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Articles

THE DAY AFTER THE LITIGATION EXPLOSION

MARC GALANTER*

Few Americans in the early months of 1986 could disagree with the observation of Senator McConnell that:

Hardly a day goes by that we do not hear or read of the dramatic increase in the number of lawsuits filed, of the latest multimillion dollar verdict, or of another small business, child care center, or municipal corporation that has had its insurance cancelled out from under it.¹

The reason for higher insurance rates and crowded courthouses, he continued, is "quite simply, everyone is suing everyone, and most are getting big money." Americans have developed a "mad romance . . . with the civil litigation process."² Two days later, introducing the Litigation Abuse Reform Act of 1986, he noted that "we are all suffering a progressively debilitating disease—the disease of hyperlexis, too much litigation."³

This diagnosis is widely shared. Columnist Jack Anderson tells us that:

Across the country, people are suing one another with abandon; courts are clogged with litigation; lawyers are burdening the populace with legal bills.

. . . .

This massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation.⁴

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1. 132 CONG. REC. S948 (daily ed. Feb. 4, 1986) (statement made on previous day).

2. *Id.*

3. *Id.* at S1009 (daily ed. Feb. 5, 1986).

4. Anderson, *U.S. Has Become a Nation of Lawsuits*, Wash. Post, Jan. 25, 1985, at B8, col. 5.

USA Today reports that:

Everybody in the USA suddenly seems to want to sue anybody with liability insurance coverage. The explosion of litigation has choked court dockets. And too-few lawyers tell potential clients that some cases are a waste of time.

. . . .

The greed has turned the temple of justice, long a hallowed place, into a pigsty. The time has come to clean it up.⁵

The AETna insurance company tells us that "America's civil liability system has gone berserk . . . [It] is no longer fair. It's no longer efficient. And it's no longer predictable."⁶ The Chairman of the Board of the National Association of Manufacturers provides a vivid account of the crisis:

Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business. *Literally*. The number of product liability suits and the size of jury awards are soaring. Filings of personal injury cases in federal courts have jumped 600% in the past decade.⁷ Product liability suits filed in federal courts doubled from 1978 to 1985.⁸

In 1974, the average product liability jury award was \$345,000. Last year it averaged more than \$1 million.

. . . .

Product liability suits have brought a blood bath for U.S. businesses and are distorting our traditional values. We're now the most litigious country on earth—one of every fifteen Americans filed a private civil suit last year. The judicial system is so clogged with cases, delays, continuances, appeals and legal shenanigans that it's slugging its way through a perpetual traffic jam.⁹

These are only a few voices in a mounting chorus of condemnation and concern about litigious America. For almost a decade now, there has been increasing concern about the excessive legalization of American society. Many observers are convinced that America has suffered a hypertrophy of its legal institutions—manifested in

5. *Hold Down Awards to Ease the Crisis*, USA Today, June 6, 1986, at 12A, col. 1.

6. AETna advertisement, Wall St. J., Apr. 8, 1986, at 9, col. 1.

7. Sic! See *infra* p. 16, Table 2.

8. This figure is too low. See *infra* p. 23, Table 3.

9. Dee, *Blood Bath*, 10 ENTERPRISE 3 (Mar./Apr. 1986).

the presence of too much law, too many lawyers, excessive expenditure on legal services, too much litigation, an obsessively contentious population enthralled with adversary combat, and an intrusive activist judiciary—and a concomitant erosion of community, decline of self-reliance, and atrophy of informal self-regulatory mechanisms.

It has become a commonplace that the United States is the most litigious nation on earth, indeed in human history, and that excessive resort to law marks America's moral decline and portends painful political and economic consequences. A phalanx of mournful and indignant commentators concur that America is in the throes of a litigation crisis requiring urgent attention from policymakers.¹⁰

I would like to examine several aspects of the current discourse about litigation: the assumption that Americans are excessively litigious; the belief that this is displayed in skyrocketing court caseloads; and the tendency to see the costs but not the benefits of litigation.

I. THE MEANING OF HIGHER CASELOADS

The core observation that supports the "litigation explosion" or "hyperlexis" reading of contemporary American life is that there is more litigation—that is, that more cases are filed in American courts. Let me begin with some reflections on the meaning of this higher level of bringing cases.

Per capita rates of filing civil cases have risen in most localities during recent decades.¹¹ Before these increases are taken as proof of runaway litigiousness, it should be noted that these rates are not historically unprecedented. Several studies document higher per capita rates of civil litigation in nineteenth and early twentieth century America, as well as in colonial times.¹²

10. Earlier manifestations of this view are cited extensively in Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) [hereinafter *Reading the Landscape*]; and Galanter, *The Legal Malaise; or, Justice Observed*, 19 LAW & SOC'Y REV. 537 (1985) [hereinafter *Legal Malaise*]. Citations here are confined to the most recent layers of this burgeoning literature.

11. *Reading the Landscape*, *supra* note 10, at 40. Rates per capita are only a surrogate measure for the propensity to litigate. Presumably such a propensity depends on the portion of occasions—troubles, injuries, problems, claims or however one characterizes instances of possible litigation—that do lead to filings. Population is only a crude measure of such occasions. Cases are filed in only a portion of all troubles and disputes. Since there is no longitudinal data about the lower layers of the disputing pyramid, of which litigation forms the apex, we cannot compute changes in the rate at which troubles become disputes or disputes become lawsuits.

12. McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 LAW &

More than 98% of all civil cases are filed in the state courts. Hence, any major rise in the propensity to litigate should be detectable by inspecting caseload trends in the state courts. But until recently, comprehensive and reliable data on state court caseload trends have simply been unavailable.¹³ Through the efforts of the National Center for State Courts (NCSC), we have recently acquired the best data yet on state caseload trends, covering a number of states for the years 1978 to 1984.¹⁴ The litigation explosion view would lead us to expect this to be a period of steeply rising caseloads. But the NCSC data, summarized in Table 1, based on all courts that reported comparable data for the years 1978, 1981, and 1984, portrays nothing that resembles the assumed explosion. Filings of civil cases surged faster than population from 1978 to 1981, but from 1981 to 1984, when litigation explosion lore would lead us to expect an intensification of litigiousness, per capita rates of filing actually declined. During this period, filings in small claims courts—the courts most readily accessible to ordinary Americans—also fell. Tort filings rose steadily, but over the six-year period they grew by 9% while population grew by 8%. In the 1981-84 period, in only five of seventeen courts for which there was tort data did filings increase significantly more than the population, while in eight of these courts, tort filings actually decreased.¹⁵

Soc'y REV. 823 (1980-81) [hereinafter *150 Years*]; M. SELVIN & P. EBENER, *MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT* 32-34 (1984). Cf. *Reading the Landscape*, *supra* note 10, at 40. Even higher rates of court use in colonial America are documented in D. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692* (1979) and in Curtis, *The Colonial Country Court, Social Forum and Legislative Precedent, Accomack County, Virginia, 1633-1639*, 85 VA. MAG. HIST. & BIOGRAPHY 274 (1977). In assessing litigation rates, it should be recalled that the 1930s and 1940s, which form our baseline of expectations, were a historic low point. Seacat, *The Problem of Decreasing Litigation*, 8 U. KAN. CITY L. REV. 135 (1940).

13. NAT'L CENTER FOR ST. CTS. & CONF. OF ST. CT. ADM'RS., *STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART* ch. 2 (1978).

14. NAT'L CENTER FOR ST. CTS., *ST. CT. CASELOAD STATISTICS: ANN. REP. 1984*, pt. 2 (Ct. Statistics & Info. Mgmt. Project, 1986) [hereinafter *NCSC REPORT 1984*].

15. *Id.* at 182-84.

TABLE 1¹⁶
 PERCENTAGE CHANGES IN STATE COURT FILINGS COMPARED TO
 POPULATION CHANGES

TYPE OF CASES	3 Year Period 1978 to 1981 Population /Filings	3 Year Period 1981 to 1984 Population /Filings	6 Year Period 1978 to 1984 Population /Filings	BASE [Number of courts* reporting comparable data for all 3 years]
TOTAL OF TORTS, CONTRACTS, REAL PROPERTY	+3% +14%	+3% - 4%	+5% + 9%	29 courts in 20 states
TORTS	+4% + 2%	+4% + 7%	+8% + 9%	17 courts in 13 states
CONTRACTS	+5% +14%	+4% -15%	+9% - 4%	11 courts in 10 states
SMALL CLAIMS	+2% +18%	+2% - 6%	+4% +11%	29 courts in 25 states

* In this context a "court" means all the courts of a particular stratum throughout the state—e.g., the Superior Court of California.

This evidence of current American litigation rates does not suggest that rates of civil court filings are dramatically higher than in the recent past. Nor is it the case that American rates are unmatched in other industrial countries. Although many countries have much lower rates of litigation, per capita use of the courts appears to be in the same range as in America in Canada, Australia, New Zealand, England, Denmark, and Israel.¹⁷

Filings are not an entirely satisfying measure of litigiousness. Since it is plaintiffs who file, we tend to think of filing as measuring plaintiff propensity to sue. But we know that most disputes are resolved without a filing.¹⁸ A filing represents not only a claim but a refusal by the defendant to satisfy it. Thus, we must be open to the notion that changes in the rate of filing may represent not only changes in plaintiff propensity to claim, but also changes in defendant propensity to resist. Or it may be that changes in filing mark changes in the local legal culture—for example, not entering serious negotiations until a case has been filed—so that we have no assur-

16. Source of data: NCSC REPORT 1984, *supra* note 14, at 177, 181, 184, 186.

17. *Reading the Landscape*, *supra* note 10, at 53. The infirmities of the data and the treacherous nature of such comparisons are discussed there. Data on Israel may be found in CENTRAL BUREAU OF STATISTICS (ISRAEL), JUDICIAL STATISTICS 1984 (1985).

18. Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1981).

ance that a filing represents the same stage of a dispute from one place or one time to another.¹⁹

The notion that Americans have an unappeasable appetite to pursue legal remedies runs counter to many stable features of our legal life. If there were a generalized litigation fever, loosening the restraints that inhibit the making of claims, we would expect to find that the increase was general—that the rate for all types of cases moved in the same direction. But as we see, some kinds of cases are increasing while others are decreasing. The world of litigation is composed of sub-populations of cases that seem to respond to specific conditions rather than to global changes in climate.

