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READING THE LANDSCAPE OF DISPUTES: WHAT WE KNOW AND DON'T KNOW (AND  
THINK WE KNOW) ABOUT OUR ALLEGEDLY CONTENTIOUS AND LITIGIOUS  
SOCIETY.

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[\*5] INTRODUCTION

Whether or not America has experienced a "litigation explosion,"<sup>n1</sup> or is suffering from "legal pollution,"<sup>n2</sup> or is in thrall to an [\*6] "imperial judiciary,"<sup>n3</sup> there has surely been an explosion of concern about the legal health of American society. A battery of observers has concluded that American society is over-legalized.<sup>n4</sup> According to these commentators, government, at our urging, tries to use law to regulate too much and in too much detail. Our courts, overwhelmed by a flood of litigation, are incapable of giving timely, inexpensive and effective relief, yet simultaneously extend their reach into areas beyond both their competence and

legitimacy. A citizenry of unparalleled contentiousness exercises a hair trigger readiness to invoke the law, asking courts to address both trifles unworthy of them and social problems beyond their grasp. In short, these observers would have us believe that we suffer from too much law, too many lawyers, courts that take on too much -- and an excessive readiness to utilize all of them. As a convenient label for this whole catalog of ills, n5 I borrow the term "hyperlexis" from one of these observers. n6 This Article will examine one component of the hyperlexis syndrome -- the alleged high rates of disputing and litigation -- in the context of current research. I shall then offer a few reflections on the hyperlexis perspective.

#### A. *The "Hyperlexis" Explosion*

That we suffer from an excessive amount of disputing and of [\*7] litigation is a theme met frequently in hyperlexology. n7 At a bicentennial observance, Professor Rosenberg detected "abroad in the land an abandoned eagerness to hail into court all and sundry." n8 This he analyzes into "[f]irst . . . a sense of assertiveness -- a compelling need to get the last of one's lawful due *from* other [and] complementing this . . . a high sensitivity to impositions *by* others." n9 Rosenberg identifies this proclivity as recently accentuated, but not entirely new: "In this century in the United States the fewer to sue has been a dominant trait; for more than a generation it has been at an uncomfortably elevated pitch." n10 The President of Columbia University decried the "growing contentiousness of American life," claiming that American society had become "an adversary morass" full of "unnecessary social conflict." n11 Dean Manning reports that "we are the most litigious people in the world." n12 Judge Forer agrees: "There can be no doubt that in absolute numbers and on a per capita basis Americans are the most litigious nation in human history." n13 Professor Kurland tells us that "[t]he craving of the public to take every disagreement to litigation is limited only by the cost of that litigation." n14 Professor Auerbach observes that "[f]ew Americans, it seems, can tolerate more than five minutes of frustration without submitting to the temptation to sue." n15

An appropriately restrained and sober version of these developments commends itself to the higher judiciary. Addressing a bicentennial observance, Judge Aldisert of the Court of Appeals for the Third Circuit referred his listeners to "a most familiar, but little appreciated phenomenon of the relatively recent past: when [\*8] people feel wronged by another person or institution, the immediate reaction is not to turn the other cheek, but to serve process and bring suit." n16 Only recently the Chief Justice of the United States referred to the "litigation explosion during this generation" and reflected that:

One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity. n17

That Americans litigate excessively is received wisdom among leaders of the bar. Shortly after taking office a recent president of the American Bar Association is reported to have complained that "everybody brings lawsuit about everything these days" and vowed to "do something about the litigious society." n18

These learned observations are echoed and magnified in the popular press. *U.S. News and World Report* reported that:

Americans in all walks of life are being buried under an avalanche of lawsuits.

Doctors are being sued by patients. Lawyers are being sued by clients. Teachers are being sued by students. Merchants, manufacturers and all levels of government -- from Washington, D.C., down to local sewer boards -- are being sued by people of all sorts.

The "epidemic of hair-trigger suing," as one jurist calls it, even has infected the family. Children haul their parents into court, while husbands and wives sue each other, brothers sue brothers, and friends sue friends. n19

*Business Week* observed that "[l]itigation has become America's secular religion." n20 James J. Kilpatrick contended that "[o]ur society has become the most litigious society in the world. No other nation is even close." n21

[\*9] We should remind ourselves just how recent this perception of things is. In 1960, Charles Breitel, then a Justice of the Appellate Division of New York's Supreme Court (the state's intermediate appellate court) delivered a lecture on "The Quandary in Litigation." He commented on the paradox that "throughout the nation the courts are congested; yet it is also true that there is a decline in litigation." n22 The key to the paradox was the accident case, where litigation was routine, but, as Breitel noted,

there is a decline in litigation of every other kind. There are fewer contract cases. There are fewer equity cases. . . . Businessmen everywhere resort to arbitration in preference to the courts. Government devises one type of administrative agency after another to handle the many disputes which require determination and which stem from the tremendous growth of regulatory statutes in our economy. When neither arbitration nor government agency is available, businessmen compromise their claims, usually taking less than what they are entitled to, rather than seeking redress in the courts. . . . The litigation bar, except that part of it which handles the accident case, is smaller than ever before. n23

