even when a case is settled, what a court could or would have done may influence the shape of the settlement. *See, e.g.,* H. ROSS, *SETTLED OUT OF COURT, THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS* (1970); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

10. 13 *NACCA L.J.* 282 (1954). The case was *Maynard v. Milwaukee Railroad*, an unreported federal district court case. It was tried before a jury applying Wisconsin law.

injury. Of course, the cost of living has gone up a great deal since 1954; but even in today's cheap dollars the award might be worth, say, a million. But today nobody blinks at awards of \$2,000,000, or \$3,000,000, or even more.

The trend toward higher awards has been with us for a century; but it has accelerated in recent years. To be sure, modern medicine is very expensive. Wrecked bodies that meant death a century ago live on at enormous cost. Round the clock care can cost a fortune: a million dollars is not at all out of line. Lawyers, of course, take their bite. But we cannot explain the awards in terms of cost alone. Underlying inflated recoveries are changes in attitude. This is reflected, for example, in more generous awards for pain and suffering. Pain and suffering (in the legal sense) are not new. They were elements of tort recovery as far back as the early nineteenth century. By the middle of that century, damages for pain and suffering were taken almost for granted.¹¹ But the amounts were usually modest.¹² Today, they are sometimes very large. Juries give out more and more money; trial judges agree; high courts affirm. While economic loss and medical costs are relatively fixed, the money value of pain and suffering is "unimaginably protean," subject to "expansion by skillful advocacy in front of juries."¹³ Pain and suffering awards thus add greatly to expanded liability.

It is worth pointing out that no real shift in *doctrine* can account for the explosion in the *size* of awards. Clearly, the nineteenth century courts did not use tort awards to give a victim full compensation¹⁴ — at least not as we now understand it. Tort awards on the whole looked backwards: they covered medical expenses; they made good lost wages; and they added something for the plaintiff's agonies. They did not really cope with future losses, or try to guarantee a standard of living or way of life over the whole life-span. There is, of course, no way to make up for lost legs, lost health or lost minds. But the nineteenth century courts did not even *try* to pay victims back full measure for their suffering or

11. See *Ransom v. N.Y. & Erie R.R. Co.*, 15 N.Y. 415 (1857).

12. In *Tartar v. Missouri, K. & T.R. Co.*, 119 Kan. 738, 241 P. 246 (1925), *cert. denied*, 270 U.S. 659 (1926), the court held \$10,000 for pain and suffering excessive and cut the sum in half. Generally speaking, appellate courts have some power to reduce recoveries if damages are excessive. In *Virginian Ry. Co. v. Armentrout*, 166 F.2d 400 (4th Cir. 1948), a verdict of \$160,000 was held to be "greatly in excess of any proper award." The victim was a thirteen month old child who lost both hands and part of his arms. There are many other examples of such holdings, but it was always far more common for high courts to *affirm* damage awards.

13. O'Connell & Simon, *Payment for Pain and Suffering, Who Wants What, When and Why* (1972).

14. See generally F. POLLACK, *LAW OF TORTS* 217-19 (3d English ed. 1894).

grief. They felt that life was hard, and full of woe. Adversity was a fact beyond the reach of tort law. That attitude has changed dramatically. Also, courts (and even juries) were once very wary of picking deep pockets. *That* attitude has vanished completely. Defendants are usually businesses (some are big businesses), or individuals who carry insurance; it seems easy enough to let insurance companies or businesses pay.

