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Beyond the Litigation Panic

MARC GALANTER

For the past decade there have been growing complaints that American society has suffered a hypertrophy of its legal institutions. It has become a commonplace that the United States is the most litigious country on earth, indeed in human history. An obsessively contentious population, egged on by an intrusive activist judiciary, is said to be enthralled with adversary combat. As the volume of law, lawyers, and lawsuits has risen, there is said to have been a concomitant erosion of self-reliance, of the sense of community, and of the informal mechanisms by which society once regulated itself. The excessive resort to law, in short, is said to threaten not just needless expense but also moral decline and far-reaching political and economic ills.

The Meaning of Higher Caseloads

The core observation that supports the "litigation explosion," or "hyperlexis," reading of contemporary American life is that Americans are bringing lawsuits at an unprecedented rate. Per-capita rates of filing civil cases have risen in most localities in recent decades. But these rates are only a surrogate measure for the propensity to litigate. Presumably, such a propensity depends on the proportion 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 the volume of such troubles and disputes.

Cases that wind up in court can be seen as the apex of a vast and uneven pyramid, whose base is formed by all human experience that might be identified as injurious. Many injuries (by any account) go unperceived. Of those that are perceived, some are attributed to deserved punishment, assumed risk, or fickle fate. Some, however, will be viewed as violations of some right or entitlement, caused by a human agent (individual or collective) and susceptible of remedy. Some victims "lump it" rather than complain. Other victims voice claims to the offending party. Some of these claims are granted; those that are not become disputes. Such disputes may be pursued in the social setting where the dispute arose (e.g., work-

place, school) or in some other forum. Some disputes are taken to lawyers, and some of these are filed in courts. At every stage along the way, disputes may be abandoned or settled.

Since there are no data on how the lower layers of the dispute pyramid have changed over time, one cannot compute changes in the rate at which troubles become disputes or disputes become lawsuits. Before the recent 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. It appears that rates of recourse to courts were even higher in colonial America.

More than 98 percent of all civil cases are filed in the state courts. Hence any major rise in the propensity to litigate should be detectable in the caseload trends in those courts. But until recently comprehensive and reliable data on state court caseload trends have been unavailable. The National Center for State Courts (NCSC) has recently produced the best profile so far available of state caseload trends, covering a number of states for the years 1978 to 1984, as summarized in table 1. The litigation-explosion view would lead one to expect this to be a period of steeply rising caseloads. But the NCSC figures, based on all courts that reported comparable data for the years 1978, 1981, and 1984, portray nothing that resembles the supposed explosion. Filings of civil cases surged faster than population from 1978 to 1981, but from 1981 to 1984, when litigation-explosion lore would have litigiousness intensifying, 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

TABLE 1

Percentage Changes, Population and State Court Filings, 1978–84

Type of Cases	3-Year Period 1978 to 1981		3-Year Period 1981 to 1984		6-Year Period 1978 to 1984		Base (Number of courts reporting comparable data for all 3 years)
	Population	Filings	Population	Filings	Population	Filings	
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

Source: National Center for State Courts, Court Statistics and Information Management Project, *State Court Caseload Statistics: Annual Report 1984*, part II (1986), pp. 177, 181, 184, 186.

six-year period they grew by 9 percent, while population grew by 8 percent. In the 1981–84 period, tort data were available for nineteen courts. In five of these courts filings increased significantly faster than population, while in eight of them filings actually decreased.

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

Filings are not an entirely satisfying measure of litigiousness. Since it is plaintiffs who file, one tends to think of filing as measuring plaintiffs' propensity to sue. But it is well known that most disputes are resolved without filings. A filing represents not only a claim but a refusal by the defendant to satisfy it. Thus, changes in the rate of filing may represent changes not only in plaintiff propensity to claim but also in defendant propensity to resist. Or changes in filing may mark changes in the local legal culture – for example, a growing tendency not to begin serious negotiations until a case has been filed. In other words, there is no assurance that a filing represents the same stage of a dispute from one place or time to another.

