

***921 THE LIFE AND TIMES OF THE BIG SIX; OR, THE FEDERAL COURTS SINCE THE
GOOD OLD DAYS**

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In this Article, Professor Marc Galanter challenges the notion that increases in the caseload of the federal courts reflect a general increased litigiousness on the part of the American public. He examines civil filings in the federal district courts in six categories of cases that he calls the 'Big Six': civil rights, prisoner petitions, social security, recovery (mainly recovery of overpayments of veterans' benefits and of defaulted student loans), other contracts, and torts. He finds that the increase in litigation is not general over these areas; instead, the incidence of some kinds of cases is growing while that of others is falling. Professor Galanter suggests that different subpopulations of cases respond to specific conditions rather than to global changes and that control of the federal court caseload requires study of these conditions and of the effects on litigation that the cases themselves have.

Last winter I went down to my native town, where I found the streets much narrower and shorter than I had left them, inhabited by a new race of people to whom I was very little known. My play-fellows were grown old, and forced me to suspect that I was no longer young. My only remaining friend has changed his principles, and has become the tool of the predominant faction. My daughter-in-law, from whom I expected most, and whom I met with sincere benevolence, has lost the beauty and gaiety of youth, without having gained much of the wisdom of age. I wandered about for five days, and took the first convenient opportunity of returning to a place [London], where, if there is not much happiness, there is, at least, such a diversity of good and evil, that slight vexations do not fix upon the heart.

Samuel Johnson to Joseph Barette, July 20, 1762.¹

I. THE CHANGING CASELOAD OF THE FEDERAL COURTS, 1960-1986

Addressing bar leaders at a 1987 meeting, Justice Antonin Scalia poignantly expressed his sense of the deterioration of the federal courts.² He compared the courts of today with their counterparts in 1960. The federal courts then had fewer judges and smaller caseloads, but they were the site of big, exotic, significant cases, 'by and large . . . *922 cases of major importance.'³ In contrast, today the federal courts are full of 'minor' and 'routine' cases about 'mundane' matters 'of less import' or even 'overwhelming triviality.'⁴ Justice Scalia gives us a picture of what, as a newly graduated lawyer, he thought was in the federal courts:

The federal courts, as I knew them then, were forums for the 'big case'-- major commercial litigation under the diversity jurisdiction, and federal actions under such laws regulating interstate commerce as the Sherman Act, the Securities Exchange Act, and the National Labor Relations Act. They were not the place where one would find many routine tort and employment disputes. They had FELA and Jones Act cases, to be sure--but those seemed to be the exception proving the rule, a touch of the mundane in a docket that was at least substantially exotic.⁵

Does this big versus small, important versus routine, exotic versus mundane contrast summarize changes in the caseload of the federal courts over the past quarter century? Was that what the federal courts were like? If so, are they less so now? And what caused the change? I propose to examine the changes in the caseload and operations of the federal district courts from 1960 to 1986--at least as they are revealed to an outsider by the published reports of the Administrative Office.⁶ I shall argue that Justice Scalia's characterization is only a very partial fit, and that there is a more complex pattern of populations of cases moving in and out of the federal courts. I will explore the implications of this pattern for policies about the future of the federal courts.

The most widespread and influential versions of the view that the federal courts are filled with inappropriate cases trace this problem to a recent and generalized increase in the litigiousness of the American population. Thus, one well-placed observer noted 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.¹⁷ Such views have flourished for a decade and have become *923 commonplace.⁸ I shall consider whether the federal court caseloads manifest a general lowering of public thresholds of legal irritability. For if today's higher caseloads reflect such a change, different policies might be commended than if the surfeit of cases was specific to various sectors of litigation and tied to the predicaments, goals, and strategies of particular groups.

Only a small fraction of all litigation in the United States takes place in the federal courts. Nevertheless, discussion about litigation in America tends to focus heavily on the federal courts. One reason for this is simply that information about federal courts is more abundant, more comprehensive, more continuous, and more manageable than for the state courts. Interest in this information is provoked by the fact that federal litigation, on the whole, involves larger stakes and higher status actors and is more visible to and through the media. Hence, figures on federal courts are frequently cited as proof of runaway litigiousness throughout American society. But federal courts are distinctive, rather than typical. The recent elevation in the number of filings in the federal courts has been more dramatic than in the state courts. Information about state court caseloads is spotty and unreliable, but the best available information is that over the six-year period from 1978 to 1984, torts, contracts, and real property filings taken together grew by 9% in the 29 courts in 20 states for which comparable data were available. Population in these states increased by 5% during this period.⁹ In contrast, civil filings in federal district courts increased by 89% from 1978 to 1984.¹⁰ Tort filings increased by 42% and contracts filings increased by 76%.¹¹ Obviously, the patterns in federal courts are sufficiently distinctive to limit our ability to draw from trends in federal courts conclusions *924 about patterns of litigation elsewhere. At the same time, this distinctiveness lends to what happens in these courts a special interest.

II. THE OVERALL PATTERN OF INCREASE

From 1960 to 1986, civil filings in the federal district courts rose from 51,063 to 254,249¹² --an increase of 398%.¹³ If the overall increase in filings over these 26 years is broken down, we notice that it is heavily concentrated in a few areas. As Table 1 indicates, six categories of cases account for over four fifths of the increase. For mnemonic purposes, I call them the Big Six: they are civil rights cases, prisoner petitions, social security cases, recovery cases,¹⁴ other contract cases, and tort cases.¹⁵ As Figure 1 shows, these six types of cases made up 74.6% of all civil filings in 1960, and 78.1% of all civil filings in 1986.

Table 1 offers a view from the present, isolating the categories that are predominant now. Historians warn against attempting to understand the past in terms of the present. So, as a corrective to this 'presentism,' consider what loomed large in 1960. Table 1 shows that only two of the Big Six, torts and contracts, were outstandingly big in 1960, making up 38% and 26% of the filings, respectively. Two others, recovery cases and prisoner cases, each made up over 4% of filings, but this level was shared by forfeitures and real property cases. The other two members of the Big Six, social security and civil rights, were barely visible.¹⁶ The changing make-up of the Big Six over the years is displayed in Figure 1.

[Note: The following TABLE/FORM is too wide to be displayed on one screen. You must print it for a meaningful review of its contents. The table has been divided into multiple pieces with each piece containing information to help you assemble a printout of the table. The information for each piece includes: (1) a three line message preceding the tabular data showing by line # and character # the position of the upper left-hand corner of the piece and the position of the piece within the entire table; and (2) a numeric scale following the tabular data displaying the character positions.]

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TABLE 1

GROWTH OF CIVIL FILINGS U.S. DISTRICT COURTS 1960-1986

	1960 Number of Filings	% of 1960 Filings	1986 Number of Filings	% of 1986 Filings	Increase in Number of Filings
TOTAL minus	51,063	100.0%	254,249	100.0%	203,186
LOCAL					
BIG SIX	38,079	74.6%	198,539	78.1%	160,442
Recovery	2,251	4.4%	40,824	16.1%	38,573
Other	13,248	26.0%	47,443	18.7%	34,195
Contracts					
[Diversity	[3,876]	[7.6%]	[31,871]	[12.5%]	[27,995]
Contrs]					
Torts	19,586	38.4%	41,979	16.5%	22,393
[Diversity	[12,661]	[24.8%]	[28,699]	[11.3%]	[16,038]
Torts]					
Civil Rights	280	0.5%	20,128	7.9%	19,848
Prisoner	2,177	4.3%	33,758	13.3%	31,581
Social	537	1.1%	14,407	5.7%	13,870
Security					

OTHER					
Forfeiture and	2,371	4.6%	3,480	1.4%	1,109
Penalty					
Real Property	2,304	4.5%	10,642	4.2%	8,338
Labor Laws	1,900	3.7%	12,839	5.0%	10,939
Intellectual	1,467	2.9%	5,681	2.2%	4,214
Property					
Tax Suits	1,545	3.0%	2,722	1.1%	1,177

Sec, Comm, and Exch	267	0.5%	3,059	1.2%	2,792
Bankruptcy Suits	308	0.6%	4,561	1.8%	4,253

Total	48,241	94.5%	241,523	95.0%	193,282
Accounted For					
Remaining Other	2,822	5.5%	12,726	5.0%	9,904

1...+...10...+...20...+...30...+...40...+...50...+...60...+...70

***** This is piece 2. -- It begins at character 71 of table line 1. *****

[FNaa]	
% of Net	Average
Increase	Annual
in	Growth
Filings	Rate
100.0%	6.4%
79.0%	6.6%
19.0%	11.8%
16.8%	5.0%
[13.8%]	[8.4%]
11.0%	3.0%
[7.9%]	[3.2%]
9.8%	17.9%
15.5%	11.1%
6.8%	13.5%

0.5%	1.5%
4.1%	6.1%
5.4%	7.6%
2.1%	5.3%
0.6%	2.2%
1.4%	9.8%
2.1%	10.9%
95.1%	6.4%
4.9%	6.0%

71...+...80.....+...90...

 ***** This is piece 3. -- It begins at character 1 of table line 43. *****

FN** This table is constructed from data contained in Table C-2 of the Annual Reports of the Administrative Office of the United States Courts for the years 1960 and 1986. In two instances where the category in question was not counted separately in 1960, I have used the 1961 figure as if it were identical with 1960. Except as noted below, this table includes every category of cases which made up more than 1% of (non-local) civil filings in either 1960 or 1986. Two composites are not included: 'Enjoining federal agencies' (1517 filings in 1960), for which there was not corresponding 1986 category; and 'Other Statutory Actions' (8645 filings in 1986) for which there was no corresponding 1960 category.