The rate of settlements remains high. The great majority of civil cases are settled. The portion of cases that run the whole course of possible contest has continued a long historical decline. In the federal courts, cases reaching trial²⁰ have fallen from 15.2% of terminations in 1940 to 5.0% of terminations in 1985.²¹ In state courts, too, a smaller portion of cases is decided by full contest than in past.²²

Wary of risks, delays, and costs, litigants do not act as if propelled by an unappeasable appetite for contest or public vindica-

19. See H. JACOB, *DEBTORS IN COURT: THE CONSUMPTION OF GOVERNMENT SERVICES* (1969); Fitzgerald, *Grievances, Disputes and Outcomes: A Comparison of Australia and the United States*, 1 *LAW IN CONTEXT* 15 (1983).

20. It should be noted that this is a measure of cases that begin trial, not of completed trials. Many cases are settled after trial has begun. For example, in a study of insurance claims arising from automobile accidents, 23% of cases that reached trial settled during trial. H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* 216 (2d ed. 1980).

21. Figures on 1940 to 1980 are from *Reading the Landscape*, *supra* note 10, at 44; the 1985 figure is from *DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1985 ANNUAL REPORT* 178 (1986). The Annual Report for a named year presents figures for the 12 month period ending on June 30 of the named year. Hereinafter these reports will be cited as [year of report] ANNUAL REPORT[S].

22. Daniels, *Continuity and Change in Patterns of Case Handling: A Case Study of Two Rural Counties*, 19 *LAW & SOC'Y REV.* 381, 400-01 (1985); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *LAW & SOC'Y REV.* 267, 288, 296 (1976); McIntosh, *150 Years*, *supra* note 12, at 838-40; M. HINDUS, T. HAMMETT & B. HOBSON, *THE FILES OF THE MASSACHUSETTS SUPERIOR COURT, 1859-1959: AN ANALYSIS AND A PLAN FOR ACTION* 147 (1979). In an unpublished study of state civil courts of general jurisdiction in 6 cities, the late Craig Wanner found that the rate of completed trials or hearings per 1000 of population fell from 12.2 in 1951 to 10.2 in 1981. C. Wanner, *The Public Ordering of Private Relations: 30 Years of Litigation in the United States*, ch. 6, Table 1. Also noteworthy is the decline in the number of jury trials from the early 1960s to 1980—a period of increased filings and larger jury awards. M. SHANLEY & M. PETERSON, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980*, at 19-20 (1983).

tion.²³ For plaintiffs²⁴ and defendants²⁵ alike, litigation proves a miserable, disruptive, painful experience. Few litigants have a good time or bask in the esteem of their fellows²⁶—indeed, they may be stigmatized.²⁷ Even those who prevail may find the process very costly.²⁸ (Which is not, of course, to say that litigants are necessarily

23. Nor is there much evidence to suggest that more than a tiny minority of claimants correspond to that figure of folklore, the schemer who wants to turn a trivial injury into a bonanza. *But cf. Hold Down Awards To Ease The Crisis, supra* note 5 (which describes "litigants with minimal complaints, hoping for huge judgments for pain and suffering [who] are too willing to pay enormous contingency fees to lawyers who routinely shoot craps with the justice system").

24. *See, e.g.,* G. LANOUE & B. LEE, *LAWSUITS AND LITIGANTS: THE IMPACT OF ACADEMIC DISCRIMINATION CASES ON THE PARTIES AND THEIR INSTITUTIONS* (forthcoming); Crowe, *Complainant Reactions to the Massachusetts Commission Against Discrimination*, 12 *LAW & SOC'Y REV.* 217 (1978); Naftulin, *The Psychological Effects of Litigation on the Industrially Injured Patient: A Research Plea*, 39(4) *INDUS. MED.* 26 (Apr. 1970). These assessments are paralleled by biographical accounts of individual plaintiffs: R. DANZIG, *THE CAPABILITY PROBLEM IN CONTRACT LAW* ch. 1 (1978); E.B. GOODMAN, *ALL THE JUSTICE I COULD AFFORD* 104, 132, 210, 259 (1983).

25. *See, e.g.,* Charles, Wilber & Kennedy, *Physicians' Self-Reports of Reactions to Malpractice Litigation*, 141 *AM. J. OF PSYCHIATRY* 563 (1984). Also see the following biographical accounts of individual defendants: E. ASINOF, *BLEEDING BETWEEN THE LINES* (1979); S. CHARLES & E. KENNEDY, *DEFENDANT: A PSYCHIATRIST ON TRIAL FOR MEDICAL MALPRACTICE* (1985); Eisenberg, *A Doctor on Trial*, *N.Y. Times*, July 20, 1986, § 6 (Magazine), at 26.

26. Few Americans engage in litigation as a sport, as do the Lipay described by Frake, *quoted in* Nader, *The Anthropological Study of Law*, 67(6) *AM. ANTHROPOLOGIST*, 1, 21 (1965). Nor is participation in litigation regarded as a mark of estimable personal skills—as it is among the Saga, *see* L. FALLERS, *LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COURTS OF COLONIAL BUSOGA* (1969); the Barotse, *see* M. GLUCKMAN, *THE JUDICIAL PROCESS AMONG THE BAROTSE OF NORTHERN RHODESIA* (1955); the Arusha, *see* F. Dubow, *Explaining Litigation Rates in Rural and Urban Tanzania* (paper presented at the Annual Meeting of the Law and Society Association, June 2-5, 1983); and the Nandiwallas, *see* R. Hayden, "No One is Stronger than the Caste"—Arguing Dispute Cases in an Indian Caste Panchayat (Ph.D. dissertation, State University of New York at Buffalo, 1981).

27. The plaintiff in a plagiarism suit reports:

No sooner had the lawsuit been filed than stories appeared, little items in the trade press—"disgruntled author suing." And little jokes were heard about Levin and his lawsuits . . . I was a troublemaker, always in the courts—"But I never before brought a lawsuit in my life! . . ." More jokes. And then there came a certain word. Levin was litigious. The word seemed to be echoing all around me. I was litigious by nature, a constant troublemaker.

M. LEVIN, *THE OBSESSION* 145 (1973).

28. For example, the firefighter who quit her job after winning a discrimination complaint (she had been forbidden to breastfeed her infant during free time on duty) explained: "Ever since my suit I was fair game . . . I was the brunt of all their hostilities." *Battle Won, War?* *N.Y. Times*, May 18, 1980, at E7, col. 3.

The victor in one of the classic church-state cases observed that:

Vindication by the highest court in the land did not make the McCollums heroes at home. It did not mean that we could quietly assume our former way of life and status in the community. We will never be forgiven nor accepted by

worse off than if they hadn't litigated.²⁹⁾

A humble example will show the mythic character of the litigation mania. The greatest single source of the bulge in filings is the increase in divorce (and post-divorce) proceedings. "[D]omestic relations cases dominate state court dockets."³⁰ All of us know many of the parties in these cases. Few of us, I suspect, know many people who filed for divorce because they were enamored of litigation or beguiled by lawyers. What attracts users is not, I think, the desire to use the legal system but the hope for a solution to what they consider an otherwise intractable problem.

For other groups of law users, too, using the courts appears the best of unpleasant alternatives. In a study of disputing in three neighborhoods of a New England city, Sally Merry and Susan Silbey conclude that their respondents

those who fought and spoke against us; and many others are still fearful of appearing too friendly.

[My husband's] career suffered. True, he could remain on the faculty; but his bargaining power for position, rank, and salary were gone. Institutions, we discovered, do not go out of their way to solicit for employment a professor whose name is associated so prominently with a religious issue. As dissenters, we were lucky to be able to stay where we were, let alone expect to find advancement elsewhere.

V. C. MCCOLLUM, *ONE WOMAN'S FIGHT* 195 (rev. ed. 1961).

A generation later, the black attorney who successfully challenged Alabama's law mandating a moment of silence in public schools reflected:

"Had I known what I was going to go through, I would not have filed the case solely because of the effects on my children They resent the fact that I brought the case. They received criticism at school My own children call it a stupid case.

In the black community, I'm sort of looked down upon That's the lasting effect. I've lost credibility in the black community."

Victor in Alabama Prayer Case Resented and Isolated, L.A. Times, June 5, 1985, at A12, col. 4 (quotation reordered).

29. In a follow up study of the litigants in the Buffalo Creek disaster,

Evidence . . . that the litigation was not prolonging their suffering, was obtained by a comparison of their responses . . . with those of a small group of nonlitigants. This comparison indicated that nonlitigants, if anything, were suffering more symptomatology than litigants. Certainly there was no evidence to suggest that the lawsuit was causing a prolongation of the psychic distress experienced by the survivors.

G. GLESER, B. GREEN & C. WINGET, *PROLONGED PSYCHOSOCIAL EFFECTS OF DISASTER: A STUDY OF BUFFALO CREEK* 140 (1981).

30. COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* 38, 166 (1984). This is based on a survey of courts of general jurisdiction in eight states in 1976. In all but one state domestic relations cases made up more than 50% of the total caseload. In California the portion was 38.5%.

Of all the common types of disputes studied in the Civil Litigation Research Project, post-divorce disputes were most likely to end up in court. Miller & Sarat, *supra* note 18, at 537.

seek to avoid court for a variety of reasons from fear of antagonizing the people they live with every day to the loss of control that court entails. When people do bring interpersonal disputes to court, they tend to be complex, intense, and involuted problems in which the moral values at stake appear sufficiently important to outweigh the condemnation of this behavior.

[F]or all respondents, turning to court and police with problems is a last resort to be used only if "the problems are very serious," "it can't be avoided," "it is absolutely necessary," and "you have tried everything else."³¹

Why do the nonlitigious sue? In his famous June 1978 commencement address at Harvard, Alexander Solzhenitsyn expressed his misgivings about various features of Western society, including its tendency to assert legal rights to solve every conflict:

A society based on the letter of the law and never reaching any higher fails to take advantage of the full range of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relationships, this creates an atmosphere of spiritual mediocrity that paralyzes man's noblest impulses.³²

A group of admirers who sought to assemble a volume of commentary "to place Solzhenitsyn's ideas in historical, political, and philosophical perspective" found the author unwilling to allow the speech to be reprinted:

Thinking that we were forbidden to use only the published version of the address, we then had a new translation made This process of seeking permission and producing a new translation consumed the better part of a year.

Finally, in January 1980, the book was ready to go to press. We sent page proofs to Solzhenitsyn and invited him and his wife to come to Washington at our expense to attend a press lunch launching the book. The reply was a phone call and a follow up telegram from Harper & Row asserting that our publication of the address in any translation would be considered a violation of the author's copyright and theirs. We then tried, both directly . . . and

31. Merry & Silbey, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 172-73 (1985).

32. SOLZHENITSYN AT HARVARD: THE ADDRESS, TWELVE EARLY RESPONSES, AND SIX LATER REFLECTIONS 8 (R. Berman ed. 1980) [hereinafter SOLZHENITSYN AT HARVARD].

through intermediaries, to get Solzhenitsyn to relent. He would not.