This decline was not considered a matter for applause, as more recent discussions would lead us to expect. Indeed, a contrary view was expressed: "[i]t is the public that is the loser in the decline of the litigation process and the litigation bar." n24 The whole litigation complex -- litigation bar, adversary system, jury, trial judiciary and appellate courts -- was seen as a valuable but underutilized public resource for securing individual redress which, at the same time, made a "substantial contribution to the development of a sound body of rules of behavior." n25

A few years later, in 1965, a wide-ranging and authoritative discussion of the causes of court congestion did not even mention litigiousness. n26 As recently as 1970, in his first "State of the Judiciary" address, Chief Justice Burger cataloged the problems of the courts, emphasizing funding, management, procedure, and other "supply side" matters. There was no hint that courts were the victims of runaway litigation. n27 But by 1977, the spectre of litigiousness [\*10] was fully visible. Chief Justice Burger spoke of the "inherently litigious nature of Americans" and deplored "a notion abroad in our times -- especially since the 60's and early 70's which I hope will pass -- that traditional litigation -- because it has been successful in some public areas -- is the cure-all for every problem that besets us or annoys us." n28

The assertion that we engage in too much disputing and litigation implies two determinations: first, ascertainment of how much we have, and, second, establishment of how much is too much. What are the data from which such determinations can be made?

Until recently there have been few attempts to measure the amount of contention and litigation. Although court statistics have been compiled for management use, they are incomplete. n29 We have no established indicators like the Gross National Product or the rate of index crimes -- indicators that are themselves fraught with all sorts of problems.

Typically the evidence cited for the litigation explosion consists of:

1. The growth in filings in federal courts;
2. The growth in size of the legal profession;
3. Accounts of monster cases (such as the AT & T and IBM antitrust cases) and the vast amounts of resources consumed in such litigation;
4. Atrocity stories -- that is, citation of cases that seem grotesque, petty or extravagant: A half-million dollar suit is filed by a woman against community officials because they forbid her to breast-feed her child at the community pool; n30 a child sues his parents for "mall-parenting"; n31 a disappointed suitor brings suit for being stood up on a date; n32 rejected mistresses sue their former [\*11] paramours; n33 sports fans sue officials n34 and management; n35 and Indians claim vast tracts of land; n36 and
5. War stories -- that is, accounts of personal experience by business and other managers about how litigation impinges on their institutions, ties their hands, impairs efficiency, runs up costs, etc. n37

Even if these statistics and accounts establish that we have a great deal of litigation, how do we know it is too much? This evidence draws its polemical power from the implicit comparison to some better past or some more favored place. Pervading these reports is a fond recollection of a time when it wasn't so -- federal courts had fewer cases, there were fewer lawyers, people with outlandish claims were properly inhibited or chastened by upright lawyers, and managers could carry out their duties without fear of being sued. In this golden pre-litigious era, problems which were not solved by sturdy self-reliance or stoic endurance were addressed by vigorous community institutions. Not only was our own past more favored but, it is often noted, other societies of comparable advancement and amenity have fewer lawyers and less litigation. n38 Japan, in particular, is viewed as exemplary. Its few lawyers and scarce litigation are thought to betoken a state of social harmony conducive to high productivity and prosperity. n39 We shall return to these comparisons after we have examined current American disputing patterns.

### B. *The Dispute Pyramid*

#### 1. The Lower Lyers: The Construction of Disputes

We can visualize litigation as the arrival at courts of disputes [\*12] which arose at other locations in society. Counting the number of cases that arrive turns out to involve some tricky questions, n40 but in theory, we can imagine measuring the amount of litigation by this method. Disputes, however, are even more difficult to chart. They are not some elemental particles of social life that can be counted and measured. Disputes are not discrete events like births or deaths; they are more like such constructs as illnesses and friendships, composed in part of the perceptions and understandings of those who participate in and observe them.

Disputes are drawn from a vast sea of events, encounters, collisions, rivalries, disappointments, discomforts and injuries. The span and composition of that sea depend on the broad contours of

social life. For example, the introduction of machinery brings increases in non-intentional injuries; higher population densities and crash crops bring raised expectations and rivalry for scarce land; n41 advances in knowledge enlarge possibilities of control and expectations of care. Some things in this sea of "proto-disputes" become disputes through a process in which injuries are perceived, persons or institutions responsible for remedying them are identified, forums for presenting these claims are located and approached, claims are formulated acceptably to the forum, appropriate resources are invested, and attempts at diversion resisted. The disputes that arrive at courts can be seen as the survivors of a long and exhausting process.

In this view, the arrival of matters at the doors of lawyers and courts is a late stage in an extended process by which the dispute has crystallized out of the sea of proto-disputes. As part of a larger system of disputing, the institution of litigation is shaped by this process of construction and selection that provides it with cases. Litigation, in turn, profoundly affects what happens at earlier stages by providing cues, symbols, and bargaining counters which the actors use in constructing (and dismantling) disputes. In order to understand what lawyers and courts do, we need to know about the "earlier" stages of this process.