FN The grouping of cases into categories like 'Labor' and 'Contracts' is along the line of the groupings in the 1986 Report. Because Table C-2 was organized differently in 1960, it was necessary to assemble 1960 categories to match the 1986 groupings. For example, the Tort total for 1960 includes United States Plaintiff cases, United States Defendant, FEOLA, Jones Act, Diversity, and several Admiralty categories (Collision of Ships, Other Negligence, Limitation of Liability, and Personal Injury); the 'Other Contract' total for 1960 includes United States Plaintiff (other than Recovery cases), United States Defendant, Miller Act, Diversity and several Admiralty categories (Cargo Damage, Other Contracts, Wage Suits); the 1960 Prisoner total includes United States Defendant Habeas Corpus (other than Deportation) and Motion to Vacate Sentence Cases and Federal Question Habeas Corpus cases.

FN Percentages are rounded to the nearest tenth of a percent.
 1...+...10.....+...20.....+...30.....+...40.....+...50.....+...60.....+...70.....+...

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***927** Examination of Table 1 suggests a picture of the changing makeup of the caseload that differs from Justice Scalia's recollections. Torts, which he recalls as 'the exception . . . a touch of the mundance,' was the predominant category in 1960--38% of all filings. In 1986, torts made up only 17% of civil filings. On the other hand, the diversity contract filings-- from which would be drawn 'the major commercial litigation under the diversity jurisdiction' that Justice Scalia recalls as typical--were only 8% of filings in 1960, but had increased to 13% of a much greater total of civil filings in 1986. Of the other kinds of cases he points to approvingly, both labor cases and securities cases have also increased their portions of the much-swollen docket; only anti-trust cases have declined.¹⁷

Before we look at the changes since 1960, it may be worth pointing out that in 1960 those who worked in the federal courts, or observed them close up, did not see them as the gleaming towers they appear to be through the mists of memory. At the time, numerous observers detected a 'crisis in the courts,' including federal courts.¹⁸ For several years prior to 1960, then Chief Justice Earl Warren regaled bar audiences with speeches expressing his distress at serious shortcomings:

[I]nterminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of constitutional government in the United States. Today, because the legal remedies of many of our people can be realized only after they have sallowed with the passage of time, they are mere forms of justice. And, to the extent that this is so, there is created a disrespect for law. . . .¹⁹

[T]he delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. It is so chronically prevalent that it is compromising the quantity and quality of justice available to the individual citizen. . . .²⁰

***928** Discontent with the federal courts was not confined to matters of congestion and delay. Distinguished federal judges complained that important and interesting cases were being squeezed out by a mass of personal injury cases. Thus, Judge Charles Wyzanski told the Attorney General's Conference on Court Congestion and Delay:

[N]ow at least a quarter to a third of my time is spent in motor vehicle litigation and a substantial part is spent in other personal injury business. . . . When I compare what my docket was 16 1/2 years ago when I began with what it is now, it is surprising how much less time I spend in cases under Federal Statutes . . . and how much in general I spend on relatively trivial kinds of business.²¹

Returning to our view from the present, let us examine the careers of the Big Six from 1960 to 1986.

III. RECOVERY CASES

In recent years, the category noted in the Annual Reports as 'Recovery of Overpayments and Enforcement of Judgments' has consisted primarily of suits, almost all of them filed by the United States, to recover overpayments of veterans' benefits (over 90%) and to recover defaulted student loans. In 1960, there were 2,251 recovery cases--a substantial 4.4% of civil filings--but they faded to a low of 246 in 1973 (0.3% of filings).²² The modern era of recovery cases began in 1977 when the government enhanced its efforts to collect defaulted student loans in response to a recommendation of the General Accounting Office.²³ Much of the increase in recovery filings from 1977 to 1979 was due to student loan collections.²⁴ In 1979, the Veterans Administration ***929** (VA) ran a test program to pursue some of its delinquent accounts.²⁵ In 1980, the VA was employed to sue to collect debts without referring the matter to the Department of Justice.²⁶ An Office of Debt Collection was established in 1982 to centralize control over debt collection activities.²⁷ Filings increased astronomically (see Figure 2), culminating in 1985 when 58,159 cases were filed--fully 21.3% of all civil cases in the federal district courts. It was estimated by a VA official that about half of the collection cases filed by the VA would not have been brought if the agency had not been given authority to institute such actions on its own.²⁸ In 1986, filings dropped sharply--by almost one third--to 40,824. This drop, like the earlier rise, reflected a change in VA policy--in this case not to pursue debts smaller than \$600.²⁹

The increase in these recovery filings also may reflect indirectly an increase in the underlying population of student borrowers and veterans receiving benefits. More directly, the spectacular rise and later falling off of recovery cases

reflect shifts in federal policy within various agencies.³⁰

IV. SOCIAL SECURITY CASES

Social security cases were not even counted separately until 1961, when there were just 537 of them. The number rose steadily to over 5,000 in 1975, then jumped to the 10,000 level, where it remained until a *930 spectacular surge of cases in 1983 and 1984, with 29,985 cases filed in the latter year. Within two years the number of social security filings had dropped by more than half to 14,407.

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As Figure 3 shows, the social security category comprises a set of sub-populations, each with a distinctive career.³¹ By the middle 1970s there was a tremendous backlog of claims within the Social Security Administration (SSA) hearing process.³² The rise in the middle 1970s was paced by a surge of Black Lung cases, which tapered off before the end of that decade.³³ Black Lung claims were given priority, thus building *931 up a backlog of cases of other types. In the late 1970s, the SSA was engulfed by massive numbers of Supplemental Income claims, a type of program that it had not handled before.³⁴ The great wave of cases that crested from 1983 to 1985 was made up mostly of disability claims. These claims stemmed from a new policy of periodic reviews of disability determinations that began in 1981. Beneficiaries who were summarily removed from the rolls could acquiesce in termination or sue for restoration. 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.³⁵ In 1985 there was a precipitous 34% drop in social security cases--from 29,983 to 19,771.

The caseload shifts in both recovery and social security cases mirror deliberate alterations of federal policy--to recover overpayments of veterans' benefits by litigation, and to curtail disability benefits by summarily removing beneficiaries from the rolls. Like federal officials seeking recovery of overpayments, terminated social security recipients turned to the federal courts with their problems because nothing better was at hand.

V. PRISONER PETITIONS

Rather than track the contours of changing executive policy, the other members of the Big Six reflect individual initiative on the part of litigants. In the twenty-six year period from 1960 through 1986, filings of prisoner petitions rose from 2,177 to 33,758--a rise of some 1,450%. *932 The portion of prisoner cases rose from 4.3% of filings in 1960 to a high of 19.4% in 1970, falling to 13.3% in 1986.³⁶

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In part, the larger number of filings reflects larger prison populations. The prison population rose from 212,953 in 1960 to 546,659 in 1986.³⁷ As Figure 5 shows, the rate of filings per capita rose steeply during the 1960s, but the per capita rate was relatively flat during the early 1970s and has fallen slightly since then.³⁸ Federal prisoners bring *933 cases several times more frequently than state prisoners, and the rates seem to move independently.³⁹ An increasing portion of these prisoner filings are civil rights complaints about conditions or treatment, rather than habeas corpus challenges to conviction.⁴⁰ Whatever the explanation for these trends, they seem to reflect responses to specific settings rather than the rise or fall of a generalized appetite for litigation.

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VI. CIVIL RIGHTS

The number of civil rights cases rose spectacularly from just 280 in 1960 to 20,128 in 1986. This increase marks a massive re-ordering of American life--first the dismantling of the segregation and enforced exclusion of blacks, then the extension of these non-discrimination norms to other disadvantaged groups.⁴¹ Civil rights litigation has been *934 the fastest growing category of all, with an annual growth rate of 17.9%. Most of the growth since the early

1970s has been in employment cases (however, given the decline in class actions, the rise in employment cases may overstate the change in the number of individuals whose claims are being litigated). Also, the pool of potential claims has been enlarged as additional forms of discrimination, such as age, have been added.

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During the period from 1960 to 1986, discrimination was declining in many areas of American life. The continued increase in civil rights cases has impressed many as evidence of increasing litigiousness. As barriers fall, lawsuits complaining of discrimination should, in this view, fall with them. And there are instances in which this seems to be the pattern--such as the decrease of public accommodations cases.

However, disputes about discrimination have a very distinct profile compared to disputes about other matters. One 'non-intuitive' feature of anti-discrimination norms is that as barriers of exclusion are lowered, occasions for potential violation are multiplied. For example, once members of a minority group are hired, there is a vast increase in the opportunities for experiencing discrimination on the job.⁴²

Another distinctive feature of discrimination grievances is a pronounced appetite 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.'⁴³ Yet, paradoxically, those with discrimination grievances are more inclined to 'lump it' than are other grievants. The Civil Litigation Research Project found that far fewer discrimination grievances were translated into claims than were other kinds of grievances.⁴⁴ When all types of middle range disputes were 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 disputes⁴⁵ (for claims overall, only 62.5% became disputes; but 73.4% of discrimination claims became disputes).⁴⁶ But a relatively low proportion of these disputes were taken to a lawyer, and a low proportion of the disputes taken to a lawyer 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.⁴⁷ Once in court, however, discrimination disputes are attended by a very high degree of contention. The percentage of civil rights cases that reach trial is higher than for any other category of cases (see Figure 10 below).