Filings in the Federal Courts

Although only a small fraction of all American litigation takes place in the federal courts, there are several reasons for focusing on those courts in assessing current trends. First, information on federal courts is more comprehensive and continuous than on state courts. Second, figures on federal courts are frequently cited as proof of runaway litigiousness. Third, the recent rise in filings has been more dramatic in federal than in state courts. During the six-year period 1978–84, in which civil filings increased 9 percent in state courts, they increased 88 percent in federal courts. Thus, if there are portents of doom in the filing statistics, they ought to be discernible there. Finally, federal court litigation involves higher-status actors and is more visible to and through the media, so the portion of the symbolic public space it occupies is far larger than its share of the total caseload.

Taking 1975 as a convenient baseline, table 2 shows a striking 122 percent increase in filings over that nine-year span. Does this increase manifest a generalized heightening of the litigiousness of the American population, a lowering of public thresholds of legal irritability? Does it evidence the “increasing tendency of Americans to define all distresses, anxieties and wounds as legal problems [and to] turn to the courts for relief whenever things work out badly?”¹

The overall increase in filings over the nine years is heavily concentrated in a few areas. Almost three-quarters of the entire increase is accounted for by just five categories: prisoner petitions, torts, civil-rights cases, Social Security appeals, and recovery cases (suits by the federal government to recover overpayments of veterans' benefits and defaulted student loans).

TABLE 2
Federal District Court Filings, Selected Categories, 1975 and 1984

Category	1975	1984	% Change	Increase [Decrease]	Share of Total Filings Increase 1975-84
Total filings	117,320	261,485	122.9%	144,165	100%
1. Prisoner petitions	19,307	31,107	61.1%	11,800	
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, etc.	681	46,190	6,682.7%	45,509	31.6%
3. Civil rights	10,392	21,219	104.2%	10,827	7.5%
A. Public accommodation	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%
A. Black lung	2,793	59	-97.9%	[-2,734]	
5. Torts	25,691	37,522	46.1%	12,831	8.2%
A. Products liability	2,886 ^a	10,745 ^b	272.3%	7,859	5.5%
Total of five "Gainers" (1A, 2,3,4,5)				105,627	72.5%
Some "losers"					
6. Antitrust	1,431	1,201	-16.1%	[-230]	
7. Fraud, including truth-in-lending	2,237	1,842	-17.7%	[-395]	
8. Class Actions	3,061	988	-67.7%	[-2,073]	

^aIncludes 278 contracts cases.

^bIncludes 619 contracts cases.

Indeed, half of the total increase is accounted for by giant increases in two categories: Social Security and recovery cases. Each is the result of deliberate and calculated official policy. On the Social Security side, officials decided to curtail disability benefits by summarily removing beneficiaries from the rolls. Terminated recipients then had to sue for restoration. The impact on the caseload was compounded by the Reagan administration's policy of "nonacquiescence," whereby it insisted on fighting each subsequent claim in spite of fresh opposing precedents. (This policy was modified in June 1985.) Is the 412 percent increase in Social Security cases to be understood as an outbreak of litigiousness among Social Security claimants? According to a *New York Times* account, "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."² In 1985 there was a precipitous 34 percent drop in Social Security cases — from 29,983 to 19,771.

The recovery cases arose from federal efforts to recover overpaid benefits through

litigation. Does it make sense to take the 6,682 percent increase in these cases as evidence of an outbreak of litigiousness among federal officials? Indirectly, it reflects an increase in the number of student borrowers and veterans receiving benefits. More directly, it reflects a shift in federal policy: in 1980, the Veterans Administration (VA) was empowered to sue directly to collect debts without referring the matter to the Department of Justice. A VA official estimated that about half the collection cases filed by the VA would not have been brought had the agency not been given authority to institute such actions on its own.

Cases that reflect individual initiative rather than the changing contours of executive policy may provide a better reading of the national propensity to litigate. Prisoners are understandably prone to bring lawsuits: the stakes are high, the alternatives few, and the costs (to them) negligible. From 1975 to 1984, prisoner petitions increased 61 percent. During this period the prison population of the United States grew by 74 percent, so the number of petitions per 1,000 prisoners dropped from 73.4 to 67.1. The rate of case filings rose slightly among state prisoners but dropped sharply among federal prisoners. Whatever the explanation for these trends, it seems more likely to reflect responses to specific circumstances than the rise or fall of an inclination for litigious contest or a proclivity to define issues as legal wrongs.