On April 30 of this year a legal complaint was filed on our behalf in the U.S. District Court for the District of Columbia, asking that Solzhenitsyn and Harper & Row be prohibited from charging us with copyright infringement if we published the address in our book. The complaint alleged that the threats of copyright infringement against us violated our First Amendment rights and the "fair use" provisions of the copyright law. A week later Harper & Row notified our lawyers that we had been granted permission to reprint the Harper & Row version of the speech. Our complaint was withdrawn³³

We need not imagine that Solzhenitsyn abandoned his scorn of Western legalism to understand the attraction of the threat to sue as a way of controlling the unwelcome attentions of this band of strangers. The admirers, too, were presumably sympathetic with his views. But, having made a major investment and finding themselves stymied, and having pursued other avenues of relief and finding none that supplied any leverage over the recalcitrant author, they found filing suit an available and viable way to solve the problem. The result is an example of the classic pattern of American litigation: the filing created a setting for serious negotiations between the parties; positions were assessed "in the [s]hadow of the [l]aw,"³⁴ including, I surmise, the shadow of the costs and risks of the proceeding;³⁵ concessions were made; and, as in most American litigation, the process was attenuated by a settlement without any direct official input.

Those who are distressed at America's excessive litigiousness often gaze longingly at Japan, which is thought to have remained uncorrupted by excessive legalism. The Japanese, the story goes, have few lawyers, avoid conflict, disdain legalism, and resolve disputes by conciliation.³⁶ Late last year the *Reader's Digest* decided to

33. LeFever, *Foreword to SOLZHENITSYN AT HARVARD*, *supra* note 32, at viii-ix.

34. That is, by anticipation of what courts might do. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950 (1979).

35. Galanter, *Justice in Many Rooms*, 19 *J. OF LEGAL PLURALISM* 1 (1981) [hereinafter *Justice in Many Rooms*].

36. Japan plays a central role in litigation explosion mythology as a benign black hole of anti-litigiousness. The reality is less enchanting. The deliberate limitation of institutional capacity to provide adjudication is documented in Haley, *The Myth of the Reluctant Litigant*, 4 *J. OF JAPANESE STUDIES* 359 (1978); and Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions*, 8 *J. OF JAPANESE STUDIES* 265 (1982).

The alleged paucity of lawyers in Japan also fails to withstand examination. Twelve

terminate its Japanese edition.

On Dec. 17, the union [representing *Reader's Digest's* Japanese employees] appealed to the Tokyo District Court to seize movable assets such as furniture as security for retirement payments owed to union members; the court executed the order the next day. The union has also filed complaints with Japan's Ministries of Labor, Finance, Foreign Affairs, and International Trade and Industry. It is preparing a lawsuit charging the company with violations of its employees' civil rights, and plans to extend its suit to the parent company in the United States. It has also appealed to the Tokyo labor relations committee to intervene, charging *Reader's Digest* with attempting to destroy the union³⁷

What, we may ask, makes the unlitigious Japanese so eager to sue? Dispute resolution theory suggests a number of reasons why recourse to litigation might be expected. First, the stakes for the workers are extremely high—their very livelihood—and we know that even those disinclined to use courts will do so if vital and irreplaceable resources such as land, power, or reputation are threatened.³⁸ Second, there is nothing to lose. Since *Reader's Digest* is leaving, there is no continuing relationship to be threatened. And, as important, there is no continuing relationship to serve as a

thousand—often cited as the number of lawyers in Japan—is the number of *bengoshi* certified to act as advocates in court. But there are a number of other law occupations in Japan: in-house legal advisors, judicial scribes, administrative scribes, patent attorneys, tax attorneys, and so forth. An American lawyer working in Japan estimated the total number of persons doing legal work there in 1982 as 95,342, which would put the ratio of legal workers in Japan in the higher rather than the lower part of the comparative range. Brown, *A Lawyer by Any Other Name: Legal Advisors in Japan*, in *LEGAL ASPECTS OF DOING BUSINESS IN JAPAN* 201 (Practicing Law Inst. 1983). On the comparative presence of lawyers, see *Reading the Landscape*, *supra* note 10, at 52.

Japanese disinterest in the law is belied by the observation of a Japanese law professor that:

[T]here is in Japan a massive diversion of younger talent into the world of law. Every year more than 38,000 youngsters graduate from law faculties in Japan as compared to 36,000 who graduate from U.S. law schools. Since the population of Japan is approximately half that of the United States, there are proportionately two times more law graduates produced in Japan.

Tsubota, *Myth and Truth on Non-Litigiousness in Japan*, 30 [University of Chicago] Law School Record 8 (Spring 1984).

37. Chira, *Reader's Digest Leaves Japan*, N.Y. Times, Dec. 26, 1985, at 21, col. 1, 27, col. 4 (nat'l ed.).

38. Starr & Yngvesson, *Scarcity and Disputing: Zeroing-in on Compromise Decisions*, 2 AM. ETHNOLOGIST 553 (1975); Mendelsohn, *The Pathology of the Indian Legal System*, 15 MOD. ASIAN STUD. 823 (1981).

locus for alternative remedial actions.³⁹ Finally, the absence of consultation, the overtly self-regarding stance, and the perceived violation of responsibility provided the spur of indignation to overcome reluctance to litigate.⁴⁰

The Solzhenitsyn and *Reader's Digest* stories remind us that even those ideologically disinclined to use the courts sometimes do so. People find themselves in a situation in which they are affected by others, but have no leverage to control those others and hold them accountable.⁴¹ In such a predicament, courts may be a recourse, usually a reluctant one.⁴²

And modern society throws up more of these predicaments. Modern technology increases the power of remote actions to impinge on us. An increasing portion of our dealings and of our disputes are with remote actors. Increasingly our transactions and disputes are not with other persons, but with corporate organizations.⁴³ The growth of knowledge enables us to trace out these connections and establish responsibility for these ramifying consequences. Education and wealth make us more competent in using institutions. Law is a way to control and hold accountable remote and overwhelming actors. We use law more both in its wholesale and *ex ante* form (legislation and administrative regulation) and in its retail and *ex post* form (litigation). We would expect litigation

39. Cf. Macaulay, *Non-contractual Relations in Business*, 28 AM. SOC. REV. 55 (1963) and its vast progeny, assessed in various contributions to *Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461.

40. The literature on Japan contains fascinating accounts of collective litigation campaigns, conducted with great moral intensity for long periods by organized groups of victims against corporations who are perceived to have conducted themselves badly by denying responsibility for their victims. See, e.g., Ino, Nishida, Sota, Yamakawa, Akiyama, Fuketa, Yoshikawa & Yamada, *Diary of a Plaintiffs' Attorneys' Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975); Upham, *Litigation and Moral Consciousness in Japan: An Interpretive Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REVIEW 579 (1976); Reich, *Public and Private Responses to a Chemical Disaster in Japan: the Case of Kanemi Yusho*, 15 LAW IN JAPAN 102 (1982).

41. One may lack leverage to control intimates as well as strangers. See Yngvesson, *Re-examining Continuing Relations and the Law*, 1985 WIS. L. REV. 623 (discussing the use of courts among intimates).

42. Of course, courts are only one method of redress. Cf. Black, *Crime as Social Control*, 48 AM. SOC. REV. 34 (1983) (discussing self-help—which is often classified as crime in modern society—as a means of social control).

43. As societies industrialize, an increasing portion of serious disputes is between entities of different sizes—typically between individuals and large organizations—rather than between comparable entities. S. MOORE, *LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH* ch. 3 (1978); J. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* (1973); J. COLEMAN, *THE ASYMMETRIC SOCIETY* (1982).

to vary with changing perceptions of problems and estimates of alternative solutions.

II. THE CHANGING WORKLOAD OF THE FEDERAL COURTS

Although only a small fraction of all American litigation takes place in the federal courts, I would like to examine recent trends in the caseload and disposition patterns of the federal courts. The reason for focusing on the federal courts is fourfold. First, information about these courts is more comprehensive and continuous than for the state courts. Second, figures on federal courts are frequently cited as the proof of runaway litigiousness. Third, the recent elevation of filings in the federal courts has been more dramatic than in the state courts.⁴⁴ Thus, if there are portents of doom in the court statistics they ought to be discernible there. Finally, federal court litigation involves higher status actors and is more visible to and through the media. Hence, it occupies a portion of our public symbolic space far larger than its share of the caseload.

Let me insert a caution about our tendency to give great credence to such figures. Lord Beveridge is reported to have said, "Nobody believes a theory except the one who formulates it; everyone believes a figure except the one who calculates it." In discussions of policy, figures like litigation rates *are* theories, especially slippery ones because the assumptions embedded in them are hard to see and especially persuasive ones because they are disguised as mere facts.

So, taking as our maxim Canning's observation that "nothing is so fallacious as facts, except figures," let us examine the available information on federal court caseloads for 1984, taking 1975 as a convenient baseline.⁴⁵ Table 2, which summarizes some of the data found in these reports, shows a striking 123% increase in filings over that nine-year span.

44. During the six-year period 1978-84 in which civil filings increased 9% in state courts, *supra* p.7, Table 1, they increased 88% in federal courts, 1984 ANNUAL REPORT, *supra* note 21, at 130.

45. Since this lecture was delivered, the Annual Report for 1985 has been published. I was tempted to present the 1985 instead of the 1984 figures. Ten is a nice round number. On reflection, it seems more interesting to retain 1984 for the major comparison, using the 1985 figures to convey a sense of the volatility and variability of trends in case filings.