How can we explain the puzzling coexistence of a great appetite for vindication and prolonged contention on the one hand, with a low rate of claiming and low rate of legal action on the other? Both make sense in light of the personal predicament of the discrimination victim. Pursuing a discrimination complaint is a costly process, often entailing disruption of valued relationships, as well as an extremely painful process, exposing the claimant to social discreditation and self-doubt.⁴⁸

Thus, discrimination is an area where a great pool of grievances is dammed up by formidable obstacles to making and pursuing such claims. As social practices change in the direction of the anti-discrimination norms embodied in the law, these obstacles are dissipated and more claims are brought. Pursuit of these claims is being successfully institutionalized.⁴⁹ Just how will these conflicting forces work themselves out? In a pessimistic scenario, less discrimination liberates more victims to bring discrimination cases, so we may expect a continuous growth of these cases. The optimistic response is that institutionalization of non-discrimination norms eventually will decrease victimization and will decrease the singular intensity of disputes about discrimination.

VII. TORTS

Torts is the area that has excited the most concern in recent debate about the litigation crisis. Unlike the other categories we have discussed, which have loomed large in federal courts only in recent years, torts have made up a substantial portion of the cases entering federal courts since before World War II. In 1960, 38.4% of all civil filings were torts. The influx of other court business in the past generation has reduced sharply the percentage of tort cases, even as their number rose. Tort filings increased from 19,586 in 1960 to 41,979 in 1986. Due to increases in other categories, tort filings fell to 16.5% of total civil filings--less than half of the portion in 1960.

The make-up of torts cases has changed over time. As Table 1 indicates, a slightly larger percentage are diversity cases. Diversity torts rose from 65% of all tort filings in 1960 to 68% in 1986. Within the diversity category, there was a shift from motor vehicle cases to other kinds of claims. In 1960, motor vehicle personal injury cases

made up 55.6% of all diversity tort filings. In 1986, motor vehicle cases were only 23.1% of the diversity tort total--a dramatic relative decline in the most routine of tort cases.⁵⁰

Motor vehicle cases have been eclipsed by the arrival of large numbers of product liability cases. From 1975 to 1985, tort product liability filings increased from 2,608 to 12,983--that is, from 10.2% of all tort filings to 31.5%.⁵¹ Filings of product liability cases have increased much more rapidly than filings of other torts. From 1974 to 1985 non-product liability tort claims increased from 22,551⁵² to 28,296--an increase of 25.5%. Product liability cases were reported to have increased from 1,579 to 13,554 over this period.⁵³ This frequently cited 758% rise is 30 times as great as the rise in the rest of the torts category, even discounting for some exaggeration in this figure.⁵⁴

***938** The recent history of product liability claims in federal courts seems distinctively different from, rather than typical of, other tort claims there. The federal history also appears to be distinctively different from the course of product liability claims in the state courts--for reasons that no one has satisfactorily explained. In Florida in 1986, only 2.3% of all tort claims were product liability cases,⁵⁵ in that year product liability claims made up 29.7% of tort filings in the federal district courts. Thus, the assertion that a similar dramatic rise in product liability cases has occurred in state courts deserves to be treated with skepticism.⁵⁶

The more modest rise in tort filings in the state courts over most of this period⁵⁷ gives some reason to believe the increase in state courts has been less dramatic. Unfortunately, there is little data from state courts that separates out product liability filings. The General Accounting Office study found data on product liability filings in three states. There, state court filings rose along with federal court filings, but not as rapidly, so that a larger portion of all product liability cases were in the federal courts at the end of the period than at the beginning.⁵⁸ If there are more product liability filings in state courts, they are not reflected in more trials of product liability cases. In two large urban counties for which there is data on the number of jury trials, the number of product liability trials fell from the 1970s to the first half of the 1980s (as did the number of jury trials generally).⁵⁹

The rise of product liability filings in the federal courts is often cited as a portent of runaway litigiousness that threatens to destroy business, misallocate resources, unravel civic morality, and overwhelm ***939** the courts. For example, the Chairman of the Board of the National Association of Manufacturers charged that:

Like a plague of locusts, U.S. lawyers with their clients have descended on 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 percent in the past decade. Product liability suits filed in federal courts doubled from 1978 to 1985. . . .

Product liability suits have brought a blood bath for U.S. business and are distorting our traditional values.⁶⁰

Underlying these grim prognoses is an assumption that the product liability category encompasses suits, involving 'thousands of products,' that 'have jeopardized the health of many industries.'⁶¹ But available data provide a different picture of the incidence of this litigation.⁶² In 1986, asbestos cases comprised 43% of all product cases.⁶³ Asbestos cases have been a major factor during the whole period (since 1974) in which product liability cases have been counted. The General Accounting Office calculated that just over one quarter of all the product liability filings in federal district courts from 1974 to 1986 were asbestos cases.⁶⁴

The rise in asbestos filings is not plausibly explained in terms of an increased proclivity to sue. As the long campaign to establish liability for asbestos exposure progressed, information about the injurious qualities of asbestos was widely disseminated, an experienced asbestos bar emerged, more injuries surfaced after the long latency period, and concern grew about possible cut-offs of liability to future claimants. Larger numbers were mobilized from the pool of asbestos victims. This pool is destined to diminish over the coming decades--due first to the deadly ***940** effects of asbestos and second to powerful preventive effects produced by the asbestos litigation.⁶⁵

This great population of asbestos cases is changing over time. '[I]n comparison to other personal injury-products liability cases, [asbestos cases] were once complex and have become routine.'⁶⁶ Throughout, relatively few asbestos cases have gone to trial,⁶⁷ but the trials are getting much shorter.⁶⁸ Cases have been simplified: the emergence of a cadre of specialized defense counsel has led 'in many instances to improved ability to evaluate and settle cases,' and 'pretrial, trial, and appellate rulings have established patterns to guide case evaluations, which, in turn, support more settlements.'⁶⁹ It is not clear that these trends toward simplification will continue or whether the career line of asbestos cases will display further turns.⁷⁰

This singular set of related product cases makes up one quarter of the total for a decade, and 43% of 1986 product liability filings. A Federal Judicial Center report observes that the epidemic of asbestos litigation is 'a [u]nique [p]henomenon.'⁷¹ The widespread use of the substance, the suppression of knowledge of the danger involved (and consequent absence of preventive measures), and asbestos' undisputed and extreme dangerousness, combined with the difficulty of proving causation in individual instances, together produced a wave of litigation that is singular. According to the author of the report, 't here are no historical analogues and no projected recurrence of similar phenomena.'⁷² But there are other major clusterings of cases in the product liability category. The General Accounting Office report found that one other product--the Dalkon Shield--was the subject of 4,952 cases, *941 some 6% of all the federal product liability cases filed during the period 1974- 1986. The 1,371 Bendectin cases were another 1.7% of the total.⁷³

A recent report by Terence Dungworth of Rand's Institute for Civil Justice finds that a considerable portion of federal product liability litigation represents such 'epidemics' of suits about a single product. Tracing the lead defendants in all the product liability filings from 1974 to 1986, he finds that half were 'concentrated among fewer than 80 lead defendants . . . [while] the other half involved more than 19,000 defendants.'⁷⁴ This information is extracted from a data set that records only the first named party on each side, so the number of companies actually involved is undercounted. Even so, Dungworth reports, 'a product liability suit is an uncommon event for most companies.'⁷⁵

Dungworth concludes that 'it makes little sense to talk about product liability litigation as if it were a homogeneous entity. It is not. There is significant diversity between defendants, between industries, and even within industries.'⁷⁶ Putting aside the concentrated 'epidemics' of suits, the remaining dispersed product liability filings grew annually from 1981 to 1986 at a rate of 'just over 4 percent. . . . This is not much greater than the figure for non-product liability torts, which was 3 percent during the 1980s, and it is a good deal less than the 7 percent rate for all other private civil suits.'⁷⁷

Hence, there is ample ground for skepticism about the use of federal court product liability filing figures as an indicator of the propensity to bring product liability claims,⁷⁸ or of the general effects of such *942 claims on business enterprise,⁷⁹ or as a portent of the general growth of litigation.

VII. CONTRACTS

Each of the five categories of cases discussed above frequently has been numbered among the perpetrators of the explosion of federal caseloads, and has been the target of proposals to eliminate or curtail the hearing of such cases. Curiously, the sixth member of the Big Six, contracts, has not only escaped condemnation, but has rarely if ever been mentioned as the scene of burgeoning caseloads. Yet upon inspection, it may be the most spectacular area of growth in federal cases.

To analyze the growth in contracts, it is necessary first to separate out the recovery cases, which are technically contract matters. In this discussion, the contract category does not include either recovery cases or cases under local jurisdiction. Over the period 1960-1986, contract filings increased from 13,248 to 47,443. This increase of 258% far out-stripped the increase in torts, the most numerous category in 1960, which grew by 114%. Contracts grew at an annual rate of some 5%, as compared to the tort rate of 3%. By 1986, contract filings made up 18.7% of all civil filings, having surpassed torts as the largest category of civil litigation (see Figure 1).