If it is assumed that discrimination declined in many areas of American life between 1975 and 1984, the increase in civil-rights cases might be seen as evidence of increasing general litigiousness. But disputes over discrimination have a very distinctive profile, compared with disputes about other matters. Lowering some barriers multiplies the potential occasions for experiencing discrimination. Once members of a minority are hired, for example, there are for the first time possibilities for on-the-job discrimination. In discrimination grievances, there is a pronounced demand for vindication of principle. One suggestive study reported that in contrast to other kinds of problems, where most respondents sought "satisfactory adjustment," a strikingly high proportion of those experiencing discrimination problems sought "justice."³ Yet those with a discrimination grievance are inclined to "lump it." The Civil Litigation Research Project found that discrimination grievances were far less likely to be translated into claims than other kinds of grievances. In all types of middle-range disputes combined, 1,000 grievances led to 718 claims; but 1,000 discrimination grievances led to only 294 claims. When discrimination claims were made, a high proportion ended up as disputes. Only 62.5 percent of claims overall became disputes, but 73.4 percent of discrimination claims did so. But a relatively low proportion of discrimination disputes were taken to a lawyer, and a low proportion of them resulted in court filings. Overall, 1,000 grievances of other types led to 50 court filings, but 1,000 discrimination grievances led to only 8 court filings. Pursuing a discrimination complaint is an extremely painful process, exposing the claimant to social discreditation and self-doubt. Thus, in the area of discrimination, a high demand for vindication is balked by formidable obstacles to making and pursuing such claims, leaving a great pool of grievances that could become cases if those obstacles were overcome. The increase

in civil-rights cases suggests that the pursuit of these claims is being successfully institutionalized.

This does not mean that a continuous exponential growth of discrimination cases is to be expected, for practices are changing, too, in the direction of the anti-discrimination norms embodied in the law. Eventually, disputing about discrimination may become more “normal,” and the number of cases may stabilize at a level similar to those in other areas. One kind of civil-rights case has already shown a marked decline in filings: public-accommodations cases fell by 51 percent during this nine-year period. There were also declines in other categories of cases, including several that represent major expenditures of resources for the courts. Anti-trust cases declined by 16 percent. Fraud and truth-in-lending cases fell by 17 percent. Class actions, often viewed as an engine of legal aggression against business, fell by 67 percent — from 3,061 in 1975 to 988 in 1984, that is, from 2.6 percent of filings to 0.4 percent. Within the burgeoning Social Security area, black-lung cases fell by 97 percent from their 1975 level, as that particular group of victims worked their way through the system — much as the victims of asbestos are doing now.

The area that has excited the most concern in recent debate about litigation is that of torts. Unlike 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 in the past generation has sharply reduced the percentage of tort cases. In 1960, 36.2 percent of all civil filings were torts. But because of increases in other categories, only 14.3 percent of federal court filings in 1984 were tort cases.

In this nine-year period, the number of tort filings increased from 25,691 in 1975 to 37,522 in 1984. Almost two-thirds of this increase was due to a rise in products-liability cases. To many observers, this is the fiery heart of the litigation explosion. In identifying “*Burgeoning Tort Liability as a Major Cause of the Insurance Availability/Affordability Crisis*,” the attorney general’s Tort Policy Working Group cited as its first item of evidence that “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 percent 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.”⁴ But the table 1 figures from the state courts, showing a modest overall rise in tort filings during most of this period, give some reason to suspect that the increase in product claims there has been less dramatic. Unfortunately, none of the data on state courts break out products-liability filings separately. If product cases are becoming more common in state courts, their growth is not reflected in figures on actual trials. In two large urban counties for which there are data on the number of jury trials over a twenty-five-year period, the number of products-liability trials fell from the 1970s to the first half of the 1980s (as did the number of jury trials generally).

Products-liability cases have been counted separately in the federal courts since

1974. From 1974 to 1985, other tort claims of all kinds rose from 22,662 to 28,039 — an increase of 23.7 percent. Products-liability cases, on the other hand, rose 758 percent over this period — thirty-two times as fast. The pattern of products-liability claims in federal courts is far from typical of the pattern of other tort claims there — much less the pattern of products-liability or other tort claims in state courts.