TABLE 2⁴⁶
 FEDERAL DISTRICT COURTS
 FILINGS IN SELECTED CATEGORIES, 1975 AND 1984

CATEGORY	1975	1984	% Change	Increase [Decrease]	Fraction of Absolute Increase '75-'84	Source: Annual Report at Page:
Total Filings	117,320	261,485	122.9%	144,165	100%	1984: 124
1. Prisoner Petitions	19,307	31,107	61.1%	11,800	8.2%	1984: 143
A. State	14,260	26,581	86.4%	12,321	8.5%	"
B. Federal	5,047	4,526	-10.3%	[-521]		"
2. Recovery of Overpayment and Enforcement of Judgments	681	46,190	6682.7%	45,509	31.6%	1984: 135
3. Civil Rights	10,392	21,219	104.2%	10,827	7.5%	1984: 145
A. Public Accomodation	601	291	-51.6%	[-310]		"
B. Employment Discrimination	3,931	9,748	148.0%	5,817	4.0%	"
4. Social Security	5,846	29,985	412.9%	24,139	16.7%	1984: 138 (1975: 226)
A. Black Lung	2,793	59	-97.9%	[-2,734]		(1975: 228)
5. Torts	25,691	37,522	46.0%	11,831	8.2%	1984: 133 (1975: 194)
A. Products Liability	2,886*	10,745**	272.3%	7,859	5.4%	1984: 148 (1975: 218)
TOTAL OF FIVE "GAINERS" (1A, 2,3,4,5)				104,627	72.5%	
SOME "LOSERS"						
6. Anti-Trust	1,467	1,201	-18.3%	[-266]		1984: 151
7. Fraud, including truth-in-lending	2,237	1,842	-17.6%	[-395]		1985: 280
8. Class Actions	3,061	988	-67.7%	[-2073]		1984: 160

* includes 278 contracts cases

** includes 619 contracts cases

46. Source of data: 1975 & 1984 ANNUAL REPORTS, *supra* note 21, page numbers as noted above.

Do these figures manifest a generalized increase in the litigiousness of the American population, a lowering of public thresholds of legal irritability? Do they evidence the "increasing tendency of Americans to define all distresses, anxieties and wounds as legal problems [W]here Americans were once willing to withstand setbacks, they now turn to the courts for relief whenever things work out badly."⁴⁷

If we break down the overall increase we notice that the increase in filings over the nine years is heavily concentrated in a few areas. Indeed, five categories of cases—recovery of overpayments,⁴⁸ social security cases, prisoner petitions, torts, and civil rights cases—account for almost three-quarters of the entire increase in filings.

Half of the total increase is accounted for by two giant increases—recovery cases and social security cases. Each is the result of deliberate and calculated official policy—to recover overpayments of veterans' benefits by litigation and to curtail disability benefits by summarily removing beneficiaries from the rolls.⁴⁹ Is the 413% increase in social security cases to be understood as an outbreak of litigiousness among social security claimants?⁵⁰ Does it make sense to take the 6,683% increase in recovery cases as evidence of an outbreak of litigiousness among federal officials? Like social security recipients whose disability payments were terminated,⁵¹ federal officials were confronted with a problem and turned

47. Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 NAT'L FORUM 10, 11 (1983).

48. The category "Recovery of Overpayments and Enforcement of Judgments" refers to civil suits, almost all of them filed by the United States, to recover overpayments of veterans' benefits (over 90%) and to recover defaulted student loans. 1984 ANNUAL REPORT, *supra* note 21, at 132.

49. Terminated recipients then had to sue for restoration. The impact on the caseload was compounded by the administration's policy of "non-acquiescence," whereby it refused to generalize the results in earlier judicial decisions to restore benefits, fighting each subsequent claim in spite of fresh opposing precedent. This policy was modified in June 1985. Strasser, *SSA's Shift on Appeals is Slammed by Critics*, Nat'l L.J., June 17, 1985, at 11, col. 1.

50. The following year there was a precipitous 34% drop in Social Security cases—from 29,983 to 19,771. Just a few months earlier (the reporting year began on July 1, 1984) the government had modified its termination policy: "The disability reviews were halted in April 1984 in response to harsh criticism from many members of Congress, Federal judges and governors, who said the Reagan Administration was improperly throwing thousands of disabled people off the rolls." Pear, *U.S. Starts Culling Ineligibles From Disability Benefit Rolls*, N.Y. Times, May 14, 1986, at 11, col. 4.

51. Another example of litigation as a response to miserly policies of benefit administration is the pathetic instance of elderly wives in New York suing to obtain support from husbands confined to nursing homes. State rules permit the wife of a Medicaid

to the courts to solve it because nothing better was at hand.⁵²

But how about cases that reflect individual initiative rather than tracking the contours of changing executive policy—do these reflect an increase in litigiousness? Consider prisoner petitions: in our nine-year period, there was a 61% increase in prisoner petitions. During this period, the prison population of the United States grew by 74%.⁵³ The number of petitions per 1,000 prisoners actually dropped from 73.4 per 1,000 in 1975 to 67.1 per 1,000 in 1984.⁵⁴ Whatever the explanation for these trends, it seems more likely to reflect responses to specific settings than the rise or fall of an appetite for litigious contest or a proclivity to define issues as legal wrongs.

The increase in civil rights cases displays a somewhat different pattern. If we can assume that the period from 1975 to 1984 is one in which discrimination was declining in many areas of American life, is not the increase in civil rights cases evidence of increasing litigiousness? Disputing about discrimination has a very distinct profile compared to disputing about other matters. The lowering of barriers multiplies potential instances of violation—for example, once members of a minority are hired, there is a vast increase in the opportunities for experiencing discrimination on the job.⁵⁵ In discrimination grievances, there is a pronounced appetite for vindication of principle. One suggestive study reported that in contrast to other kinds of problems, in which most respondents sought “satisfactory adjustment,” a strikingly high proportion of those experiencing discrimination problems sought “justice.”⁵⁶ Yet those with discrimina-

recipient to retain only \$400 per month from savings and pensions without loss of benefits, but court-ordered support payments are exempt from such calculations. So some 30 women in New York City sued their institutionalized husbands for support. Sullivan, *Nursing Costs Force Elderly to Sue Spouses*, N.Y. Times, Mar. 6, 1986, at 1, col. 2.

52. In 1985 filings of recovery cases climbed another 25% to 58,160. 1985 ANNUAL REPORT, *supra* note 21, at 131.

53. 1975 figures are from U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1977 (1978), at 629; 1984 figures from U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN (Apr. 1985), at 2; 1985 figures from *id.*, June 1986, at 2.

54. This is a composite of very different populations. As state prison populations grew from 242,750 in 1975 to 429,603 in 1984 and 463,378 in 1985, the rate of petitions rose from 58.7 per thousand in 1975 to 61.9 per thousand in 1984, falling back to 58.7 per thousand in 1985. But among federal prisoners (24,131 in 1975; 34,263 in 1984; 40,223 in 1985) the rate of petitions dropped sharply from 209.2 per thousand in 1975 to 132.1 per thousand in 1984, then jumped to 155.7 per thousand in 1985.

55. Cf. L. MAYHEW, LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION 159 (1968) (observing that the profile of discrimination complaints tracks patterns of employment rather than patterns of exclusion).

56. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y

tion grievances are inclined to "lump it." The Civil Litigation Research Project found that far fewer discrimination grievances were translated into claims than was the case with other kinds of grievances. In all types of middle range disputes combined, 1,000 grievances led to 718 claims, but in discrimination matters, 1,000 grievances produced only 294 claims. Where discrimination claims were made, a high proportion ended up as disputes.⁵⁷ But a relatively low proportion of these disputes was taken to a lawyer and a low proportion of these resulted in court filings. Overall 1,000 grievances led to 50 court filings, but in discrimination matters, 1,000 grievances led to only 8 court filings.⁵⁸ Pursuing a discrimination complaint is an extremely painful process, exposing the claimant to social discreditation and self-doubt.⁵⁹ Thus, discrimination is an area where a great appetite for vindication coexists with formidable obstacles to making and pursuing such claims, leaving a great pool of grievances that could become cases if those obstacles were dissipated. The increase in civil rights cases suggests that the pursuit of these claims is being successfully institutionalized.⁶⁰

This does not mean we should expect a continuous exponential growth of discrimination cases, for practices are changing, too, in the direction of the anti-discrimination norms embodied in the law. As nondiscrimination norms are institutionalized, disputing about discrimination may become more "normal," leading to levels of dis-

REV. 401, 413 (1975). Mayhew reports, based on a study of Detroit metropolitan area residents, that of those respondents reporting serious problems, only a tiny proportion sought "justice" or legal vindication—except in discrimination. Only 4% of those with serious problems connected with expensive purchases sought "justice"; only 2% of those with neighborhood problems did so. But 31% of those reporting discrimination problems sought "justice."

57. For claims overall, only 62.5% became disputes; but 73.4% of discrimination claims became disputes. Miller & Sarat, *supra* note 18, at 544.

58. *Id.*

59. See G. LANOUE & B. LEE, *supra* note 24; K. BUMILLER, *ANTI-DISCRIMINATION LAW AND THE ENSLAVEMENT OF THE VICTIM: THE DENIAL OF SELF-RESPECT BY VICTIMS WITHOUT A CAUSE* (Univ. of Wisc. Disputes Processing Research Program Working Paper No. 1984-6, 1984). Crowe observes:

Although it is the respondents who are charged with wrongdoing before the MCAD, it is the complainants who feel they are being placed on the defensive. The burden of proving a specific, discrete act of discrimination can seem as unjust as the discrimination itself [S]ome complainants feel humiliated when they must admit that they suffered, and were hurt by discrimination.

Crowe, *supra* note 24, at 229.

60. Cf. Burstein & Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, — LAW & SOC'Y REV. — [forthcoming], which concludes, on the basis of claimants' success rates, the focusing of cases on significant targets, and the availability of lawyers and other help, that EEO laws are being successfully mobilized.

puting similar to those in other areas.⁶¹

In one kind of civil rights cases, we see a marked decrease in filings—public accommodations cases fell by 51% during our nine-year period.⁶² There were declines in other categories of cases, including several that represent major expenditures of resources for the courts. Antitrust cases declined by 16%.⁶³ Fraud and truth-in-lending cases fell by 18%.⁶⁴ Class actions, often viewed as an engine of legal aggression against business, fell by 68% from 3,061 in 1975 to 988 in 1984 (that is, from 2.6% of filings to 0.4%).⁶⁵ And within the burgeoning social security areas, black lung cases fell by 98% from their 1975 level.⁶⁶ A particular group of victims worked their way through the system—as asbestos victims are doing now.

Finally, we come to the area that has excited the most concern in recent debate about the litigation crisis—torts. Unlike these other categories, which have loomed large in federal courts only in recent years, torts have always made up a substantial portion of the cases entering federal courts. The influx of other business has in the past generation sharply reduced the percentage of tort cases. In 1960, 36.2% of all civil filings were tort cases.⁶⁷ But due to increases in other categories, only 14.3% of federal court filings in 1984 were tort cases.⁶⁸

In our nine-year period, the number of tort filings increased

61. Short-term fluctuations in the incidence of civil rights cases are difficult to interpret, since case levels reflect changes in the underlying behavior, in expectations and perceptions of fair treatment, and in the resources for and perceived rewards and costs of litigation vis-a-vis alternative responses. In 1985, there was a 7.9% decrease in civil rights filings, paced by a sharp 17.1% drop in employment discrimination claims. 1985 ANNUAL REPORT, *supra* note 21, at 151.