The ascendancy of contracts over torts is particularly pronounced in diversity jurisdiction. Diversity contract filings grew at an annual rate of 8.4%, more than two and a half times the 3.2% annual growth rate of diversity torts. As noted above, the percentage of tort filings that were based on diversity of citizenship increased slightly from 65% in 1960 to 69% in 1986. The relative increase of diversity cases within the contract category is much more dramatic. In 1960, only 29% of contract filings were based on diversity; in 1986, diversity cases were 67% of all contracts filings. Since the mid- 1970s, there have been more contract cases than tort cases in the diversity jurisdiction. This shift is shown in Figure 7 and Figure 8.

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***944** It might be imagined that these contract cases are routine matters that bulk large in counts of filings but have little significance. This hypothesis is disproved by consideration of another measure of the prominence of case categories, the 'weighted caseload statistics' devised by the Administrative Office of the Courts for the purpose of determining the need for judicial appointments. A weight is assigned to each type of case corresponding to the average amount of judge time reported to be expended on cases of that type as compared to the average case. The last assignment of weights was in 1979.⁸⁰ At that time, a diversity motor vehicle personal injury case was given a weight of 0.89; a diversity product liability personal injury case was given a weight of 1.51; diversity 'other' contract cases were weighted 1.40.⁸¹ Multiplying these weights by the number of filings produces an estimate of the percentage of judge time consumed by cases of that type. Thus, in 1986, all contract cases (excluding recovery) consumed an estimated 18.8% of total judge time--21.2% of all the judge time expended on civil cases.⁸² In the finer grained figures for 1985 presented by Flanders, diversity 'other' contract cases consumed more judicial attention than any other category of cases--some 11.37% in 1985, up from 8.11% in 1979.⁸³ In contrast, diversity motor vehicle personal injury cases occupied 2.04% of judge time in 1985, and diversity product liability personal injury cases occupied 6.24% of judge time (2.38% on asbestos cases).⁸⁴ This single contract category consumed more than twice the judge time of prisoner cases and social security cases combined.⁸⁵

It is ironic that Justice Scalia imagined that the 'major commercial litigation under the diversity jurisdiction' was more characteristic of the federal courts in 1960 than at the present. Apparently there has been an upsurge of commercial litigation that spills beyond the bounds of contracts. If we go back and look at Table 1, we see that other areas that might be identified as business litigation, such as intellectual property and bankruptcy, have also grown rapidly.⁸⁶

***945** This surge of contract litigation invites us to examine the changes that have taken place since Stewart Macaulay's classic analysis of business disputing in the world of 1960--a world in which the managers of large manufacturing enterprises assiduously avoided litigation.⁸⁷ It appears that since then large numbers of business people have turned to the federal courts (I know of no evidence of a comparable rise in business litigation in the state courts).⁸⁸ One might imagine that this surge of contract cases reflects changes in the economy: the rise of franchising, the multiplication of corporate mergers and acquisitions, the internationalization of the American economy, and so forth.⁸⁹ But explanation of these trends awaits a detailed examination of these cases. There is no way to tell from the Annual Reports (or any other published source) who is bringing these cases and just what they are about.

A separate and intriguing puzzle is how this steep rise in contract litigation has escaped the notice of those who have examined litigation patterns (including the present author). Contract cases, an ethnographer of American legal life reminds us, hardly register as a disturbance and do not excite the same condemnation as other kinds of litigation.⁹⁰ Thus, all the horror stories about litigation chronicle outlandish or predatory tort or civil rights or family claims, but pass over contracts; ***946** they focus on the claims of individuals and ignore those of businesses, government, or other organizations.⁹¹

IX. 'GAINERS' AND 'LOSERS'

The Big Six account for nearly four fifths of the increase in filings between 1960 and 1986. As we can see from Table 1, there are other categories that grew briskly over this time span--real property, labor, intellectual property, bankruptcy. There were also some categories of cases that declined. Public accommodations civil rights filings dropped from a high of 601 in 1975 to 230 in 1986. Black Lung cases (in the social security category) dropped from their high of 4,908 in 1976 to 93 in 1986. Indeed, the whole social security category fell by half from 1984 to 1986. There were declines in other categories of cases, too, including some that represent major expenditures of resources for the courts. Anti-trust cases, both government and private, fell substantially from their earlier levels.⁹² Fraud and truth-in-lending cases were below their 1976-1981 levels.⁹³ Class actions, often viewed as an engine of legal aggression against business, fell 73% from their 1976 high of 3,584 to 971 in 1985. In 1976, class actions were 2.7% of all civil filings; in 1985, they were 0.4%.⁹⁴

X. AFTER THE FILING

Of course, filing is only the beginning of the process. Different kinds of cases tend to have different careers once in court. Some drop out early with little expenditure of court resources; others are settled after extensive involvement of judges and other court personnel in motions, conferences, and other pre-trial activities; some stay the course to begin and complete trial, and go on to post-trial motions and other proceedings.

We have traced changes in patterns of filings. Time does not permit an examination of changing patterns of dispositions in equal detail. But *947 let us see how the basic outline of disposition patterns fits within our findings about filings.

It is commonplace for the great majority of civil cases in both federal and state courts to be settled. This observation requires some qualification. Settlement is indeed the modal disposition of civil cases in most courts in the United States, and probably has been so for a long time. However, this predominance should not be exaggerated. Oft-cited figures of 85% or 90% or 95% are misleading: they represent the portion of civil cases that do not go to trial.⁹⁵ But that is not quite the same as 'settled,' if settlement means resolved by agreement between the contending parties rather than by the decision of an authoritative decision-maker. Cases may be disposed of by authoritative decisions in other ways than trial. My colleague Bert Kritzer, analyzing some 1,649 cases in federal and state court in five localities, found that, although only 7% of the cases terminated through trial, another 15% terminated through some other form of adjudication (arbitration, dismissal on the merits, etc.). In a further 9% of the cases, settlement followed a ruling on a significant motion.⁹⁶

The termination data on the federal district courts provided by the Annual Reports does not inform us about the involvement of the court or the contribution the court made to the disposition of the case. The data only tells us at which of four stages a given set of cases left the system: 'during or after trial,' 'during or after pretrial,' 'before pretrial,' or if the case involved 'no court action.' Using these four categories, we can trace some patterns from this termination data.⁹⁷

Over the period examined here, there has been an increase in the portion of cases that terminate early in the process. Figure 9 shows the percentage of all terminations that occurred at each of the four stages. A declining percentage of cases proceeded to trial--or even survived until the holding of a pre-trial conference. In 1961, 11% of civil cases reached the trial stage and another 13.9% reached the pre-trial conference.⁹⁸ In 1986 only 4.4% reached trial and 11.3% reached pre-trial.⁹⁹ *948 The portion of cases that run the whole course of possible contest has been in a long historical decline.¹⁰⁰

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Different categories of cases proceed to latter stages with very different frequencies. Part of the decline in the percentage of cases that proceed to trial is due to the arrival of large numbers of recovery and social security cases. Cases in these categories hardly ever reach trial. But the decline in the trial rate is not explained entirely by the increase of cases in categories with low rates of trial. Figure 10 shows the percentage *949 of cases in each of the Big Six categories that is terminated during or after trial.¹⁰¹ Although different categories maintain distinctly different levels of reaching trial, all of them have trended downward over most of our period.

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Although the Big Six include several categories in which almost all the cases are relatively simple and routine, the Big Six retain their dominance even when their presence is measured in terms of judge time consumed. In 1986, they comprised 78.1% of all civil filings. When filings are weighted for the amount of judge time typically consumed by each type of case, the six categories consumed an estimated 72% of all the judicial time expended on civil cases in 1986.¹⁰² The Big Six make up most of the cases that reach the trial stage. In 1986, cases in these categories comprised 83% of the 'during or after trial' terminations, including *950 90.7% of the jury trials.¹⁰³ Figure 11 shows the changing portion of each of the Big Six in the total number of terminations during or after trial. A declining portion of trials involve torts; an increasing portion are in civil rights cases and prisoner petitions; contracts has held its own.

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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.¹⁰⁴ But these settlements are vitally affected by what courts do.¹⁰⁵

*951 XI. FROM LITIGIOUSNESS TO DISAGGREGATION

The patterns we have observed cast considerable doubt on the notion that increasing caseloads in the federal district courts can be explained in terms of a heightened propensity of Americans to seek legal remedies and engage in litigious combat. If there were a generalized litigation fever loosening the restraints that inhibit the making of claims, one would expect to find that the increase was general--that the rate for all types of cases moved in the same direction. But 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. And once cases arrive in court, their further course hardly suggests an increased appetite for litigious combat. The portion of cases that are pursued through the full possibilities of contest has not increased--indeed it has continued to decline. (Of course, it may be that more contest can be packed into earlier stages; or that increased transaction costs mean that parties can afford less contest than they would prefer.)