What are these products-liability cases? Asbestos cases make up a significant share, as they have during the whole period since products-liability cases began being counted in 1974. In 1985, the first full year in which asbestos cases were counted separately, they made up 31.3 percent of all products-liability filings. In 1986, asbestos filings rose 28 percent while other products-liability filings declined by 7 percent, so that asbestos cases accounted for 43 percent of all products cases. It was estimated in 1985 that more than 16,000 asbestos cases had been filed in the federal courts, which would amount to more than a quarter of the cumulative total of 60,508 products-liability filings counted from 1974 to 1985.

These asbestos cases are a kind of litigation whose growth is not plausibly explained by an increase in the proclivity to sue. By the early 1980s, broad dissemination of information about the injurious nature of asbestos, the presence of an experienced asbestos bar, and concern about possible cutoffs of liability to future claimants were mobilizing large numbers from the pool of asbestos victims. This pool is destined to diminish over the coming decades — in no small measure because asbestos litigation has helped to reduce exposure!

If a single set of related products cases makes up a quarter of the total, other major clusterings may possibly be found in the category. At least one other product — the Dalkon Shield — was the subject of thousands of cases during this period. In October 1984, the A. H. Robins Co. moved to form a class of more than 3,500 pending cases with punitive damage claims. The total number of Dalkon Shield suits filed by early 1985 exceeded 8,700. The major movements of the products-liability category may be expected to reflect the flow and ebb of waves of litigation about specific products and the ways in which these populations of related cases are aggregated.

The products-liability category is often visualized as one in which suits over “thousands of products” have “jeopardized the health of many industries.”⁵ Its growth is then presented as an index and portent of the general growth of litigation. But if it is a category populated largely by several epidemics of suits about specific products, its growth may be less easily generalized. The available data do not indicate whether the cases in the products-liability category are widely dispersed across the whole range of manufactured products or instead contain large clusters of suits over a relatively small set of products. A 1986 Conference Board survey of risk managers of 232 major United States corporations found that products liability impinges in a major way only on a small number of specialized firms and concludes that products liability and the related crisis of insurance availability “have left a relatively minor dent on the economics and organization of individual large firms.”⁶

The Users and Uses of Litigation

Does the course of these cases, once they get to court, suggest an increase in the proclivity for litigious combat? By far the majority of civil cases in both federal and state courts are settled before they come to trial. There has been a great increase in the proportion of cases that terminate early in the process. In the federal courts a declining percentage of cases proceed to trial or even survive until the holding of a pretrial conference. In 1960, 11 percent of civil cases reached the trial stage and another 13.9 percent reached the pretrial conference. In 1986 only 4.4 percent reached trial and 11.3 percent reached pretrial. In state courts, too, a smaller proportion of cases were decided by full contest than in the past. Both trends reflect a long historical decline in the proportion of cases that run the whole course of possible contest.

What do these patterns reveal? If a generalized litigation fever were loosening the restraints that inhibit people from making claims, one would expect to find a general increase in the proportion of cases that are pursued through the full possibilities of contest. But although more disputes are arriving at court, proportionately fewer of these — though more cases in absolute numbers — proceed to later stages of the judicial process. The vast majority are resolved by negotiation rather than full-blown adjudication. Indeed, some critics contend that although lawsuits abound, there are too few opportunities to vindicate claims and elucidate principles through full adjudication.

The world of litigation is composed of subpopulations of cases, some increasing in number and others decreasing, that seem to respond to specific conditions rather than to global changes in climate. The distinctive traits of each subpopulation of cases reflect such factors as the number, concentration, or diffusion of the injuries or troubles in question, the presence or absence of other ways of dealing with these troubles, the availability of information about legal remedies, the development of lawyer expertise, and so forth. Such a subpopulation is not just a statistical collection of discrete cases observed against a fixed (or slowly changing) backdrop of law. It has a career. It is a changing stream whose course shifts and turns as lawyers gain expertise and develop specialization, new knowledge is generated and disseminated, and parties change their expectations. The underlying behavior also changes, as do insurance practices, record keeping, and so forth. New types of cases come on the scene; some expand into sizable populations; some stabilize and remain relatively constant for long periods (like automobile-injury cases and divorces); others fade away (like black-lung and truth-in-lending cases). The careers of these changing populations in turn cumulate into major changes in the makeup of court caseloads.