Although change in doctrine does not explain the great rise in amounts awarded, there has been, in fact, an erosion of doctrine in tort law. Judges and legislators in the nineteenth century — especially in the first half of it — were very eager to encourage business growth.¹⁵ Their program included protecting young enterprise against lawsuits. Tort law was, therefore, uncommonly fertile in inventing new defenses against lawsuits. One of these was the fellow-servant rule (long since abolished). Others included assumption of risk, contributory negligence and charitable immunity.¹⁶ But probably the most important protective doctrine was the principle of fault. I refer here simply to the idea that a plaintiff could not win unless he proved some sort of “negligence” or “fault.”¹⁷ “Fault” sounds like a moral concept.¹⁸ But to my way of thinking, the shift in theories of liability had little or nothing to do with morals. Instead, it meant that recovery could not be automatic. To say that a business or individual would pay a victim for his injury only if defendant was “negligent” or “at fault” meant that recovery could not be automatic. The plaintiff had to meet some sort of burden of proof; he had to show that defendant’s behavior fell short of some standard. This gave plaintiff a difficult, expensive job. He could not simply wave his bloody wounds in front of judge and jury, show that defendant owned or controlled the instrument that injured plaintiff, and collect. Rather, he had to prove that defendant’s conduct fell short of the standard. The standard was itself shifting and problematic; but it was there.

Today, the fault principle is fading into history. The defenses, too, are vanishing: contributory negligence is a sinking ship; assumption of risk is dying. A new age of absolute liability is at hand. Products liability has expanded magically in the twentieth century. The main

15. See J. W. HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES* (1956).

16. See generally L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 409–27 (1973).

17. One of the set-pieces of legal history is the decline of absolute liability and the rise of negligence or fault. See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* 744–58 (1956).

18. “The early law asked simply, ‘Did the defendant do the physical act which damaged the plaintiff?’ The law of today, except in certain cases of public policy, asks the further question, ‘Was the act blameworthy?’ The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one’s peril.” Ames, *Law and Morals*, 22 *HARV. L. REV.* 97, 99 (1908).

steps on the road are well known.¹⁹ The extent of liability has gone far beyond anything dreamed of as recently as twenty years ago.²⁰

Again, something more general than expanded tort liability is afoot. One example may illustrate the point. In 1972, a fourteen-year-old girl sued her parents in a juvenile court in Minnesota.²¹ The family had three daughters and a lifetime dream. They owned a forty-foot boat, and on that boat they intended to cruise out through the Great Lakes into the big world. The girls would of course go along; mother and father would educate them "through an approved correspondence system." The date of the trip grew near. The father sold his business; the mother quit her job. They planned to be gone at least a year — maybe two, maybe three.

Lee Anne, the oldest daughter (fourteen), was the fly in the ointment. She had a new set of friends; they meant a lot to her. The idea of the trip was "anathema." She wanted to stay behind with her friends. Her parents, on the other hand, disapproved of her crowd. They worried about her behavior in general. They insisted she break off with her friends and come on the trip. The daughter refused, and brought the matter to the court. The judge heard both sides, and reached out for a compromise: Lee Anne would stay behind, but in the care of an aunt.

This case is, obviously, *very* unusual. How many girls of fourteen have the nerve or the skill to do what this girl did? Yet, doctrinally, the case broke no new ground. For a long time courts have had power to act in the best interests of the child. Again, the startling difference is more one of attitude than doctrine. It is hard to imagine a court hearing this complaint, under *any* theory, in 1850 or 1900 or even 1950. But in 1972, the court was at least willing to listen, even though what the girl wanted was both novel and farfetched. Other "freak" cases have been reported in the newspapers. A man sued (or threatened to sue) a young

19. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), is a landmark case.

20. See Note *Colorado Judge Refuses to Reduce Dalkon Shield Award*, 16 TRIAL at 10 (Aug. 1980) (jury awarded \$600,000 compensatory damages and \$6.2 million in punitive damages to plaintiff who became pregnant while using a defective contraceptive and suffered near fatal results).

The New York Times reported, on November 3, 1979, that a city jury awarded \$4,848,000 to a child in the Bronx, who suffered irreversible brain damage after a hospital incident. This was said to be the largest award for medical malpractice in New York State, and "among the highest in the country." N.Y. Times, Nov. 3, 1979, at 23, col. 1. Interestingly, the United States is far out in front of the British in the matter of tort awards. Recently, a widow won £187,000 in the London High Court for the death of her husband, a businessman. He died in a railway accident. This was said to be a "record," (at least for an action for wrongful death). *Daily Telegraph*, Oct. 17, 1979, at 11, col. 5.