How then can we make sense of these patterns? One way is to turn away from the search for global explanations and pursue the path of disaggregation. We have seen that the population of cases is made up of sub-populations with 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. A sub-population is not just a statistical collection of discrete cases in which each is measured against a fixed (or slowly changing) framework of law.¹⁰⁶ It has a career. As in the case of asbestos, such a population 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, and 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 (like automobile injury cases and divorces); others fade away (like Black Lung). The careers of these changing populations in turn cumulate into major changes in the make-up of court caseloads.¹⁰⁷

*952 We know very little about the behavior of these populations of cases. They seem to have certain homeostatic or self-limiting properties. No case population grows in frequency forever. One cluster of these homeostatic effects might be summed up as preventive. That is, litigation sends signals to those engaged in the underlying activity--about which aspects of that activity are normatively approved, are likely to be formally sanctioned, are likely to engender costs to defend. Through a complex set of channels of moral suasion and calculation of costs and benefits, these considerations of morality or cost influence that activity.¹⁰⁸ Products may be redesigned or withdrawn; hazards repaired or guarded; disclaimers made; permissions sought. Although the amount and character of these preventive effects is the subject of great controversy, it seems clear that they are of major significance. Thus, a study of product design in major corporations concludes that 'o f all the various external social pressures, product liability has the greatest influence on product design decisions.'¹⁰⁹

If cases can have these self-limiting, litigation-suppressing effects, they may in other ways promote more rather than fewer cases. By establishing new patterns of recovery, litigation may mobilize potential clients and educate lawyers about the needed ingredients of a successful case. More numerous cases enable start-up costs to be spread over many cases, promise economies of scale, encourage investment, permit specialization, and promote information sharing.

The same litigation can have self-liquidating and self-promoting effects. So it is impossible to know a priori what the net effect will be. For example, we can imagine that a line of cases establishing that particular behavior by a physician was negligent would lead to fewer instances of that behavior than there would otherwise have been. Although more of them would be brought to lawyers and result in claims, more of these claims would be settled, perhaps before filing. The number of filings, then, would be a product of the relative magnitude of these effects on different players at different stages in the construction of the case. We would expect to encounter populations of cases in which this repertoire of possible effects works itself out in different combinations.

*953 Right now we know very little about the behavior of these populations. But even these preliminary surmises suggest that what courts do when they encounter cases has a variety of non-obvious and interactive effects. Deciding which cases are 'important' or 'significant' for federal (or any) courts to hear is more complex than identifying those which are intellectually challenging to judges or which involve high stakes or renowned parties. If we are serious about utilizing limited judicial resources to maximize justice (or efficiency or whatever), we have to know something about how these effects work out in the various populations of cases that enter the courts.

XII. THE OPTIONS AHEAD

The growth of business in the district courts since 1960 is roughly comparable in scale to a set of changes in the other institutions of the legal world. The number of lawyers, the size of law firms, the amount of regulatory activity, the body of authoritative legal material, the amount of information about law, expenditures on legal services--these and other features of the legal world have undergone a comparable enlargement. Although what federal courts do undoubtedly exerts some influence on these other institutions, it would be difficult to maintain that all these changes were attributable to changes initiated by the federal courts. Obviously, the influences run in the other direction as well. The federal courts cannot help but reflect changes in the other legal institutions that surround them. For example, the courts are surrounded by a larger and more specialized bar, and by a larger number of legal actors capable of sustained strategic use of litigation. All these players are supplied with improved technology for assembling and manipulating the vastly greater body of legal material.

This whole larger legal complex, in turn, is responsive to developments in the wider social environment. Limitations of time and space prevent even a preliminary attempt to trace the way that changes in economy and society modify the demands made on legal institutions and, indirectly, on the federal courts.¹¹⁰ But a few examples may be in order to remind us that the shifting populations of cases that pass through the federal courts are a reflection of massive changes in the larger world outside the world of legal institutions. For example, where expenditures on health and social services have greatly outstripped the growth of GNP, and where the elderly are more numerous, longer lived, more affluent, more knowledgeable, and more organized, a greater number of disputes about their entitlements can be expected to come to legal institutions. Similarly, the multiplication of high stakes transactions *954 among businesses that are not tied into self-regulating, continuing relations can be expected to lead to more contract disputes being brought to legal institutions.

Should increased populations of, say, social security cases or diversity contract cases be welcomed by the federal courts? Much of the discussion of what should be in the federal courts turns on targeting categories of cases for exclusion on grounds that they are 'burdensome' or 'routine' or are not 'important' or needed to carry out the distinctive mission of the federal courts. Our hasty tour of the caseload inspired some reflections on case populations and their wider context. These in turn suggest an alternative way of charting that mission in an environment of larger, more proficient legal institutions, responding to a world in which transactions, information, and disputes are all multiplied.

Consider some of the implications of this new social and legal context. It seems plausible that we can expect:

- a continuous expansion of rights, entitlements, protections, and social services;
- a rise in expectations of institutional performance (and critical assessment of institutions);
- an increase in the number and size of 'sub-populations' of similar cases;
- an increase in the costs of law--as adjudication becomes more elaborate and due process more refined, using it will become more expensive.

In such a world, the multiplication of transactions and disputes would make it costly or impossible for courts to deal directly with all disputes. Courts would monitor or oversee other institutions handling a large volume of disputes. Once cases arrived in court, high transaction costs would induce settlement in most cases, so 'important cases' would be those that established signals and markers for the resolution of disputes. Courts might elaborate devices for aggregating related cases¹¹¹ and for strengthening the signaling system that projects the 'shadow of the

law' to legal actors.¹¹² And the courts should surely be interested in enhancing their own knowledge of the ramifying effects of their own policies and decisions--about who uses the courts, about the ways disputants use the endowments conferred by the courts, and about the effects of judicial decisions on the behavior underlying the disputes that come before them.¹¹³

¹ J. BOSWELL, *BOSWELL'S LIFE OF JOHNSON* 263 (London, new ed.1953).

² A. Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Council of Bar Presidents, New Orleans, La. (Feb. 15, 1987).

³ *Id.* at 6.

⁴ *Id.* at 3, 6.

⁵ *Id.* at 3.

⁶ The use of 1960 as the base year for these comparisons introduces a certain bias, compared to, say, 1955 or 1965. New restrictions on diversity jurisdiction and jurisdictional amount, enacted in 1958, had reduced diversity filings from 38% of civil filings in 1958 to 34% in 1960. But 1960 seems to many to be a turning point. R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985) refers to 'the litigation explosion that began in a short period centered around 1960.' *Id.* at 80. See also where he says the period 1958-1962 represents a 'sharp turning point.' *Id.* at 65. Cf. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232 (1976) ('the real acceleration [in caseload] began in the 1960s').

⁷ Cannon, *Contentious and Burdensome Litigation: A Need for Alternatives*, 63 NAT'L F. 10, 11 (1983).

⁸ Catalogs of these beliefs can be found 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*]; Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) [hereinafter *The Day After*]. A fresh example, if not a fresh thought, can be found in Lee Iacocca's address to the American Bar Association last August: 'We're the most litigious society on earth. We sue each other at the drop of a hat.' L. Iacocca, Remarks at the American Bar Association Annual Convention, San Francisco, Cal. (Aug. 10, 1987).

⁹ 1984 NATIONAL CENTER STATE COURTS, *STATE COURT CASELOAD STATISTICS ANNUAL REPORT 2* (1986) [hereinafter *NCSC REPORT*]. For purposes of these computations, a 'court' refers to all the courts of a particular stratum throughout the state--for example, the Superior Court in California.

¹⁰ Figures on filings in federal district courts are taken, except where otherwise noted, from Table C-2 (later C-2A) in the Annual Reports of the Director of the Administrative Office of the United States Courts [hereinafter *ANNUAL REPORTS*]. The reporting year ends on June 30 of each calendar year. For convenience, the years are referred to by the date of the report. For example, 1986 refers to the year ending June 30, 1986. Throughout, I have eliminated cases under local jurisdiction from totals and in calculating percentages. The local jurisdiction of the district courts has been considerably diminished since 1960. Since there were many local cases then and few in 1986, elimination of local cases increases comparability, but it makes increases appear larger.

¹¹ The contracts figure excludes recovery cases. If the latter are included, the growth rate for contracts was 244%. Separate figures for torts and contracts filings in state courts are available for other sets of courts: in 17 courts in 13 states, torts filings increased 9% from 1978 to 1984, while population increased by 8%; in 11 courts in 10 states, contracts filings decreased by 4% while population increased by 9%. *NCSC REPORT*, supra note 9, at 182, 185.

¹² From 59,284 to 254,828 if cases under local jurisdiction are included.

¹³ The analysis here is based on filings. But it should be noted that filings are not an entirely satisfying measure of litigiousness. Since it is plaintiffs who file, one tends to think of filing as measuring plaintiff propensity to sue. But it is well known that most disputes are resolved without a filing. Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525 (1980-81). A filing represents not only a claim, but also a refusal by the defendant to satisfy it. Thus 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, changes in filing may mark changes in the local legal culture--for example, not entering serious negotiations until a case has been filed--so that there is no assurance that a filing represents the same stage of a dispute from one place or one time to another. H. JACOB, *DEBTORS IN COURT: THE CONSUMPTIONS OF GOVERNMENT SERVICES* (1969); Fitzgerald, *Grievances, Disputes and Outcomes: A Comparison of Australia and the United States*, 1 *LAW IN CONTEXT* 15 (1983).

¹⁴ Explained in Section III, *infra*.

¹⁵ Why cut off at six categories when the difference in 1986 filings between the seventh largest category (labor) and the sixth (social security) is smaller than the difference between the sixth and the fifth (civil rights)? Any cut-off is arbitrary, but drawing the line here is justified because, unlike labor cases, social security cases loomed even larger in the caseload for the last decade (see Figure 1), having dropped by half from 1984 to 1986 (see Figure 3), and their presence has been a target of concern and complaint.