62. The decline continued with a further 13.1% drop from 1984 to 1985. *Id.*

63. And by a further 3.7% from 1984 to 1985. *Id.* at 156.

64. This category seemed to be fading away, having dropped from 2,237 in 1975 to 941 in 1983 (1983 ANNUAL REPORT, *supra* note 21, at 132), when a 97% increase in 1984 brought it to 1,842. In 1985, there was a 1.4% drop to 1,816. 1985 ANNUAL REPORT, *supra* note 21, at 160.

65. 1984 ANNUAL REPORT, *supra* note 21, at 160. In 1985 they fell a further 1.7% to 971. 1985 ANNUAL REPORT, *supra* note 21, at 166.

66. In 1985, Black Lung cases rose by 61% from 59 to 95—but were still only a tiny fraction of the 2,793 of 1975. 1985 ANNUAL REPORT, *supra* note 21, at 145; 1975 ANNUAL REPORT, *supra* note 21, at 225.

67. 1960 ANNUAL REPORT, *supra* note 21, at 230-33, Table C-2. My total is for the 86 district courts only, excluding local and territorial jurisdictions. It includes U.S. plaintiff tort cases (265), U.S. defendant tort cases (1218), FELA cases (1085), Jones Act cases (2645), and diversity tort cases (12,821)—altogether 18,034 out of a total of 49,852 filings in the 86 districts.

68. 1984 ANNUAL REPORT, *supra* note 21, at 133.

from 25,691 in 1975 to 37,522 in 1984.⁶⁹ Of this increase of 11,831, almost two-thirds (7,859) was contributed by an increase in products liability cases.⁷⁰ Products liability filings increased by 272% during this period, while the remainder of the tort category increased by a modest 17%. So it seems that within the tort category we have touched the fiery heart of the litigation explosion—a junction of rapidly mounting caseloads, expanding frontiers of liability and skyrocketing recoveries.⁷¹ To demonstrate “Burgeoning Tort Liability as a Major Cause of the Insurance Availability/

69. 1975 ANNUAL REPORT, *supra* note 21, at 346; 1984 ANNUAL REPORT, *supra* note 21, at 253. This rose 10.3% to 41,593 in 1985. 1985 ANNUAL REPORT, *supra* note 21, at 280.

70. In 1975 products liability filings were 2,886; in 1984 products liability filings were 10,745. *Supra* p.16, Table 2.

71. Commentators on products liability regularly point out that the average verdict in such cases is over one million dollars. “[N]obody sues for a couple of thousand dollars any more: court judgments now average more than \$1 million. Awards of \$5 million are now common, and much higher awards are far from rare.” Conine, *The Big Losers in Liability Judgments Are Us*, Milwaukee J., Nov. 24, 1985, “Accent on the News” section, at 15, col. 2; Dee, *supra* note 9; *Sorry, Your Policy is Cancelled*, TIME, Mar. 24, 1986, at 20. This item of information has its origin in computations by Jury Verdict Research, Inc. [JVR], which reported that in 1984, the average award in products liability cases was some \$1,021,956. INJURY VALUATION: CURRENT AWARD TRENDS IV, No. 304, at 19 (1986) (hereinafter INJURY VALUATION). Examination of this source suggests some needed qualifications. First, this computation of average award is an average of awards in favor of plaintiffs—but “less than one half of these cases results in a plaintiff verdict when tried by a jury.” *Id.* at 20. Second, this very valuable, and admittedly incomplete, data compilation is a small sample of products liability verdicts. JVR’s 1984 average is based on a population of 337 plaintiff verdicts. *Id.* at 19. Assuming an equal or slightly higher number of defendant verdicts, that would come to about 700 verdicts altogether. This is a small portion of the whole universe of products liability verdicts. There is no count anywhere of these, even in the federal courts. But we can estimate from the 2,495 tort jury trials in the federal courts in 1984, 1984 ANNUAL REPORT, *supra* note 21, at Table C-4, that there were approximately 800 products liability verdicts. This estimate is based on the fact that almost one-third of tort filings in federal courts in 1984 were products liability cases and that products liability cases seem to be tried in a slightly greater proportion than other torts cases. There are *at least* 12 times as many tort jury trials in the state courts each year as in the federal courts. Even if a smaller percentage of state tort jury trials are products liability cases—say only 10%—that would mean a minimum of 4000 products liability jury verdicts, state and federal, in 1984. Third, JVR’s sample is selective; it aims to include “significant” or “important” verdicts, not typical ones; and it makes “every effort to collect reliable information on all million dollar verdicts . . .” INJURY VALUATION, *supra*, at 12. Hence there is reason to believe that JVR averages give disproportionate weight to the high end of the range. *Cf.* Localio, *Variations on \$962,258: The Misuse of Data on Medical Malpractice*, 13(3) LAW, MED. & HEALTH CARE 126 (1985) (arguing that the average medical malpractice jury verdict published by JVR suffers from many of these same weaknesses); S. Daniels, *Civil Juries, Jury Verdict Reporters, and the Going Rate 6* (paper prepared for the 1986 Meeting of the Law & Soc’y Ass’n, Chicago, Ill., May 29-Jun. 1, 1986) (available from Am. Bar. Found., Chicago, Ill.) (arguing that JVR’s coverage is selective and emphasizes what it considers precedent-setting verdicts).

Affordability Crisis," the Attorney General's Tort Policy Working Group cites as its first item of evidence:

The growth in the number of product liability suits has been astounding. For example, the number of product liability cases filed in federal district courts has increased from 1,579 in 1974 to 13,554 in 1985, a 758% increase There is no reason to believe that the state courts have not witnessed a similar dramatic increase in the number of product liability claims.⁷²

We are advised to consider this increase as an "example," representative of some larger population of cases. What is in this "product liability" category? Starting in 1974, the Annual Report separated out products liability filings from other torts. The next year a set of sub-categories was specified. These have remained the same until 1984 when the "other" sub-category was further divided into "asbestos" and "other." Table 3 shows the number of filings counted in each category from 1974 to 1985.

72. REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT, AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 45 (Feb. 1986). But the more modest rise in tort filings in the state courts over most of this period, *supra* p.7, Table 1, gives some reason to believe the increase in state courts has been less dramatic. Unfortunately no state court data break out products liability filings separately.

TABLE 3⁷³
 PRODUCTS LIABILITY CASES AND OTHER TORT CASES FILED IN FEDERAL DISTRICT COURTS 1974-1985

	PRODUCTS LIABILITY CASES											Source: Annual Report at Table C-2 & data at page(s)	
	1	2	3	4	5	6	7		8	9	10		11
	Contract Actions	Torts to Land	Property Damage	Airline	Personal Injury			Other	Total Products Liability	Total Other Tort Cases*	Total Tort Cases		
Marine					Motor Vehicle								
1974	278	42	173	301	46	438		1,608	1,579	22,652	24,231	218; 237	
1975	363	46	271	160	140	385		2,331	2,886	23,083	25,691	218	
1976	405	50	256	198	149	372		2,647	3,696	22,403	25,736	195	
1977	435	45	292	237	139	350		2,874	4,077	22,357	26,029	212	
1978	425	49	340	699	128	457		4,034	4,372	22,438	26,375	204	
1979	464	52	363	283	89	535		5,969	6,132	23,194	28,901	230	
1980	515	88	440	256	69	491		7,212	7,755	25,248	32,539	236	
1981	504	75	457	374	122	556		6,856	9,071	25,211	33,767	219	
1982	601	82	512	337	164	574		6,951	8,944	25,778	34,218	106	
1983								<u>Asbestos/Other</u> 8,521	9,221	27,864	36,484	130	
1984	619	70	379	371	133	652		(2,788 5,733)	10,745	27,396	37,522	148; 150; 151	
1985	571	77	399	278	112	612		11,505	13,554	28,610	41,593	151; 154	
Total								(4,239 7,266)					

* "Other Tort Cases" means Total Tort Cases (column 10) minus all Tort Products Liability Cases (columns 2-7). The figures do not include Contract Actions (column 1).

73. Source of data: 1975 to 1985 ANNUAL REPORTS, *supra* note 21, page numbers as noted above.

If we separate out the other tort claims from those labelled as products liability claims, we see that in the course of these twelve years they increased from 22,662 to 28,039—an increase of 23.7%. Products liability cases, on the other hand, increased 758% over this period—32 times as fast. The pattern of products liability claims in federal courts is distinctively different from, rather than typical of, other tort claims there—much less is it typical of tort claims elsewhere.

But what are these products liability cases? The six defined sub-categories have been relatively stable. Filings in these sub-categories increased from 1,278 in 1975 to 2,049 in 1985—a 60% increase. But they only make up a small portion of the products liability category—44% in 1975, falling to just 15% in 1985. As the products liability category has grown over the years, an increasing portion is located in the “other” sub-category, which has grown far more rapidly than the specified categories. What are these “other” cases?⁷⁴

In good part the answer is that they are asbestos cases. During 1984, the form was changed to count asbestos cases separately.⁷⁵ In that year, 2,788 of the 8,521 “other” products liability filings were asbestos cases. (Since the new forms were introduced about one-third of the way through the record keeping year, we may assume that the portion of filings that were asbestos cases was actually higher—perhaps 4,000 or so if there was no seasonal variation.) In 1985, the first full year of counting asbestos cases, they made up 4,239 of the 11,505 “other” filings—31.3% of the whole products liability category.

It seems likely that asbestos cases have been a major factor during the whole period in which products liability cases have been counted. There is no direct count before 1984, but there seems to be a heavy concentration of “other” products liability cases in those

74. Before 1984, the Annual Report gives only occasional hints: in 1976, it noted that “the bulk” of products liability personal injury cases alleged “injury due to malfunction of household appliances, tools and assorted manufactured products,” 1976 ANNUAL REPORT, *supra* note 21, at 194; in 1977 and 1978 it was reported that the “majority” of these cases involved injuries “due to malfunctioning household appliances, tools and other manufactured products,” 1977 ANNUAL REPORT, *supra* note 21, at 211; 1978 ANNUAL REPORT, *supra* note 21, at 210. In 1979, it was reported that the number was swollen as a result of two major air crashes and over 400 swine flu vaccine cases. 1979 ANNUAL REPORT, *supra* note 21, at 229.

75. The count of products liability cases, and the categorization of filings generally, is done on the basis of entries on the cover sheet (JS-44) filled out by the plaintiff's attorney at the time suit is filed. The form contains a listing of some 85 types of suits; the attorney is instructed to place an “X” in the one box that is “most definitive.”

districts that are the source of most asbestos claims.⁷⁶ It is estimated that during this period there were more than 16,000 asbestos cases filed in the federal courts⁷⁷—that would be more than a quarter of the cumulative total of 60,508 products liability filings counted from 1974 to 1985.