21. *In re Lee Anne G.* (4th Dist. Juv. Div. Mn., Aug. 11, 1972). Michael Wald brought this case to the author's attention.

woman, for standing him up on a date.²² Still another man tried to sue his mother and father for malpractice in bringing him up.²³ This case to be sure was thrown out of court. But such a case is at least not unthinkable, as it would have been in times past. After all, we have medical malpractice, lawyer malpractice, teacher malpractice — why not parent malpractice? Medical malpractice cases themselves used to be rare.²⁴ Lawyer malpractice cases are on the rise.²⁵ Recently three teachers wrote a book to warn their colleagues how to avoid classroom malpractice.²⁶ Today it is possible to sue dentists, nurses, accountants, architects — anyone who can hurt the body or the pocketbook.²⁷ Perhaps no one is immune.

Let us go back to Lee Anne for a moment and watch the judge at work. The case, he found, was quite troublesome. A fourteen-year-old girl tries to upset her parents' plans: should a court really hear this kind of issue? On balance, his answer was yes: "Surely no American seeking protection of her real, or even her pretended rights, will be barred from at least posing her plea to the courts." (For "authority," he reached all the way back to the Magna Carta.) The judge continued: it would be wrong to deny "justice" to the girl merely because he could find no law which specifically gave a "right or remedy," or which defined her parents' authority. After all, the role of "equity" was "to work justice where there is no adequate remedy at law." Traditionally, equity has had "flexibility and expansiveness"; it must "meet the requirements of every case and satisfy the needs of a progressive social condition." Equity, then, gave him the right to frame a remedy for this case.

The little essay on equity was a distortion of history, of course. But that is beside the point. What is crucial is the judge's attitude. He

22. See Wash. Post, Aug. 18, 1980, at 1, col. 2.

23. See N.Y. Times, June 16, 1968, at 16, col. 2.

24. See U.S. DEPT OF HEALTH, EDUCATION, AND WELFARE, MEDICAL MALPRACTICE: REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE (1973).

25. See generally Schnidman & Salzler, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. CIN. L. REV. 541 (1976).

The rate at which clients were suing their attorneys doubled between 1972 and 1976. In addition, liability is expanding. In 1975 a judgment for \$26 million was entered against two attorneys who had represented Doris Day and her late husband. Wall St. J., Feb. 3, 1976, at 1, col. 1.

26. R. STRICKLAND, J. PHILLIPS & W. PHILLIPS, AVOIDING TEACHER MALPRACTICE (1976).

27. A recent report indicates that huge malpractice insurance premiums are now plaguing all sorts of professionals. "Lawyers, architects, real-estate agents, corporate officers and directors, and travel agents are among people whose malpractice premiums increased as much as 100% [between 1976 and 1978]." Wall St. J., June 9, 1978, at 36, col. 1.

reversed traditional attitudes. Not that judges in America were ever slaves to precedent. They always assumed the right to correct "mistakes" of the past. But judges in the nineteenth century felt in their bones the need to be wary of novelty. In the ordinary case, the past was an excellent guide. If a claim was novel, that was a strong (but not conclusive) argument against it. Over the years, this attitude has begun to show signs of serious decay. A new concept of courts and their roles is gaining ground among judges and among members of the public. It is hard to find a good name for this attitude. It is vague and half-formed, and hardly amounts to a "philosophy." The core idea is that courts will brush aside old limits and technicalities, and administer even-handed justice — full and complete justice between the parties, of whatever kind and with whatever remedy. The mandate of the courts should be as broad as the needs of the community. Old ideas about limits and restraints no longer serve. The courts are, or should be, full-service stations of justice.