¹⁶ In fact, social security cases were not counted separately until 1961. For convenience, I have assumed that the 1960 figure would have been the same as that for 1961.

¹⁷ That a statistical profile of the federal courts in 1960 reveals a pattern very different than that recollected by Justice Scalia is an instance of the familiar tendency of memory to embellish the past. But the discrepancy also illustrates the difference between the perspective of a law review editor who knows the courts through casebooks and advance sheets and a judge who knows them through being a worker in them. As is the case with scientists, artists, scholars, and others, judges are destined to experience the hours of quotidian drudgery that are mixed with moments of creativity.

¹⁸ Banks, *The Crisis in the Courts*, *FORTUNE*, Dec. 1961, at 86; Now There's a New Worry About Federal Courts, *U.S. NEWS & WORLD REP.*, June 1, 1959, at 88.

¹⁹ Address by Chief Justice Earl Warren, American Bar Association Annual Meeting (1958), quoted in Ecker, *Historical Review*, 328 *ANNALS* 1, 3 (1960).

²⁰ Warren, *Delay and Congestion in the Federal Courts*, 42 *J. AM. JUDICATURE SOC'Y* 6, 7 (1958). This acute concern with delay may reflect the substantial increase in the time taken for cases in the federal courts during the 1950s--a period during which there was some reduction of delay in the state courts. Green, *The Situation in 1959*, 328 *ANNALS* 7, 18 (1960). The sense of congestion was aggravated by the sharp decline in judicial appointments during the last years of the Eisenhower administration. Clark, *Adjudication to Administration: A Statistical Analysis of the Federal Courts in the Twentieth Century*, 55 *S. CAL. L. REV.* 65, 129 (1981).

²¹ Proceedings of the Attorney General's Conference on Court Congestion and Delay in Litigation 137-38 (June 16-17, 1958). Cf. Clark, *supra* note 20, at 126, 131.

²² I have not yet been able to determine what these cases were about.

²³ The GAO recommendation is reported in *N.Y. Times*, Aug. 16, 1977, § 1, at 16, col. 1; the nationwide collection program that began later that year is reported in *N.Y. Times*, Oct. 4, 1977, § 1, at 20, col. 1.

²⁴ 1979 *ANNUAL REPORTS*, *supra* note 10, at 59. After 1980, student loan cases make up only a small portion of recovery filings. In 1985 a new effort was launched to collect defaulted loans, inspired by a desire to reduce the federal deficit and the belief that many defaults were in high income families. Friendly, *College Loan Crackdown*

Intensifies, N.Y. Times, Sept. 17, 1985, § 2, at 2, col. 1. Since 1980, much of the initiative for collection has moved to the states. Cases are more likely, if Wisconsin is not atypical, to be filed in state rather than in federal court. Thus most student loan cases in Wisconsin have been filed in state courts since the early 1980s. Telephone interview with Richard Johnston, Wisconsin Higher Education Corporation (Oct. 8, 1987), conducted by Mike Haakenson. In addition, a new federal strategy of withholding tax refunds from defaulting borrowers succeeded in collecting substantial amounts without court action. N.Y. Times, July 14, 1987, § 1, at 25, col. 1.

²⁵ 1979 ADMINISTRATION OF VETERANS AFFAIRS ANNUAL REPORT 80.

²⁶ Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, 94 Stat. 2171 (1980).

²⁷ 1981 ADMINISTRATION OF VETERANS AFFAIRS ANNUAL REPORT 134.

²⁸ 1985 ANNUAL REPORTS, *supra* note 10, at 236.

²⁹ Telephone interview with Douglas Barton, Esq., Deputy Assistant General Counsel for the VA (Oct. 2, 1987), conducted by Mike Haakenson. Mr. Barton suggested that new tax incentives for paying off delinquent loans also contributed to reducing the number of filings in 1986.

³⁰ There is some irony that such a major contribution to the federal courts' caseload was made by the VA, an agency that for more than a century has been clothed with a unique immunity from court challenges to its benefit determinations. This immunity rests upon a statutory bar to court review of the VA's determinations (38 U.S.C. § 211(a) (1982)) and a Civil War statute providing that attorneys' fees for services in claims under laws administered by the VA 'shall not exceed \$10 with respect to any one claim' (38 U.S.C. § 3404(c)(2) (1982)). The Supreme Court has recently held that this limit does not violate due process or first amendment rights. *Walters v. National Association of Radiation Survivors*, 473 U.S. 305 (1985). Provoked by revelations about the political bias and perfunctory proceedings of the VA's internal Board of Veterans Appeals, whose members received cash bonuses for adjudicating a quota of 40 cases per week, legislation permitting limited judicial review (by an Article I court) had passed the Senate and was pending in the House of Representatives at the end of 1988. Franklin, *Court Review of V.A. Claims Backed*, N.Y. Times, Dec. 9, 1988, at 10.

³¹ For the years 1979 to 1981, the breakdown of sub-categories is not found in Table C-2, but at the following pages: 1979 ANNUAL REPORTS, *supra* note 10, at 251 Table 30; 1980 ANNUAL REPORTS, *supra* note 10, at 244 Table 33; 1981 ANNUAL REPORTS, *supra* note 10, at 233 Table 32.

³² HOUSE COMM ON WAYS AND MEANS, RECENT STUDIES RELEVANT TO THE DISABILITY HEARINGS AND APPEALS CRISIS, 94th Cong., 1st Sess. 87 (Comm. Print 1975) [hereinafter RECENT STUDIES].

³³ In 1969, the federal government established a compensation system specifically for coal miners disabled by black lung disease (technically, 'coal worker's pneumoconiosis'). 30 U.S.C. § 901 (1982). The Act was to be administered by the SSA in its initial phases, when claims based on illness before January 1, 1974, were to be paid by the federal government; claims for illness after that date were to be paid by the responsible coal mine operator through a program to be administered by the Department of Labor and eventually developed to the states. An unanticipated surge of claims and a high initial rate of denials led not only to the district court filings noted here, but to a series of congressional amendments that eased the burden of proof for claimants, enlarged the Act's coverage, changed the provisions for funding benefits to an excise on coal, and fixed claim administration with the Department of Labor. Claim determinations by administrative law judges are appealable to the Department's Benefits Review Board and from there to the federal courts of appeals. For a review of these developments, see P. BARTH, *THE TRAGEDY OF BLACK LUNG: FEDERAL COMPENSATION FOR OCCUPATIONAL DISEASE* chs. 2, 5 (1987); E. GELLHORN, *THE 'BLACK LUNG' ACT: AN ANALYSIS OF LEGAL ISSUES RAISED UNDER THE BENEFITS PROGRAM CREATED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969 (AS AMENDED)* (Fed. Jud. Center 1981).

³⁴ 1975 ANNUAL REPORTS, *supra* note 10, at 225; RECENT STUDIES, *supra* note 32, at 159, 160.

³⁵ Pear, U.S. Starts Culling Ineligibles From Disability Benefit Rolls, N.Y. Times, May 14, 1986, at 11. The impact of disability claims on the case load 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.

³⁶ These percentages are slightly higher than those given by Resnik, Tiers, 57 S. CAL. L. REV. 837, 940 (1984), because I have excluded cases under local jurisdiction from the total civil filings.

³⁷ U.S. DEPT JUSTICE, BUREAU JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DECEMBER 31, 1984, at 50 (Feb. 1987); BUREAU JUSTICE STATISTICS BULL.: PRISONERS IN 1986, at 1 (May 1987). Part of the increase since 1977 is due to a change in what is being counted. Before 1977, only those prisoners in the custody of the state or federal prison systems were counted. After that date, the count includes all persons under the jurisdiction of one of these systems, even if not in its custody--such as those in local jails, in hospitals, on furlough or work release, etc. The 'jurisdiction' figure for 1977 was 2.6% higher than the 'custody' figure. U.S. DEPT JUSTICE, *supra*, at 50.

³⁸ Resnik, *supra* note 36, at 943, notes that there is some fuzziness in these rates. Prison population figures may not be completely accurate; non-prisoners, such as people on bail, probation, or parole, may bring some of these cases. And, of course, rates do not reflect the actual proportion of prisoners seeking relief, since some prisoners file multiple petitions.

³⁹ The Day After, *supra* note 8, at 18 n.54.

⁴⁰ Resnik, *supra* note 36, at 945-46.

⁴¹ The portion of employment discrimination cases in the appellate courts alleging racial discrimination first dipped below half--to 47%--in 1977 and has fluctuated around the 50% level through 1985. Complaints to the Equal Employment Opportunities Commission based on race fell below half the total for the first time in 1983. P. Burstein, Race, Religion, Sex, and National Origin: Barriers to Mobility in the American Labor Market, 1965-85 (paper delivered at Conference on Longitudinal Research on Trial Courts, State University of New York at Buffalo, Aug. 1987).

⁴² Cf. Mayhew's observation that the profile of discrimination complaints mirrors patterns of employment rather than patterns of exclusion. L. MAYHEW, LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION 159 (1968).

⁴³ Mayhew reports that among respondents to a Detroit-area survey reporting serious problems, only a tiny proportion sought 'justice' or legal vindication--except for discrimination problems. Only 4% of those with serious problems connected with expensive purchases sought 'justice,' as did 2% of those with neighborhood problems. But 31% of those reporting discrimination problems sought 'justice.' Mayhew, Institutions of Representation, 9 LAW & SOC'Y REV. 401, 413 (1975).