In these asbestos cases, we again encounter litigation whose presence is not plausibly explained in terms of a change in the underlying proclivity to sue. By the early 1980s, broad dissemination of information about the injurious qualities of asbestos, the presence of an experienced asbestos bar, and concern about possible cut-offs of liability to future claimants, were mobilizing large numbers from the pool of asbestos victims—a pool that is destined to diminish over the coming decades.⁷⁸

If a single set of related products cases makes up one-quarter of the total, one wonders what other major clusterings are contained in this category. At least one other product—the Dalkon Shield—was the subject of thousands of cases during this period.⁷⁹ We might then expect that the major movements of the products liability category will reflect the flow and ebb of waves of litigation about specific products and will be affected by the devices for aggregating these populations of related cases.

The products liability category is often visualized as one that encompasses suits, involving “thousands of products,” that have “jeopardized the health of many industries.”⁸⁰ Its growth then is

76. Jurisdictions with the greatest concentration of asbestos litigation are listed in D. HENSLER, W. FELSTINER, M. SELVIN, P. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 8 (1985) (hereinafter HENSLER). The 10 federal district courts on their list—namely, Northern California, Connecticut, Southern Georgia, Massachusetts, Southern Mississippi, New Jersey, Eastern Pennsylvania, Eastern Tennessee, Eastern Texas, and Eastern Virginia—had 24% of all the “other” products cases in 1975; 23.2% in 1979; 31.6% in 1983; 35.4% in 1985.

77. *Id.* at 21. This is the number of cases; the number of asbestos *claims* was much higher in most jurisdictions. *Id.* at 24, 26.

78. On the career of asbestos litigation, see P. BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); HENSLER, *supra* note 76.

79. In October 1984, A.H. Robins moved to form a class of more than 3,500 pending cases with punitive damage claims. M. MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN AND THE DALCON SHIELD* 240 (1985). According to the *Legal Times*, Apr. 7, 1986, at 11, col. 2, the total number of Dalkon Shield suits by early 1985 was over 8,700. It is not known how many were in federal courts.

80. Pear, *Draft Bill Is Set on Liability Suits*, N.Y. Times, Apr. 21, 1986, at 14, col. 4 (nat'l ed.). This theory of general and dispersed incidence of products cases is found in the 1976 to 1978 Annual Reports of the federal courts. See *supra* note 74. But since the forms from which the data on products cases were compiled did not generate any information about the make-up of the “other” category, this may have been just a plausible supposition.

presented as an index and portent of the general growth of litigation. But if it is a container populated largely by several epidemics of suits about specific products, it may have less generalizability. The available data do not tell us whether the products liability category contains cases that are widely dispersed across the whole range of manufactured products, or whether it contains large clusters of suits involving a relatively small set of products.

TABLE 4

COMPARISON OF TERMINATIONS, TIME TO DISPOSITION, PERSONNEL
FEDERAL COURTS, 1975 AND 1984

A. Civil Terminations by Stage, District Courts
1975 and 1984⁸¹

TERMINATED	1975	1984	% INCREASE '75-'84
During/After Trial	8,722 (8.4%)	12,080 (5.0%)	+ 38.5%
During/After Pre-Trial	15,575 (15.0%)	29,638 (12.3%)	+ 90.3%
Before Pre-Trial	40,271 (38.8%)	86,135 (35.6%)	+ 113.9%
Subtotal - Above	64,568 (62.2%)	127,853 (52.9%)	+ 98.0%
No Court Action	39,219 (37.8%)	113,900 (47.1%)	+ 190.4%
Total	103,787 (100%)	241,753 (100%)	+ 132.9%

B. Median Time to Disposition, District Courts
1975 and 1984⁸²

Cases that Terminated During/After Trial	16 months	19 months	+ 18.7%
All Cases	9 months	7 months	- 22.2%

C. Personnel, Federal Courts
1975 and 1984⁸³

Authorized District Judges	383	495	+ 29.2%
Total Personnel Federal Judiciary	10,082	16,667	+ 65.3%
As above excluding Bankruptcy	9,076	13,678	+ 50.7%

81. Source of data: 1984 ANNUAL REPORT, *supra* note 21, at 152.

82. Source of data: 1975 ANNUAL REPORT, *supra* note 21, at 153; 1984 ANNUAL REPORT, *supra* note 21, at 375.

83. Source of data: 1975 ANNUAL REPORT, *supra* note 21, at 111; 1984 ANNUAL REPORT, *supra* note 21, at 45.

Does the course of these cases once they get to court suggest an increase in the appetite for litigious combat? In federal, as in state courts, most cases settle. Table 4A summarizes data on terminations from the federal courts in 1975 and 1984. We can see that there has been no decline in the portion of cases that settles. Indeed, a declining percentage of cases proceed to trial—or even survive until the holding of a pre-trial conference. There has been a great increase in the portion of cases that terminate early in the process,⁸⁴ paralleling the long-term decline of the portion fully adjudicated in the state courts.⁸⁵

Federal courts have become more amply staffed (see Table 4C) and better managed. As Table 4B shows, the median time from filing to disposition of cases terminated in 1984 was seven months for all cases and nineteen months for those that reached trial.⁸⁶ (If the numerous recovery cases are excluded, the median time to disposition for all cases would go up to nine months.⁸⁷) The median for all cases in 1975 was nine months,⁸⁸ but then the median for cases reaching trial was only sixteen months.⁸⁹ Back in 1960, median time from filing to disposition was almost twice as long as in 1984—17.8 months.⁹⁰

What do these patterns tell us? More disputes arrive at court by filing; a decreasing portion of these—though absolutely more—proceed to later stages of the judicial process. The vast majority are resolved without full-blown adjudication. Courts are arenas in which most cases are resolved by negotiation.⁹¹

The population of cases is made up of sub-populations with

84. The trend toward termination earlier in the process continued in 1985: cases reaching trial fell to 5.0% and those reaching pretrial to 11.6%. 1985 ANNUAL REPORT, *supra* note 21, at 178.

85. *See supra* note 22.

86. These remained unchanged in 1985. 1985 ANNUAL REPORT, *supra* note 21, at 313.

87. 1975 ANNUAL REPORT, *supra* note 21, at 346; 1984 ANNUAL REPORT, *supra* note 21, at 148.

88. 1975 ANNUAL REPORT, *supra* note 21, at 211.

89. *Id.* at 375.

90. 1960 ANNUAL REPORT, *supra* note 21, at 94. On this secular reduction of delay in federal courts, see Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65 (1981).

91. *Reading the Landscape*, *supra* note 10, and *Justice in Many Rooms*, *supra* note 35. Indeed, some critics contend that while well supplied with lawsuits, we have a shortage of opportunities for full adjudication to vindicate claims and elucidate principles. *See, e.g.,* Alshuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1983).

their own distinctive traits that reflect such specific factors as the number, concentration, or diffusion of the injuries or troubles in question; the presence (or withdrawal) of other ways of dealing with these troubles; the availability of information about legal remedies; the development of lawyer expertise; and so forth.⁹² Such a population of cases is not just a statistical collection of discrete cases in which each is measured against a fixed (or slowly changing) framework of law. It has a career. It is a changing stream whose course shifts and turns as lawyers gain expertise, specialization develops, new knowledge is generated, information is disseminated, parties change their expectations, the underlying behavior undergoes changes, as do insurance practices, record-keeping, and so forth. New types of cases come onto the scene; some expand into sizable populations; some stabilize and remain relatively constant for long periods (such as automobile injury cases and divorces); and others fade away (for example, black lung and truth-in-lending cases).⁹³

These changes reflect and reinforce changes in public beliefs and expectations about the legal system. Thus, the shifting patterns of filings we observe are compatible with the notion of a general but uneven spread of higher expectations of justice and the growth of a sense of entitlement to recompense for many kinds of injury.⁹⁴ But this sense is not self-activating and its presence does not sufficiently account for the patterns of court use. Its translation into claims depends on various contextual factors.

III. THE BENEFITS OF LITIGATION

What difference does it make? Why should we be concerned about the ebb and flow of different currents of litigation? We hear much of bizarre claims, immense jury verdicts, undeserved windfalls, the engorgement of contingency fee lawyers, financially devastated defendants, and other things that befall the specific

92. This comports with findings in both the United States and Australia that the subject matter of the claim predicted more about its prospective course than any other factor. What happens depends on institutionalized ways of handling different kinds of disputes. Fitzgerald, *supra* note 19, at 28, 39. Cf. Mayhew, *Institutions of Representation: Civil Justice and the Public*, 9 LAW & SOC'Y REV. 401 (1975) (the cases that come to the attention of the legal profession constitute a small portion of the problems and conceivable claims that might merit legal advice and protection; the particular distribution of cases coming to the legal profession reflects the institutional organization of the legal system, not merely the inability to pay of those who think they want lawyers).

93. The careers of these changing populations in turn cumulate into major changes in the makeup of court caseloads. See *Reading the Landscape*, *supra* note 10, at 42.

94. See L. FRIEDMAN, *TOTAL JUSTICE* (1985); G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* xv-xvi (1980).

participants in specific cases. Beyond this, we hear much about the deleterious effects of litigation in the large—that it dampens enterprise, distracts managers, makes doctors practice defensive medicine, increases the cost of products, keeps useful products off the market, etc. All of these attribute to litigation a powerful effect not only on the behavior of the immediate parties but on other actors who respond to the signals that courts broadcast by doing and avoiding and spending what they would otherwise not have done or avoided or spent. Are all of these ramifying effects on conduct undesirable, so that we should account them as costs? Or should some of them be accounted as benefits?

Current discussion of the litigation system displays sensitivity to the various kinds of costs, direct and indirect, that attend the system. But in considering benefits there is a tendency to focus only on the immediate distributive consequences for the parties. Thus, an insurance executive measures the efficiency of the tort system only in terms of compensation of claimants' economic losses, with no indication that this transfer might have any other effect.⁹⁵ The same blindness to general and public effects is evident in a *Wall Street Journal* editorial questioning the need for public courts:

If civil disputes can be satisfactorily resolved by arbitrators, why is there ever any need to settle them at public expense? Why should the taxpayers have to support a civil court system? More to the point, why should jurors have to pay in time and lost wages to enable a condo developer to extract a cash settlement from a builder? Private disputes, unlike criminal proceedings, often have no social consequences. The full costs should fall on the litigants themselves.⁹⁶

To balance the anecdotal stock, let me present a few recent items that caught my attention. I make no claim that they are representative of anything. But they do provide vivid illustrations of some of the beneficial effects of litigation. As an aid to memory, I give each of them a label:

1. *Cape Cod*—Consider the Cape Cod restaurant owner who "has begun giving classes to his employees to help them recognize intoxicated customers who might later decide to sue him if their intoxication should lead to an automobile wreck. 'We've become our

95. See, e.g., R. Sturgis, *The Cost of the U.S. Tort System: An Address to the American Insurance Association* 16-18 (Nov. 14, 1985) (available from Tillinghast, Nelson & Warren, Inc.).