This new role for the court, it seems to me, is clearly related to the vast expansion of tort liability. The nineteenth century judge felt that life could be rough and unfair. Accidents happened; sometimes a victim could collect *some* compensation, but there was certainly no reason to expect full recovery in every case. In a tort case in the late nineteenth century, one Margaret Spade, jostled on a train, suffered "severe nervous shock"; as a result, she said, she suffered physical and mental damage. She lost her case. The court said: "One cannot always look to others to make compensation for injuries received. Many accidents occur, the consequences of which the sufferer must bear alone."²⁸ Few courts today would express such an attitude. Rather, judges seem to assume that everybody *should* recover, and recover fully. Sometimes victims do fail, but their failure is considered a defect in the law. In *Reyes v. Wyeth Laboratories*,²⁹ one of the wilder cases of products liability, a little girl suffered a tragic accident — crippling polio from the very vaccine supposed to protect her from this terrible disease. There was, it seems, no way to make the vaccine absolutely safe. The company was as careful as humanly possible. One out of a million would get the disease; plaintiff was that one. The nineteenth century jurist would have called this bad luck and dismissed the case. But not the modern judge. The precise doctrines used to help plaintiff do not concern us here. What is interesting is what the judge said toward the end of the opinion. He cited a "policy factor": this kind of loss should not lie on the

28. *Spade v. Lynn & Boston R.R.*, 168 Mass. 285, 289, 47 N.E. 88, 89 (1897).

29. 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

victim, but on the manufacturer. It was a "foreseeable cost of doing business," and should be "passed on to the public in the form of price increases."³⁰ In other words, plaintiffs should get full compensation from *somewhere*; and the courts would see to it that this act of justice was done.

At this point, I will digress to bring in two other types of case. They seem, on the surface, to live in legal worlds far removed from our juvenile's novel case or from the law of torts. But I will argue that they have at least something in common, that they too are the products of a new legal climate. The first is the great constitutional case. The Supreme Court has always had its great cases, at least since *Marbury v. Madison*. Every law student knows the *Dred Scott Case*, and other noble or notorious examples. But the number and impact of constitutional cases has grown greatly over time. One hundred years ago, the United States Supreme Court still decided common law cases: an occasional will contest out of the District of Columbia, or a contract case from the territories, or appeals from simple diversity cases.³¹ Today the Court has almost total control of its docket. It hears only cases of importance, and federal questions of heavy moment. Every case the Court decides is worth at least a paragraph in the *New York Times*. Many make headlines. The unusual case has become normal for the court.

The Supreme Court is an exceptional court, of course; and even today not every case the Court decides presents constitutional issues. But beyond a doubt, constitutional litigation has "exploded." There is evidence of this explosion in the lower federal courts and in the high state courts as well.³² It is not far off the mark to say that an important new law becomes final, not when a President or governor signs it, but when it passes its test in court. This is also true of major moves by administrative agencies: if the Food and Drug Administration tries to ban some important product (or lift a ban), if oil leases are to be sold for offshore drilling, if there is a question of building a dam, or a jetport, or

30. *Id.* at 1294. The court supported its position with a quote from another products liability case, *Helene Curtis Industries, Inc. v. Pruitt*, 385 F.2d 841, 862 (5th Cir. 1967), *cert. denied*, 391 U.S. 913 (1968): "Until Americans have a comprehensive scheme of social insurance, courts must resolve by a balancing process the head-on collision between the need for adequate recovery and viable enterprises." 498 F.2d at 1294. In the *Pruitt* case, however, the manufacturer won out in the balancing contest.

31. See generally F. FRANKFURTER & J. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 302 (1928).

32. In state high courts over the past century there has been a tremendous increase in the number of criminal cases which turn on constitutional issues. See Kagan, Cartwright, Friedman, & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 STAN. L. REV. 121, 147-49 (1979).

of chopping down a grove of famous trees in a national forest, there is always the strong risk that some group or some person will attack the action in court. This is true on the federal, state and local levels. The last word belongs to the courts.