⁴⁴ These results are reported in Miller & Sarat, *supra* note 13, at 537. This study analyzes data compiled from a telephone survey of approximately one thousand randomly selected households in each of five federal judicial districts: South Carolina, Eastern Pennsylvania, Eastern Wisconsin, New Mexico and Central California. Respondents were asked whether their household had experienced and of a long list of problems in the preceding three years and how they had pursued these problems. Only middle range problems were recorded--those estimated to involve a value of more than \$1,000. *Id.* at 534-35.

⁴⁵ *Id.* at 537. By dispute, I mean an instance in which 'a claim based on a grievance is rejected in whole or in part.' *Id.* at 527. The relation of disputes to grievances and claims, and the relation of this definition to other definitions of dispute, are discussed in Reading the Landscape, *supra* note 8, at 12-14.

⁴⁶ Miller & Sarat, *supra* note 13, at 544.

⁴⁷ *Id.* at 543.

⁴⁸ G. LANOUE & B. LEE, *ACADEMICS IN COURT: THE CONSEQUENCES OF FACULTY DISCRIMINATION LITIGATION* (1987); Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421 (1987). Crowe, *Complainants Reactions to the Massachusetts Commission Against Discrimination*, 12 *LAW & SOC'Y REV.* 217, 229 (1978), 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, discretion act of discrimination can seem as unjust as the discrimination itself . . . some complainants feel humiliated when they must admit that they suffered, and were hurt by discrimination.

⁴⁹ Cf. Burstein & Monaghan, *Equal Employment Opportunity and the Mobilization of Law*, 20 *LAW & SOC'Y REV.* 355 (1986). The authors conclude, 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.

⁵⁰ The absolute number of motor vehicle personal injury tort filings in the diversity jurisdiction was 7,035 in 1960 and 6,634 in 1986. The 1986 total does not include 656 product liability cases involving motor vehicles.

⁵¹ 1975 ANNUAL REPORTS, *supra* note 10, at 218; 1985 ANNUAL REPORTS, *supra* note 10, at 151, 154. The totals exclude the small portion of product liability cases not classified as torts. Product liability cases have been counted separately since 1974. Figures for 1974 and 1986 are not comparable, so these 1975 and 1985 figures are the longest span for which this proportion can be measured. Available figures for product liability filings from 1975 to 1985 are gathered in *The Day After*, *supra* note 8, at 23.

⁵² Because the count of product liability cases in 1974 does not separate contract from tort claims, it was necessary to derive this figure in the following way. The percentage of product liability claims that were contract claims was calculated for each of the following four years: 9.6% for 1975, 9.8% for 1976, 9.9% for 1977, 9.9% for 1978. The average portion of product liability cases that were contract cases in these years was 9.8%. A comparable contract portion was assumed to be present in the 1974 product liability filings. That would be 155 contract cases, leaving 1,424 tort product liability filings. This was then subtracted from 23,975, the total number of non-local tort filings for 1974, leaving 22,551.

⁵³ These frequently cited figures include the contract cases that were eliminated in the previous note for the purpose of computing the rise in non- product liability torts.

⁵⁴ Without minimizing the importance of the surge in product claims, it should be noted that this spectacular 758% figure exaggerates the magnitude of the increase. The count of product liability cases, and the categorization of filings generally, have since 1975 been 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.' When new categories are added and new cover sheets distributed, it may take some time for the supply of old sheets without that category to be used up, and for lawyers to become accustomed to checking that category. This lag and underreporting of new categories probably kept down the total of product liability filings reported in 1974, driving up the percentage increase attributed to later years. Thus, a General Accounting Office report concluded that coding changes in 1974 and 1975 made 1976 'a more appropriate baseline year' for examining the growth in products liability filings. Percentage growth 'since 1976 is about one-third the growth calculated, using 1974 as the baseline year.' U.S. GEN. ACCOUNTING OFFICE, *PRODUCT LIABILITY: EXTENT OF 'LITIGATION EXPLOSION' IN FEDERAL COURTS QUESTIONS 27* (1988) [hereinafter *GAO REPORT*].

While the reported count of product liability cases understates the number of claimants involved, it overcounts the number of cases, since cases transferred from one district to another, and cases removed from state courts, are counted twice. See T. DUNGWORTH, *PRODUCT LIABILITY AND THE BUSINESS SECTOR: LITIGATION*

⁵⁵ Gifford & Nye, *Litigation Trends in Florida: Saga of a Growth State*, 39 U. FLA. L. REV. 831, 849 (1987); see also GAO REPORT, *supra* note 54, at 32-40.

⁵⁶ To demonstrate '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:

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.

ATTORNEY GENERAL 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).

⁵⁷ See NCSC REPORT, *supra* note 9, Table 33.

⁵⁸ GAO REPORT, *supra* note 54, at 32.

⁵⁹ M. PETERSON, *CIVIL JURIES IN THE 1980S: TRENDS IN JURY TRIALS AND VERDICTS IN CALIFORNIA AND COOK COUNTY ILLINOIS* 11 (1987).

⁶⁰ Dee, *Blood Bath*, 10 ENTERPRISE 3 (Mar.-Apr. 1986). Cf. L. Iacocca, *supra* note 8.

⁶¹ Pear, *Reagan Aides Draft Bill to Pre-empt States' Product-Liability Laws*, N.Y. Times, Apr. 21, 1986, at B9, col. 1.

⁶² Until 1988, there was little solid information about the products or parties involved in product liability litigation. The Annual Reports from 1975 to 1985 specified some subcategories of product claims by product, but these accounted for only a small and declining portion of the total, apart from asbestos cases that were added as a category only in 1984. The figures are gathered in *The Day After*, *supra* note 8, at 23. Other data about asbestos filings aroused the suspicion that a major part of product liability litigation involved a relatively small number of products. That suspicion was confirmed and refined by the appearance of the GAO REPORT, *supra* note 54; and T. DUNGWORTH, *supra* note 54.

⁶³ Asbestos cases have been counted separately only since part way through 1984.

⁶⁴ GAO REPORT, *supra* note 54, at 22. The GAO figure comports with the earlier Institute for Civil Justice estimate that by 1985 more than 16,000 asbestos cases had been filed in the federal courts--more than a quarter of the cumulative total of 60,508 product liability filings officially counted from 1974 to 1985. D. HENSLER, W. FELSTINER, M. SELVIN, & P. EBENER, *ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS* 21 (1985) [hereinafter HENSLER].

⁶⁵ On the career of asbestos litigation, see P. BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985); HENSLER, *supra* note 64; T. WILLGING, *TRENDS IN ASBESTOS LITIGATION* (1987).

⁶⁶ T. WILLGING, *supra* note 65, at xii.

⁶⁷ From 1977 to 1986, 3% of asbestos cases went to trial; 9% of personal injury product liability cases in ten courts from 1980 to 1986 went to trial. *Id.* at 25, 27.

⁶⁸ *Id.* at xii.

⁶⁹ Id.

⁷⁰ The Asbestos Claims Facility, an undertaking by 36 manufacturers and 16 insurers for joint settlement of asbestos suits, collapsed in 1988; it was succeeded by a Center for Claims Resolution made up of fewer defendants and by a surge of cases going to trial. Carter, *Let 1,000 Asbestos Suits Bloom*, NAT'L L.J., Dec. 26, 1988, at 3, col. 3. The Manville Asbestos Trust, created by the Manville Corporation bankruptcy proceedings to pay out \$2.5 billion to asbestos claimants over the next 26 years, is expected to start operations in early 1989. The Manville Asbestos Trust, 6 ALTERNATIVES TO THE HIGH COST OF LITIGATION 97 (1988).

⁷¹ T. WILLGING, *supra* note 65, at xi.

⁷² Id. at xii.

⁷³ Bendectin, an anti-nausea drug marketed by the Merrell-Dow Pharmaceutical Corporation and accused of causing birth defects, has been embroiled in litigation since 1977. See GAO REPORTS, *supra* note 54, at 22, 33.

⁷⁴ T. DUNGWORTH, *supra* note 54, at 49.

⁷⁵ Id. at 52. He estimates that about one half of one percent of all manufacturing concerns were lead defendants in product cases in 1976, and that this increased to nine-tenths of a percent in 1986. Based on a sample from one district, he surmises that this estimate of involvement might double if there were information about co-defendants in each case. Id. at 53-54.

⁷⁶ Id. at 57.

⁷⁷ Id. Indeed, according to the two most recent Annual Reports, the total of reported product liability cases has continued to increase, but the total of non-asbestos product liability personal injury filings has actually been falling, from 8,268 in 1985 to 6,996 in 1986 to 6,371 in 1987. That is, the reported number of non-asbestos product liability filings in the federal courts has decreased by 27% in the two latest years for which data are available. 1987 ANNUAL REPORTS, *supra* note 10, at Table C-2a. This drop is probably overstated because asbestos cases were significantly undercounted (and hence non-asbestos cases overcounted) through 1986. That is, part of the apparent decline is the result of more accurate classification of asbestos cases. See T. DUNGWORTH, *supra* note 54, at 20-21.

Separate counting of asbestos cases was started part way through the 1984 reporting year, so 1985 is the first year for which we know the number of product liability cases that involve asbestos and the number that involve other products.