96. *Settling Out of Court*, *Wall St. J.*, Aug. 22, 1985, at 20, col. 1.

brother's keeper,' he says."⁹⁷

2. *Madison Parks*—Or consider the changes in park design contemplated in Madison:

The Madison Parks Commission, acting on advice from the city attorney, has asked the City Council to remove asphalt under playground equipment in city parks.

The asphalt, which was originally installed to eliminate mud and cut park mowing costs, would be replaced by softer materials, such as wood chips or pea gravel.

"We want to put in something with a little give to it," said Mark Peterson, parks operations analyst. "It's a good idea, since (liability lawsuit) settlements are going through the roof."⁹⁸

3. *Princeton Club*—Or consider the change in policy of a Princeton eating club:

One of the three all-male eating clubs at Princeton University, the University Cottage Club, has voted to admit women.

The decision, Wednesday night, by the 100-year-old club's graduate board for governors was made in the midst of a sex-discrimination suit filed against the clubs and university.

"The suit encouraged us to look at the issue a lot more closely than we had in the past," the chairman of the board, James L. Crawford, said. "We feel it is the right decision for the long-term benefit of the club. Rather than being forced to admit women, it made sense."

.....

Mr. Crawford said that the Cottage Club, a stately Georgian mansion where F. Scott Fitzgerald was a member, wanted to admit women voluntarily to avoid a possible court-imposed admissions process.

.....

Mr. Crawford conceded high legal fees influenced the

97. Lindsey, *Businesses Change Ways in Fear of Lawsuits*, N.Y. Times, Nov. 18, 1985, at 1, col. 3 (nat'l ed.). Consider also a report from Madison that "More and more people are being refused another drink or having their car keys taken away by bartenders wary of being found responsible for the damage drunkards do when they hit the outside world." Stamler, *Bartenders Trade 'Set 'em up Again' Image for None for the Road*, [Madison] Capital Times, Feb. 24, 1986, at 1, col. 1.

98. Waller, *Liability Fear Spurs Park Safety Steps*, Wis. State J., Aug. 28, 1985, at 4, col. 2. A year later, removal of the hard surfaces was completed and the process of replacement with wood chips was underway. Telephone interview with Dan Stapay, Superintendent of Parks, City of Madison (Aug. 11, 1986).

club's decision to admit women. He said the decision, which was not unanimous, reflected the results of a poll of club alumni. "The undergraduates would prefer to have kept it as it was."⁹⁹

According to the *New York Times*, the Cottage Club admitted its first women members in February, 1986.¹⁰⁰

4. *Georgia*—Or consider the impact of a recent wrongful discharge case at the University of Georgia:

The Board of Regents of the University System of Georgia today [April 3, 1986] released a special audit report that showed a pattern of academic abuse in the admission and advancement of student-athletes at the University of Georgia for the last four years.

The report concluded that the preferential academic treatment was given because of pressure from the athletic department The report also stated that the university officers who had admitted authorizing the academic exceptions said they acted with the knowledge of the university's president

. . . Although such treatment for athletes has been rumored at many schools, many times, this is the first time it has been documented through an official investigation.

. . . .

The investigation was ordered in the wake of a jury award of \$2.57 million to Dr. Jan Kemp, a former English instructor in the Developmental Studies Program, who had sued the university, charging that she had been dismissed in 1983 for protesting favorable treatment given to student-athletes The jury verdict stunned the university, the state government and legions of loyal followers of the athletic teams, and the affair has continued to unravel in ways harmful to the university's reputation. The state has appealed the case.¹⁰¹

Each of these accounts reports changes as a result of litigation. In each case, the changes strike me as including at least some benefits. The flow of beneficial effects may be related to the litigation in different ways. In *Georgia*, the parties were still embroiled in onerous and expensive litigation when the above account was written,

99. *A Princeton Club to Admit Women*, N.Y. Times, Jan. 10, 1986, at 13, col. 1 (nat'l ed.).

100. *Princeton Settles Suit for Bias*, N.Y. Times, July 23, 1986, at 12, col. 4 (nat'l ed.).

101. Clendinen, *Investigation of Georgia U. Cites Preferential Grading for Athletes*, N.Y. Times, Apr. 4, 1986, at 1, col. 1, 45, cols. 1-2 (nat'l ed.).

but they subsequently settled.¹⁰² In *Princeton Club*, the litigation terminated early for the club that adjusted its behavior, but proceeded for the other defendants.¹⁰³ In *Cape Cod* and *Madison Parks*, behavior was adjusted with an eye to preventing harm and avoiding future litigation. This is the “[s]hadow of the [l]aw,”¹⁰⁴ and it may be a benign shadow.

To analyze this shadow, it is useful to distinguish between “special effects” and “general effects.” Special effects are the effects produced by the impact of litigation (full-blown, attenuated, or threatened) on the parties immediately involved. General effects are (a) effects of the communication to others of information about litigation, including (b) effects of the response to that information.¹⁰⁵

Special effects are changes in the behavior of the specific actors

102. In post-trial proceedings, the jury award was reduced to \$679,682.65 plus interest, costs, and attorney’s fees by the trial judge. *Kemp v. Ervin*, Civil Action No. C83-330A, (N.D. Ga. Apr. 22, 1986) (order reducing jury award). A final settlement of \$1,080,000 was reached in early May, 1986. Telephone interview with Joseph C. Nelson, III, Esq., Athens, Ga. (Aug. 8, 1986).

103. In June 1986, an administrative law judge found that the other two clubs had violated New Jersey’s anti-discrimination law. *Judge Finds 2 Clubs At Princeton Guilty in Sex-Bias Lawsuit*, N.Y. Times, Jun. 22, 1986, at 17, col. 5 (nat’l ed.). A month later, Princeton University, accused of “aiding and abetting” the clubs’ discriminatory practices, settled with the complainant, paying \$27,500 for her legal and other expenses. *Princeton Settles Suit on Bias*, N.Y. Times, July 23, 1986, at 12, col. 4 (nat’l ed.).

104. Since only a small fraction of behavior is regulated by full-blown adjudication, the influence of courts and rules on most behavior and on the resolution of most disputes is not direct, but through the anticipation of what courts might do. Cf. Mnookin & Kornhauser, *supra* note 34; *Justice in Many Rooms*, *supra* note 35.

105. This notion of “general effects” takes off from the very helpful discussion of general preventive effects of punishment by J. GIBBS, CRIME, PUNISHMENT AND DETERRENCE (1975), as usefully elaborated by Feeley, *The Concept of Laws in Social Science: A Critique and Notes on an Expanded View*, 10 LAW & SOC’Y REV. 497, 517-21 (1976). It is simply a generalization from the illuminating and now familiar (if not entirely serviceable, as Gibbs points out) distinction between special deterrence and general deterrence introduced by Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). Theory about these general effects is still inchoate. In a review of the now sizable literature on deterrence, Gibbs observes that since deterrence research has proceeded without controls for other general effects, “all previous purported tests of the deterrence doctrine . . . are tests of an implicit theory of general preventive effects; and such will remain the case as long as nondeterrent mechanisms are left uncontrolled.” Gibbs, *The Deterrence Doctrine: Theory, Research and Penal Policy*, in LAW AND THE SOCIAL SCIENCES (L. Lipson & S. Wheeler eds. 1986). The literature on the effects of tort law displays the same conflation of deterrence with other preventive effects that Gibbs finds in the criminal law literature. Some of the labels used here for the various effects are inspired by (but disloyal to) those carefully discussed by Gibbs in *The Deterrence Doctrine*, *supra*. A fuller taxonomy of the effects of litigation can be found in Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES ABOUT COURTS 124-42 (K. Boyum & L. Mather eds. 1983).

involved in a particular lawsuit—like the Princeton Club or the University of Georgia or the plaintiffs who sued them. We can, in theory at least, isolate various kinds of effects on the subsequent activity of such actors. An actor may be deprived of resources for future violations. This is *incapacitation*. Or the result of litigation may be increased *surveillance* which renders future offending behavior less likely. The *Georgia* case dramatically illustrates this surveillance effect. Or the offending actor may be deterred by fear of being caught again. This is *special deterrence*. Or the experience of being exposed to the law may change the actor's view that it is right to exclude women or pass failing athletes or whatever. This is *reformation*.

In addition to these special effects on the parties before the court, there may be effects on wider audiences that we may call general effects. Litigation against one actor may lead others to reassess the risks and advantages of similar activity. We see this displayed in our *Cape Cod* and *Madison Parks* examples. This is *general deterrence*. It neither presumes nor requires any change in the moral evaluation of the acts in question, nor does it involve any change in opportunities to commit them. It stipulates that behavior will be affected by the acquisition of more information about the costs and benefits that are likely to attach to the act—information about the certainty, celerity, and severity of “punishment,” for example. Thus, the actors can hold to what Hart called the “external point of view,”¹⁰⁶ treating law as a fact to be taken into account rather than a normative framework that they are committed to uphold or be guided by. The information that induces the changed estimate of costs and benefits need not be accurate. What a court has done may be inaccurately perceived; indeed, the court may have inaccurately depicted what it has done.

On the other hand, communication of the existence of a law or its application by a court may change the moral evaluation by others of a specific item of conduct. To the extent that this involves not the calculation or the probability of being visited by certain costs and benefits, but a change in moral estimation, we may call this general effect *enculturation*. There is suggestive evidence to indicate that at least some segments of the population are subject to such effects.¹⁰⁷

106. H.L.A. HART, *THE CONCEPT OF LAW* 86-87 (1961).

107. See Berkowitz & Walker, *Laws and Moral Judgments*, 30 *SOCIOMETRY* 410 (1967); Colombatos, *Physicians and Medicare: A Before-After Study of the Effects of Legislation on Attitudes*, 34 *AM. SOC. REV.* 318 (1969). Other studies provide suggestive but contrasting hypotheses about the conditions under which such enculturation takes place and its rela-

Less dramatically, perceiving the application of law may maintain or intensify existing evaluations of conduct, an effect that Gibbs¹⁰⁸ calls *normative validation*.