This is a great change in the way lawmaking works. It has been a long time coming, has built up slowly, but it seems to be gathering force. Obviously, the courts did not bring this change on by themselves. They seized an opportunity, nothing more. The real architect of judicial review is American society, the world outside the courtroom door. The courts are only tools, levers, instruments — used to advance social change, or retard it, as the case may be. The *doctrines* are sometimes almost irrelevant. How much the ferment in court depends on social change, how little on legal doctrine, stands out in high relief when we see old claims come suddenly to life, or when old wounds suddenly start bleeding. Take the upsurge of claims by Native Americans — claims for ancient fishing rights, for autonomy, or *reclaims* for whole empires stolen or wheedled away in the nineteenth century. The militance may be new, but the grievances are not, and there is now a sense (or a hope) that courts may set things right. Will a federal court give half of Maine back to the Indians?³³ Unlikely, but no longer impossible. In 1850 or 1900, Indian claims would be laughed out of court — not that the grounds were illogical, or the cause unjust, but simply . . . because.

Here too, in a sense, the sky is the limit. Judicial review has (apparently) run riot. Today no one would be very surprised if a federal judge ordered the government to give away billions of dollars or billions of acres. For a judge to stop some program dead in its tracks, or to tell a school board or prison what to do would be downright commonplace. Old doctrines of defense or restraint are no longer the barriers they were in the nineteenth century. Public law is traveling along a road very similar to the journey of tort law. Here too courts are becoming full-service stations of justice.³⁴

Is it farfetched to see a connection with still another kind of case, the monster private suit? The great antitrust suits are egregious examples. Some of these drag on for years. The costs are staggering; millions of dollars are spent on either side. Whole battalions of lawyers line up for both plaintiff and defendant. The antitrust bar gets rich off these cases. The amounts at stake make one's head swim. A complaint

33. Cf. *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me.), *aff'd*, 528 F.2d 370 (1st Cir. 1975).

34. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

asking for a million or two would be small potatoes. The treble damages allowed by the Sherman Act make it easy to run (alleged) damages up into hundreds of millions. Some plaintiffs have asked for a billion or more.

The Sherman Act was passed in 1890.³⁵ In essence, it was a criminal statute. It allowed private suits, in a rather off-hand way, and the treble damage clause gave plaintiffs extra incentive to sue. Even so, private antitrust suits were not common at first. By all accounts, there has been a big jump in the *number* of such lawsuits only in recent years.³⁶ Some of this is explained by developments in procedure (*e.g.*, class action suits);³⁷ some private lawsuits piggyback on government cases. But growth of these big private cases is not closely linked with trustbusting. Neither doctrinal change nor procedural change can account for the upsurge in these cases. They seem to be growing by themselves. Is it wrong to see in these cases a response to the new judicial culture? These are big, bold cases; and potential plaintiffs observe that some big, bold cases are successful. At least they recognize that the judges will listen to a novel complaint or to a case breathtaking in size. When judges give Maine to the Indians (or might), make school boards jump through hoops, tell governors where to get off, stop pipelines to save a herd of reindeer, they may not blink at cutting a giant corporation into pieces.

My point is this. Big antitrust cases, and big judicial review, help to explain why so many people think they see a litigation explosion. One monster case against Kodak eats up as much energy and time as thousands of uncontested divorces. A great constitutional case makes such an obvious splash in society, that it (presumably) colors attitudes about what courts do, and how much time is spent doing it. It just might be true that courts find it hard to cope with case loads, not because of sheer volume, but because a handful of cases have inordinate appetites.