⁷⁸ Nye and Gifford, analyzing national data on claims frequency in different insurance lines, found that claim frequency per unit of exposure in Products Liability coverages and in Manufacturers and Contractors' coverages 'actually declined from 1975 through 1984,' but rose sharply in 1985 and 1986. Nye & Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909, 919-21 (1988).

⁷⁹ The perils of inference from product liability filings are confirmed by a 1986 Conference Board survey of the risk-managers of major United States corporations that found that product liability impinges in a major way only on a small number of specialized firms. The report concludes that product liability and the related crisis of insurance availability 'have left a relatively minor dent on the economics and organization of individual large firms.' N. WEBER, *PRODUCT LIABILITY: THE CORPORATE RESPONSE 2* (1987). Surprise with the sanguine response of the Weber respondents led the Conference Board to undertake 'a broader look at the effect of product liability on overall company operations' by surveying the chief executive officers of the 2,000 largest manufacturing companies and a sample of smaller manufacturers. E. McGUIRE, *THE IMPACT OF PRODUCT LIABILITY* at v (1988). A large portion of those CEOs who responded reported that the product liability system had a major impact on their firms and industries.

⁸⁰ The methods of assigning weights for each category has changed from time to time, so figures derived from successive weightings are not directly comparable. See Flanders, *What Do the Federal Courts Do? A Research Note*, 5 REV. OF LITIGATION 199, 203 (1986).

⁸¹ Explained in 1980 ANNUAL REPORTS, *supra* note 10; Flanders, *supra* note 80, at 206.

⁸² 1986 ANNUAL REPORTS, *supra* note 10, at 21.

⁸³ Flanders, *supra* note 80, at 206. Another diversity contract category, insurance, increased from 1.63% of all judge time in 1979 to 2.28% in 1985. As Flanders points out, the 1979 figure is computed directly from a survey of judges, while the 1985 figure is an indirect calculation of the expenditure of judge time. These categories correspond to the 'Nature of Suit' codes listed on the JS-44. See *supra* note 54.

⁸⁴ Flanders, *supra* note 80, at 206.

⁸⁵ *Id.*

⁸⁶ A comparable growth of business litigation is suggested by Peterson's analysis of trends in jury trials in both state and federal courts in two major cities. He finds that:

There was only one constant change over time and across jurisdictions: the increasing number of trials of business/contract cases. Jury trials for such cases increased continuously between 1960 and 1984 in both jurisdictions. The number of trials roughly doubled every five years in Cook County. By the 1980s, the resolution of business or contract disputes became one of the principal tasks of San Francisco juries. One-fourth of all civil jury trials in San Francisco during the 1980s involved a business or contract dispute, almost as many as involved automobile accidents.

M. PETERSON, *supra* note 59, at 14.

⁸⁷ Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963). The research reported there was conducted in about 1960.

⁸⁸ In the 11 courts in 10 states that provided separate figures for contract cases, filings fell by 15% from 1981 to 1984, after having risen by 14% between 1978 and 1981. NCSC REPORT, *supra* note 9, at Table 34. Because the state courts contain a vast number of contract cases, usually lumped together in their statistical reports with other kinds of cases, one cannot rule out the possibility that these figures include a substantial number of business disputes resembling those in the federal courts and that this sub- group of contract filings has followed a pattern of increase similar to that in the federal courts.

⁸⁹ A preliminary explanation is put forward in M. Galanter & J. Rogers, *The Transformation of Business Disputing: Preliminary Observations* (paper delivered at the Annual Meeting of the Law and Society Association, Vail, Colo., June 9-12, 1988).

⁹⁰ Thus David Engel reports of an Illinois county where:

Contract actions . . . were nearly ten times as numerous as personal injury actions. . . . One might expect that concerns about litigiousness in the community would focus upon this category of cases, which was known to be a frequent source of court filings. Yet I heard no complaints about contract plaintiffs being 'greedy' or 'sue happy' or 'looking for the easy buck.' Such criticisms were reserved exclusively for injured persons who made the relatively rare decision to press their claims in court.

Engel, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community*, 18 LAW & SOC'Y REV. 551, 574-75 (1984).

⁹¹ Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986*, at 26 (paper presented at the Annual Meeting of the American Ethnological Society, St. Louis, Mo., Mar. 26, 1988); Brill & Lyons, *The Not-So-Simple Crisis*, AM. LAW., May, 1986, at 1; Chait,

Corporate Ambulance Chasers: The Charmed Life of Business Litigation (paper presented at the Annual Meeting of the Law and Society Association, Vail, Colo., June 9-12, 1988). On the role of such horror stories in professional discourse, see Reading the Landscape, *supra* note 8, at 64.

⁹² There were 863 anti-trust cases filed in 1986, the lowest number since 1969. This was a 48% decline from the 1977 high of 1,650 (even further below the 1962 total of 2,046, inflated by the electrical anti-trust cases of that time).

⁹³ The 1,816 filings in 1986 were 17% below the average filings of 2,180 for 1976-1981.

⁹⁴ 1985 ANNUAL REPORTS, *supra* note 10, at 166. Figures for 1985 are used here because this data is not provided in the 1986 Annual Report.

⁹⁵ For example, in the federal district courts in 1986, the portion of civil cases that were terminated 'during or after trial' was 4.4% of all terminations. 1986 ANNUAL REPORTS, *supra* note 10 at 208, Table C-4A. It should be noted that this includes cases that settled after the commencement of trial.

⁹⁶ Kritzer, Adjudication to Settlement: Shading in the Gray, 70 JUDICATURE 161, 163 (1986). Default judgments were not counted as adjudications.

⁹⁷ Data on terminations discussed here is drawn from ANNUAL REPORTS, *supra* note 10, at Table C-4. This set of 'stage' categories was introduced in 1961. Comparable data is not available for 1960, so the following discussion of terminations takes 1961 as a starting point. In 1961, Table C-4 does not separate cases under local jurisdiction. When it seemed important for purposes of comparability to eliminate local cases, the computations start from 1962.

⁹⁸ 1961 ANNUAL REPORTS, *supra* note 10, at 246 Table C-4.

⁹⁹ In state courts, too, a smaller portion of cases is decided after full contest than in the past. 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 of Litigation and Dispute Settlement: A Court Tale, 15 LAW & SOC'Y REV. 823, 838-40 (1980-81); M. HINDUS, T. HAMMETT & B. HOBSON, THE FILES OF THE MASSACHUSETTS SUPERIOR COURT, 1859-1959: AN ANALYSIS AND A PLAN FOR ACTION 147 (1979); WANNER, THE PUBLIC ORDERING OF PRIVATE RELATIONS: 30 YEARS OF LITIGATION IN THE UNITED STATES, ch. 6 Table 1 (1983) (unpublished manuscript).

¹⁰⁰ The percentage of cases terminating 'during or after trial' in the district courts was 15.2% in 1940 and 12.8% in 1950. 1940 ANNUAL REPORTS, *supra* note 10, at 49; 1950 ANNUAL REPORTS, *supra* note 10, at 76,149. These figures omit most, but not all local jurisdiction cases. (The percentage figure for 1950 here differs from that reported in Reading the Landscape, *supra* note 8, Table 2. This is because in reading the top row of the 1950 ANNUAL REPORTS, *supra* note 10, at Table C-4, I omitted 680 cases noted as consent judgments and dismissals 'during or after trial.')

¹⁰¹ In reading this Figure, it is necessary to remember that it records the percentage of cases in each category that reach trial as a percentage of the total number of terminations of that category. The percentages shown are not percentages of the same total.

¹⁰² 1986 ANNUAL REPORTS, *supra* note 10, at 21. This is a projection using the case weightings determined in 1979. See 1980 ANNUAL REPORTS, *supra* note 10, at 625-29; Flanders, *supra* note 80.

¹⁰³ More precisely, four of the Big Six accounted for these trials, since virtually no social security cases or recovery cases reach trial. See Figure 10 above.

¹⁰⁴ See Reading the Landscape, *supra* note 8. 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. 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).

¹⁰⁵ See Galanter, Justice in Many Rooms, 19 J. LEGAL PLURALISM 1 (1981).

¹⁰⁶ The populations referred to here do not necessarily correspond to the administrative categories used in collecting judicial statistics, but the latter may be close enough to give us an idea of the movements of these populations of cases.

¹⁰⁷ Reading the Landscape, *supra* note 8, at 42. For a preliminary exploration of the varying careers of different types of cases, see M. GALANTER, CASE CONGREGATIONS AND THEIR CAREERS (Disputes Processing Research Program, Univ. of Wisconsin-Madison, Working Paper No. 9:6, 1988).

¹⁰⁸ These preventive effects are often lumped under the heading of deterrence. I have followed J. GIBBS, CRIME, PUNISHMENT, AND DETERRENCE (1975) in trying to separate out a number of distinct effects. See Galanter, The Radiating Effects of Courts, in EMPIRICAL THEORIES ABOUT COURTS 117-92 (K. Boyum & L. Mather eds. 1983).

¹⁰⁹ G. EADS & P. REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION vii-viii (1983). See also *The Day After*, *supra* note 8, at 35-36.

¹¹⁰ Some of these connections are explored in M. Galanter & J. Rogers, *supra* note 89.

¹¹¹ For example, by consolidation, trial of representative cases, class actions, promotion of lawyers' networks by curtailing protective orders, etc.

¹¹² For example, by refusing to countenance the suppression of information about settlements.

¹¹³ For example, by enlarging court data collection practices to provide the basis for this kind of knowledge.