These changes reflect and reinforce changes in public beliefs and expectations about the legal system. The shifting patterns of filings 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 protection from, or recompense for, many kinds of injury. But this sense is not self-activating, and its growth does not suffi-

ciently account for the patterns of court use. Its translation into litigation depends on the values and resources of claimants, and on the remedial options available to them. These in turn reflect changes in the wider institutional context in which disputes arise.

The aggregate data reviewed above suggest a moderate and modulated rather than a feverish and unrestrained use of litigation. This picture is confirmed by what is known of the experience of individual litigants. Wary of risks, delays, and costs, litigants do not act as if propelled by an unappeasable urge for contest or public vindication. There is little 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. For plaintiffs as well as defendants, litigation is usually a miserable, disruptive, painful experience. Few litigants enjoy it or bask in the esteem of their fellows – indeed, they may be stigmatized. Even those who prevail may find the process costly. As a 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.”⁷

The mythic nature of the notion that Americans are suffering from a litigation mania is revealed by a humble example. The greatest single source of the bulge in filings is the increase in divorce (and postdivorce) proceedings. According to the Council on the Role of the Courts, “domestic relations cases dominate state court dockets.”⁸ This conclusion 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 percent of the total caseload. In California the proportion was 38.5 percent. Of all the common types of disputes studied in the Civil Litigation Research Project, postdivorce disputes were most likely to end up in court. Everyone knows many people who are parties in these cases, but few know many who sought divorce or postdivorce remedies because they were enamored of litigation or beguiled by lawyers. What attracts users is not 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, the courts appear the best of unpleasant alternatives. In a study of disputing in three neighborhoods of a New England city, Sally Merry and Susan Silbey concluded that their respondents

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.

. . . For all respondents turning to court and police with problems is a last resort to be used only if “the problems are very serious,” “can’t be avoided,” “it is absolutely necessary,” and “you have tried everything else.”⁹

Why, then, do people sue? In his famous June 1978 commencement address at Harvard University, 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."¹⁰

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 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 withdrawn. . . .¹¹

It need not be imagined 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 ending up stymied, finding no other avenue of relief that supplied any leverage over the recalcitrant author, they found filing suit an available and viable way to solve the problem. The result conformed to the classic pattern of American litigation: the filing created a setting for serious negotiations between the parties; positions were assessed "in the shadow of the law" — that is, by anticipating what courts might do, including the shadow of the costs and risks of the proceeding; concessions were made, and, as in most American litigation, the process culminated in a settlement without any direct official input.

Those who are distressed at the United States's excessive litigiousness often gaze longingly at Japan, which is thought to have remained uncorrupted by excessive legalism. Japan, they think, has few lawyers, avoids conflict, disdains legalism, and resolves disputes by conciliation. The country plays a central role in litigation-explosion mythology as a benign black hole of antilitigiousness. In reality, Japan's antilegalism is more complex and ambivalent. The capacity of Japanese courts to provide adjudicatory remedies has indeed been deliberately constricted for generations. But the alleged paucity of lawyers in Japan will not withstand examina-

tion. Twelve thousand – the number often cited – 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 advisers, judicial scriveners, administrative scriveners, 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. The supposed Japanese lack of interest in the law is belied by the observation of a Japanese law professor that “there 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.”¹²

In late 1985, *Reader's Digest* terminated its Japanese edition. The *New York Times* reported:

On Dec. 17, the union 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 union. . . .¹³

What would make the unlitigious Japanese so eager to resort to all-out legal warfare? Dispute-resolution theory suggests a number of possible explanations. First, the stakes for the workers are extremely high – their very livelihood – and it is well established that even those disinclined to use the courts will do so when faced with a threat to vital and irreplaceable resources, such as land, power, and reputation. Second, there is nothing to lose. Since *Reader's Digest* is leaving, there is no continuing relationship to be threatened. Just as important, there is no continuing relationship to serve as a locus for alternative remedial actions. Finally, the employer's perceived violation of responsibility – its overtly self-regarding stance and refusal to consult over its decision – provided the spur of indignation that can overcome reluctance to litigate. Once the Japanese overcome this reluctance they can pursue litigation with great moral intensity for long periods, as in the collective litigation campaigns conducted by groups of victims against corporations that are perceived to have conducted themselves badly by denying responsibility to those they have injured.