Medical malpractice cases lend support to those who wring their hands and bemoan the law explosion. People seem to want to sue their doctors at the drop of a forceps. The judges are equally at fault. Malpractice cases might disappear if plaintiffs consistently lost. The same is true of the other classes of cases. The courts, in short, invite

35. Act of July 2, 1890, ch. 647, 26 Stat. 209 (current version at 15 U.S.C. §§1-7 (1976)).

36. Between 1937 and 1954 an *average* of about 100 such cases were filed in federal court each year. In 1974, 1,162 cases were filed — over 10 times as many. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 34 (1976). In 1978 there were 1,507 antitrust cases filed, and in 1979, 1,312. 1979 ADMIN. OFF. U.S. CTS. ANN. REP. 62.

37. This too can be questioned. See Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* HARV. L. REV. 664, 672 (1979).

litigation. Enough plaintiffs win to encourage others. Plaintiffs, lawyers and judges are caught up in a single current of social change.

How do we explain these massive and surprising developments? One way to approach the question is to turn it around. What kept courts so modest in the first place? Why do we assume that modesty and restraint are "natural" for courts? If we put the question this way, the answer seems obvious: neither restraint nor activism are "natural" or "inherent" in courts. They are matters of custom and tradition. To be sure, western legal thought is most comfortable with the idea of judicial restraint. There is an old, satisfying theory that judges do not and should not make policy; they merely find and declare what is law. They are bound by precedent and principle. The will and word of the legislature governs or should govern their behavior. The theory of limits on judges is particularly strong in civil law countries.³⁸ American activism may be unique in its boldness. But even in this country most judges, especially state judges, hold old-fashioned ideas about the proper distribution of power between judges and other branches of government. Still, whether they know it or not, and whether they admit it or not, the role of judges is indeed changing. The sense of limits on judicial policy-making has always been subtle, hard to capture in words, hard to pin down to a text. Ultimately, it depends, at least in part, on the idea of a sharp separation between two spheres of action and thought, one "legal" and one "non-legal." Rules of policy and morality are part of the non-legal realm; they are somehow *different* from rules of law. Yet many societies make no such separation, and the tendency today is to bring the two spheres much closer together. Some judges are no longer content to confine themselves to "law." They do not accept the argument that what is sound in policy and morality is beyond the scope of "law." In fact, if not in theory, even judges who say that "policy is for the legislature," would be most uncomfortable to reach a result that they thought immoral or bad policy (but good "law"). Deep down, they probably feel that law *must* be good for society, that it *must* be moral and just. In the process, the line between "law" and "not-law" gets more and more blurred. This change in judicial culture comes out clearly in opinions such as the one in Lee Anne's case.

In a way, it is no surprise to find the fence between law and not-law collapsing. After all, in the past century there has been a real "explosion" in the growth of the state. Today hardly any area of life, or of human affairs, is beyond the long arm of government. Since this is so,

38. See J. MERRYMAN, *THE CIVIL LAW TRADITION* 87 (1969).

why should any area of life, or of human affairs, be beyond the reach of the judges? Judges, after all, are part of the system that keeps the state under control. The more the state does, the more these controls are needed. Courts are one of the few agencies that offer up some hope of redressing grievances. Of course, they are too expensive and formal for small claims (no one denies that); but, they are well suited for group claims, class actions, big cases.³⁹ And we need a place for big cases. Society itself is big: cities are big, industry is big, institutions are big, technology is big, government is big. America is big too, in the fundamental sense of being a huge land-mass, and its population shifts and flows about like so many migratory birds.

A society of the kind we now live in is profoundly interdependent; people depend on each other to an extreme degree. But the "others" they depend on are usually total strangers. Dependence is nothing new, but in small societies the links in the chain of dependence are made up of kinfolk by marriage or blood. Today, in our society, the links in the chain are strangers. People work for big companies; they buy ready-made food and clothing (produced by other big companies); strangers protect them on the streets or put out their fires; strangers teach their children. Our lives are controlled by unseen nerve centers that are physically and socially remote. People learn about the world not by word of mouth, but through newspapers, television and radio. The pilots of our planes — who carry our lives in their hands — are strangers that we never see face to face.