In addition to these effects on the underlying behavior, litigation may produce effects on the level of disputing behavior. It may encourage or discourage the parties to a case from making (or resisting) other claims. And generally it may encourage claimants and lawyers to pursue claims of a given type. It may provide symbols for rallying a group, broadcasting awareness of grievances, and dramatizing challenges to the status quo. On the other hand, grievances may lose legitimacy, claims may be discouraged, and organizational capacity dissipated. These effects may be labeled *mobilization* and *demobilization*.¹⁰⁹

While supposition about the effects of litigation is abundant, serious studies of these effects are relatively rare. During the 1960s, political scientists (chiefly) accumulated a body of findings on the impact of decisions of the United States Supreme Court (mostly) and other appellate courts, exploring the extent to which these decisions elicited compliance from the lower courts, school boards, police and other agencies they were designed to regulate.¹¹⁰ A critical survey of this literature concluded that:

[T]he decisions of the Court, far from producing uniform impact or automatic compliance, have varying effects—from instances in which no action follows upon them to wide degrees of compliance (usually underreported), resistance, and evasion. These varying effects include increases in the level of political activity and activity within the judicial system itself and changes in governmental

tion to the coercive aspects of law. The reaction of local school boards to decisions of the United States Supreme Court banning officially sponsored prayer in classrooms was examined in W. MUIR, *PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE* (1967), and K. DOLBEARE & P. HAMMOND, *THE SCHOOL PRAYER DECISIONS: FROM COURT POLICY TO LOCAL PRACTICE* (1971). Muir finds substantial compliance and substantial enculturation associated with low perceived coerciveness of the legal setting; Dolbeare and Hammond, finding little compliance, attribute the dissociation of practice from legal doctrine to the absence of coercive pressure.

108. See *supra* note 105.

109. Indeed, one of the most evident effects of recent litigation has been its profound mobilizational effect on various groups like doctors and insurers who are involved in political initiatives to change it.

110. This literature is usefully surveyed in S. WASBY, *THE IMPACT OF THE UNITED STATES SUPREME COURT: SOME PERSPECTIVES* (1970); a convenient sampling of the literature may be found in *THE IMPACT OF SUPREME COURT DECISIONS* (T. Becker & M. Feeley 2d. ed. 1973). The limitations of this genre are critically examined in Feeley, *supra* note 105.

structure Important social interests, both economic and noneconomic, may be dislocated or legitimated, and the Court's decisions also often perform an agenda-setting function for other political actors.¹¹¹

A new generation of "impact" research has widened its concerns from the United States Supreme Court to other courts, from public to private law, and from a focus on compliance with doctrinal pronouncements to ascertainment of a wider range of effects. Recent work includes studies tracing out the effects of specific tort cases. Thus, Wiley found that a decision of the Supreme Court of Washington¹¹² holding liable an ophthalmologist for failing to test a young patient for glaucoma did bring about an increase in the amount of testing for glaucoma in young patients.¹¹³ And Givelber, Bowers and Blitch found that a California decision,¹¹⁴ holding that therapists had a duty to exercise reasonable care to protect third parties from violence by their patients, had important effects nationwide.¹¹⁵ Eighteen months after its highly publicized original ruling that a therapist has a duty to warn the potential victim, the court, upon reconsideration, nullified its earlier opinion and modified the duty to one of exercising reasonable care to protect potential victims. The researchers found that the case was widely known by therapists throughout the nation, that observance of its ruling was felt to be obligatory by most even though technically the ruling bound only those in California,¹¹⁶ that "by and large the case appears to be misunderstood as involving and requiring the warning of potential victims"¹¹⁷ [i.e., in accordance with the withdrawn original opinion]—and that the case influenced therapists' responses to threatening behavior toward giving warnings, initiating involuntary hospitalizations, and taking notes.¹¹⁸ The story is wonderfully complex. What happens is remote from a calculated intervention by the

111. S. WASBY, *supra* note 110, at 243.

112. *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974).

113. Wiley, *The Impact of Judicial Decisions on Professional Conduct: An Empirical Study*, 55 S. CAL. L. REV. 345, 373-74 (1981). However, the admixture of other influences promoting more testing leads the author to conclude that "the actual impact of *Helling* . . . seems to have been quite minor." *Id.* at 385.

114. *Tarasoff v. Regents of the University of California*, 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), *withdrawn and replaced by* 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

115. Givelber, Bowers & Blitch, *Tarasoff, Myth and Reality: An Empirical Study of Private Law in Action*, 1984 WIS. L. REV. 443.

116. *Id.* at 474.

117. *Id.* at 466.

118. *Id.* at 481-82.

court designed to bring about these effects;¹¹⁹ and the therapists' response is more than a calculating re-estimation of costs and benefits.¹²⁰

In contrast to these studies focusing on the radiating effects of a single decision, other researchers have examined the way that an array of judicial decisions impinges on decisionmaking by private actors. Thus, a study of large manufacturers found that:

[E]xcept for firms subject to the maximally intrusive regulation of such agencies as the Food and Drug and the Federal Aviation administrations, product liability is the most significant influence on product safety efforts. Product liability, however, conveys an indistinct signal. The long lags between the design decision and the final judgment on product liability claims (frequently five or more years), the inconsistent behavior of juries, and the rapid change in judicial doctrine in the area, all tended to muffle the signal.

. . . .

Of all the various external social pressures, product liability has the greatest influence on product design decisions. The other influences largely work through the product liability mechanism.¹²¹

A study of small manufacturers of agricultural implements in California found that 22% had dropped product lines out of fear of products liability suits.¹²²

I am not claiming that these effects are optimal or that the benefits they produce outweigh all the costs or that existing litigation patterns represent the best way to achieve these benefits. But we should recognize that benefits are present and that any assessment of the social value of litigation must take account of them and must involve an attempt to estimate the *net* effects of present litigation patterns and the proposed or likely alternatives. These examples

119. The authors remind us that this is an instance in which "a court announced a rule designed to change private behavior without reliable data regarding the practices it was intending to change, the extent of the problem it was trying to remedy, or the costs which the proposed cure would impose." *Id.* at 444. The court had "no mechanism for monitoring the impact of its decision." *Id.* at 445.

120. Indeed a majority of respondents had translated the obligation to threatened third parties into a requirement of professional ethics. *Id.* at 475.

121. G. EADS & P. REUTER, *DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION* vii-viii (1983).

122. Comment, *Products Liability: The Impact on California Manufacturers*, 19 AM. BUS. L.J. 343, 357 (1981). The survey included large manufacturers, but their response rate was so low that I am reporting only the author's results for the smaller manufacturers.

should also remind us that these effects are not ascertainable by supposition or by deduction.

The studies mentioned above are revealing, but they are only the beginning of what we need to form a realistic picture of the way that legal doctrine and institutions affect conduct. Although reliable knowledge about litigation and its effects is thin and spotty, there is a flourishing folk sociology about the causes, dimensions, and consequences of the present "crises." Space permits only a few examples. One is the notion that there has been a runaway growth of tort litigation and an unparalleled enlargement of the tort system encouraged by the progressive loosening of liability standards. But as we have seen, tort filings have increased only modestly.¹²³ While expenditures for the tort system have grown more rapidly than government as a whole or the Gross National Product, they have lagged behind other entitlement systems, such as public aid, government health care, and social insurance. Nor have tort costs outpaced those of Workers' Compensation.¹²⁴

Similarly, there are grounds for skepticism of the confident assertion that recent dramatic cost increases and restrictions on insurance coverage are closely linked to specified features of American tort litigation. A similar crisis in the mid 1970s proved short-lived and passed without any important changes in the tort system.¹²⁵ Similar contractions of insurance availability seem to occur independently of the presence of these features. Ontario, which enjoys freedom from virtually all of the objectionable features of the United States tort system—jury trial, punitive damages, contingent fees, open-ended awards for noneconomic damages—is experiencing a very similar insurance crisis.¹²⁶

IV. SURVIVING THE LITIGATION PANIC

I hope I have persuaded you that respect for the available evidence suggests a more benign reading of our current situation than is found in the discourse that depicts us in a lawsuit crisis, litigation explosion, etc.:

123. See *supra* p.7, Table 1.

124. "Tort costs per capita in 1984 were \$281, as compared to \$287 per worker for Workers' Compensation." R. Sturgis, *supra* note 95, at 10, 18.

125. See Page & Stephens, *The Products Liability Insurance Crisis: Causes, Nostrums and Cures*, 13 *CAN. U.L. REV.* 387 (1984).

126. Berkowitz, *In Canada, Different Legal and Popular Views Prevail*, *Wall St. J.*, Apr. 4, 1986, at 23, col. 4; Harrington, "Crisis" *Team to Investigate Soaring Price of Insurance*, *Toronto Star*, Jan. 10, 1986 at A1, col. 1.

— Higher caseloads do not reflect a heightened appetite for adversarial combat; they represent people trying to cope with problems in a given array of remedial alternatives.

— We are not faced with an inexorable exponential explosion of cases, but rather with a series of local changes, some sudden but most incremental, as particular kinds of disputes move in and out of the ambit of the courts.

— The effects of litigation include an admixture of benefits as well as costs—as do the alternative ways of handling such troubles; the net effects of each type cannot be ascertained by deduction or supposition.

Why the consternation about litigation? Why is the bad face of law so evident and its good face hidden to so many? The answer is surely complex, but let me just mention a couple of things. First, litigation implies accountability to public standards. The heightening of public accountability is in many quarters an unwelcome counter to deregulation or self-regulation. The sense of being held to account has multiplied far more than cases or trials, for it depends, as we have seen, not on the direct imposition of court orders, but on the communication of messages about what courts might do. Law as a system of symbols has expanded; information about law and its workings is more widely and vividly circulated to more educated and receptive audiences.¹²⁷ As a source of symbols and bargaining counters, litigation patterns have changed too. The predominance of cases enforcing market relations has given way to tort, civil rights, and public law cases “correcting” the market.¹²⁸ It is such litigation “up”—by outsiders and clients and dependents against authorities and managers of established institutions—that excites most of the reproach of our litigious society.¹²⁹

The sense that America is uniquely cursed by rampant community-destroying legalism, unravelling the fabric of trust, distorting markets, and confounding authority, strikes me as yet another reincarnation of the worn cliché of America as a land of alienation and oppression. The American reality, in all of its puzzling complexity, is found wanting in comparison to an imagined harmonious and or-

127. On the “explosion” of information about law, see *Legal Malaise*, *supra* note 10.

128. On the changing composition of court caseloads, see *Reading the Landscape*, *supra* note 10, at 41-43.

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

ganic society. Instead of yielding to this cliché, we should take America's variform and changing patterns of litigation as a challenge to explore the central and distinctive features of this society.