The Solzhenitsyn and *Reader's Digest* stories are a reminder that even those ideologically disinclined to use the courts sometimes do so. They find themselves in situations where they are affected by others but have no leverage to control those others or hold them accountable – typically in dealings with strangers but sometimes with intimates as well. In such a predicament, they may turn to courts for recourse, usually with reluctance. And modern society presents more of these

predicaments. Modern technology increases the likelihood that remote actions will impinge on persons. An increasing proportion of dealings and of disputes is with remote actors, especially with corporate organizations as opposed to other persons. Thus, a growing share of serious disputes are between entities of very different size — typically between individuals and large organizations. The advance of knowledge enables people to trace out more of the connections between actions and their ramifying consequences. Education and wealth make people more competent at visualizing remedies and enlisting the help of the law to control and hold accountable remote and overwhelming actors. The law is used *ex ante* in the “wholesale” form of legislation and administrative regulation and also *ex post* in the “retail” form of litigation.

Current discussions of the litigation system display a sensitivity to the various kinds of costs, direct and indirect, that attend the system. One hears much of bizarre claims, immense jury verdicts, undeserved windfalls, the engorgement of contingency-fee lawyers, the financial devastation of defendants, and other horrors that befall the participants in specific cases. One also hears 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, and so on. One hears much less of the benefits of litigation: that in addition to its direct provision of compensation, it supports a vast system of bargaining in which almost all disputes are resolved by negotiation and that it stimulates a host of preventive activities by threatening and educating those engaged in the various activities that underlie injuries and disputes.

It is not claimed that the system is optimal, that its benefits outweigh all its costs, or that the current patterns of litigation represent the best way to achieve those benefits. But it should be recognized that the benefits are real and that any assessment of the social value of litigation must take them into account in comparing the net effects of present litigation patterns with those of proposed or likely alternatives.

Conclusion

Respect for the available evidence suggests a more benign reading of the current situation than inhabits discussions of the lawsuit crisis or litigation explosion. The United States is not faced with an inexorable exponential explosion of cases but with a series of local changes, some sudden but most incremental, as particular kinds of troubles move in and out of the ambit of the courts. Higher caseloads do not reflect a heightened desire for adversarial combat; they occur as people try to cope with problems within a given array of remedial alternatives. Litigation, like the alternative ways of handling such troubles, includes among its effects a mix of both benefits and costs. The net effects of each method cannot be ascertained by deduction or supposition.

Why the consternation about litigation? Why is the bad face of law evident and

its good face hidden to many? The answer is surely complex, but two points deserve mention. First, litigation implies accountability to public standards. This heightening of public accountability in the courts can be seen as a counter to deregulation in the executive branch of government, and as such is unwelcome in many quarters. The sense of being held to account has multiplied far more than the number of cases or trials, for it depends 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 working is more widely and vividly circulated to more educated and receptive audiences. As a source of symbols and bargaining counters, litigation patterns have changed too. The kind of litigation that once dominated the system — lawsuits to enforce market relations — has given way to tort, civil-rights, and public-law cases that “correct” the market. It is litigation aimed “upwards” — by outsiders, clients, and dependents against authorities and managers of established institutions — that excites most of the reproach of this litigious society.

The sense that the United States is uniquely cursed by rampant legalism that destroys community, unravels the fabric of trust, distorts markets, and confounds authority is yet another manifestation of the cliché of the United States as a land of alienation and oppression. Instead of unfavorably comparing the reality, in all its puzzling complexity, with some imagined harmonious and organic society, one should take the United States’s variform and changing patterns of litigation as a challenge to explore the central and distinctive features of this society.

NOTES

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