By now we are used to an environment of strangers. We are even used to the idea that strangers may intrude on the most intimate corners of life. In the old days, a doctor — at least so goes the romance — was a trusted friend, almost a member of the family. But now the situation is profoundly different. We may have a regular doctor, but most health professionals we use are strangers or virtual strangers — pathologists, technicians, "specialists."⁴⁰ Generally speaking, even family relationships, even matters of love and sex, are not immune to science and the state, to the advice and control of experts. When a marriage gets frayed, or when children are in trouble, social workers, doctors, psychiatrists, juvenile officials, marriage counselors may all play a role. Sometimes people consult professionals because they want to; sometimes they are forced to. In either case, a technical, impersonal

39. See Chayes, *supra* note 34.

40. "[T]he fragmentation of care leads to an erosion of the relationships between doctors and patients and the quality of communication and trust." Mechanic, *Some Social Aspects of the Medical Malpractice Dilemma*, 1975 DUKE L.J. 1179, 1183. The patient feels less loyalty and commitment to a physician. The patient, then, is more likely to consider litigation when things go wrong.

world has invaded even this bastion of the personal, the private. Hence, why should any realm be too intimate or personal for law, including court law, to deal with? If "custom" is the word for norms that regulate face-to-face relations, then "law" is the word for norms about the relation between strangers. When customary norms break down, society turns to law — turns to formal, structured ways to govern itself and its people.

This is not the place to discuss whether the vast changes in legal culture over past generations are good or bad. Of course, many people look at these changes and deplore them. Many see activism as a curse, and feel that courts have run wild. A slight reaction has set in: against class action suits, against extremes in litigation. The Chief Justice and others talk about solving the crisis, about saving the courts. I doubt that much will come of this. There is no way to turn back the clock, no way to put "Humpty Dumpty" together again. Besides, is the new legal culture something to be stamped out? Is it even something to control or deplore? I have my doubts. There is a certain inevitability about the process — a certain sense that it *has* to be.

Of course, in a sense, nothing really *has* to be, at least not in any particular form. We live in that kind of society which must be governed by and through law. There is no way to make the "law flood" recede. But law does not mean, necessarily, court-law, or litigation; and it certainly does not mean that disputes must go to a certain kind of court, with judges who wear robes, have a degree in "law" from a law school and are heirs to a very special, very specific legal tradition. Nor does the necessity of "law" mean that reform is impossible. The law of products liability, for instance, is a terrible waste. A few "lucky" plaintiffs collect a lot of money (if one can call such victims "lucky"). Many collect nothing, or far too little. Lawyers and insurance companies skim off millions of dollars that might have gone to victims. Treble damage suits (to take another case) are an awfully odd way to run antitrust policy. Malpractice law is hardly the ideal mode of forcing doctors to be careful. Tiny fish hold up mighty dams — and years drag on before either side wins. And so it goes; all so inefficient. Can nothing be done?

Almost certainly, something can be done. Procedures can perhaps be tightened. The legal process can perhaps be speeded up. And, as more and more people agree, there ought to be new and better forms of tribunals. In any event, litigation is bound to change its patterns over the years. Old types of cases have disappeared (or almost so) from the courtroom. Sometimes this is because the problem itself has faded away. More often, society has found a better way to deal with the matter. The classic example is the industrial accident. This was an extremely common type of personal injury case in the late nineteenth century. It

had more or less the same place on court dockets that automobile accidents have today. The law on the subject was dense, complex. Most victims got nothing; a few collected what was, in those days, a large amount of money. Millions of dollars flowed into the pockets of lawyers, insurance companies and claims adjusters. The situation satisfied no one — not capital, not labor. In the early twentieth century, the states, one by one, passed statutes setting up a new system, workmen's compensation. This system drove industrial accident cases almost completely out of court. Most claims were settled routinely. Administrative boards took care of contested cases. Only a tiny, tiny number went to court.

In any field with a host of contested lawsuits, the litigants, as a class, will pay and pay. Lawyers do not work for nothing. There are court costs and additional out-of-pocket expenses. Insurance is also expensive. There are other costs too — costs in time and energy. People have to take time off to talk to lawyers, make depositions and appear in court. There is also the paralyzing uncertainty of trial. What all of this amounts to is anybody's guess. Probably less than half of every insurance dollar goes to pay victims of accidents; administrative expenses and litigation costs eat up the rest. The big awards shrink considerably when we consider what the lawyers take (typically, a third). And all this only takes raw dollar costs into account. No doubt about it: lawsuits are terribly inefficient.

The "solution" to the problem of litigation lies in the very wastefulness of the process. Workmen's compensation laws are examples of this at work. The old tort system had no formal limits on recovery. In theory, a plaintiff could recover millions of dollars. In practice, recoveries were (by present standards) small; social custom kept them in rein. But the awards seemed like a lot of money to the companies; they were paying through the nose for lawyers and insurance. The plaintiffs were paying too, in the aggregate. Social justice and industrial peace were heavy losers. Under the new plan (workmen's compensation) everyone, or almost everyone, recovered; but the law put a cap on *amounts*. This made it possible to figure the cost of accidents actuarially and to insure against them more efficiently. The greedy middlemen could be driven out of the system. Money paid out went where it belonged: to injured workmen and their families.⁴¹

Another big breeder of cases, divorce, is now disappearing from the courts, in all but name. The no-fault laws have drastically cut the time, the expense and the bother of divorce. Neither husbands nor wives had

41. See generally Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

anything to gain from the costs of divorce. Outside pressures — religious pressures, social pressures — kept the old system going. The point was to make divorce noxious, expensive and slow. But these ancient biases have broken down. In the process, divorce has become cheaper, more routine. It is now possible to get rid of the middlemen, at least for the simple consensual divorce. Still, for the time being, divorces are funneled through court; the remaining amounts of supervision and ceremony, no doubt, reflect official concern about family stability.

Attempts to bring order to medical malpractice law show that reform urges have not burned themselves out. Most states now have laws to encourage settlements in malpractice cases and to screen out cases that have no hope of success.⁴² Other problem areas are harder to deal with. It is hard to think of a way to "solve" big constitutional issues outside of court. Nor, for the moment, do we have a clear idea of what (if anything) to do about antitrust cases or products liability litigation. Simply to get rid of some class of cases — to choke off causes of action — will not do. The history of workmen's compensation suggests that solutions must involve some give and take. It is not always easy to see who gives and who takes and what is transferred in the process. Some fields of law invoke deep wells of "principle"; this makes compromise difficult. The major types of lawsuit survive for definite reasons. Each embodies some sort of social expectation; in each case, there is no specialized agency able or willing to handle the problem, no adequate social solution, no legitimate and satisfying social compromise. Hence, society cannot take the matter out of the courts, and put it in some safe, snug harbor. In other words, for now we have to muddle through with a rough brand of justice.

My point, then, comes down to this: the "crisis" in the courts is partly real, partly unreal. What is real about it stems from social causes. These causes lie deep in society — much deeper than the court system itself, which is a kind of thin skin over the flesh and nerves of the system. Too many jurists have focused their attention on the woes of judges and courts, as if the problem were there. But it is not. Court congestion and delay are at worst symptoms of a problem. And indeed, we may be misreading the signs. The "crisis" of courts may be a sign of a sort of success. Sometimes, when nothing else seems to work, the law machine does: its body, a battered wreck, is eaten by rust; its motor coughs and sputters, its frame is patched with spit, gum, and string. Yet it still creaks slowly forward.

42. See generally Abraham, *Medical Malpractice Reform: A Preliminary Analysis*, 36 MD. L. REV. 489 (1977).