We can visualize the early stages of the process as the successive layers of a vast and uneven pyramid. Only recently has there been any attempt to examine systematically the lower layers of the pyramid. A pioneering inquiry by Felstiner, Abel and Sarat provides a useful conceptual map of these lower reaches. n42 We begin, [\*13] in effect, with all human experience which might be identified as injurious. This should alert us to the subjective and unstable character of the process, for what is injurious depends on current and ever-changing estimations of what enhances or impairs health, happiness, character and other desired states. Knowledge and ideology constantly send new currents through this vast ocean.

Some experiences will be perceived as injurious. (Felstiner, *et al.* call these *perceived injurious experiences*.) n43 Among these perceived injurious experiences, some may be seen as deserved punishment, some as the result of assumed risk or fickle fate; but a subset is viewed as violations of some right or entitlement caused by a human agent (individual or collective) and susceptible of remedy. These, in Felstiner, *et al.*'s terminology are *grievances*. n44 Again, characterization of an event as a grievance will depend on the cognitive repertoire with which society supplies the injured person and his idiosyncratic adaptation of it. He may, for example, be liberally supplied with ideological lenses to focus blame or to diffuse it.

When such grievances are voiced to the offending party they become *claims*. n45 Many will be granted. Those claims not granted become *disputes*. n46 That is, "[a] dispute exists when a claim based on a grievance is rejected in whole or in part." n47 Using this terminology lets us attempt a crude sketch of the lower layers of the pyramid.

First, a very large number of injuries go unperceived. Breaches of product warranties and professional malpractice may be difficult to recognize and go undiscovered. Even if the injury is discovered, the injured may not perceive that he has an entitlement that has been violated, the identity of the responsible party, [\*14] or the presence of the remedy to be pursued. n48

The perception of grievances requires cognitive resources. Thus Best and Andreasen found that both higher income and white households perceive more problems with the goods they buy and complain more both to sellers and to third parties than do poor or black households. n49 It seems unlikely that this reflects differences in the quality of the goods purchased. Similarly, Curran reports

that better educated respondents experience more problems of infringement of their constitutional rights. n50

Even where injuries are perceived, a common response is resignation, that is, "lumping it." In the most comprehensive study available, Miller and Sarat report that over one-quarter of those with reported "middle range" (i.e., involving the equivalent of \$ 1,000 or more) grievances did not pursue the matter by making a claim. n51 This proportion was fairly uniform across subject matters (with the striking exception of discrimination problems; almost three quarters did not move from grievance to claim). n52 Of course this figure is not a precise measure of the phenomena of "lumping it" because it may include individuals who took other forms of unilateral action -- like exit, avoidance or self-help.

These estimates for middle range disputes fit closely with those provided by several studies of consumer problems, mostly smaller in magnitude. In a systematic survey of consumer disputes in Milwaukee, Ladinsky and Susmilch specifically measured the rate at which consumers with problems "lumped it"; they found that roughly a quarter were "lump-its." n53 This comports with some 28% who didn't make claims in King and McEvoy's [\*15] national sample of consumer problems, n54 and 20% who did not make claims in Ross and Littlefield's study of problems with major household appliances. n55 Curiously, the rate is even higher with serious criminal offenses. Ennis reported that roughly half of those who reported being victimized by index crimes did not make a complaint to the police. n56 Allowing for some admixture of other responses (self-help, complaints to others) this is a rate of "lumping it" higher than that found in "civil" problems. Also, some populations have a higher proclivity for "lumping it": e.g., the low income consumers studied by Caplovitz who made claims in only forty percent of the situations where they had grievances with purchases. n57

"Lumping it" is done not only by naive victims who lack information about or access to remedies, but also by those who knowingly decide that the gain is too low, or the cost too high, including the psychic costs of pursuing the claim. n58 Inaction is familiar on the part of official complainers (police, agencies, prosecutors) who have limited resources, incomplete information about violations, policies about *de minimis* injury, schedules of priorities and so forth. n59

Exit and avoidance -- withdrawal from a situation or relationship by moving, resigning, severing relations, etc. -- are common responses to many kinds of troubles. n60 Like "lumping it," exit is an alternative to invoking any kind of organized remedy system, although its presence as a sanction may support the working of other remedies. n61 The use of "exit" options depends on a number [\*16] of factors: on the availability of alternative opportunities or partners and information about them; on bearable costs of withdrawal, transfer, relocation, and development of new relationships; on the pull of loyalty to previous arrangements; and on the availability and cost of other remedies. n62

Disputes are also pursued by various kinds of self-help such as physical retaliation, seizure of property, or removal of offending objects. The amount of self-help in contemporary industrial societies has not been mapped, but it evidently occurs very frequently. n63 Two recent and revealing studies portray self-help as a major component of disputing in American neighborhoods. n64

The most typical response to grievances, at least to sizable ones, is to make a claim to the "other party" -- the merchant, the other driver or his insurer, the ex-spouse who has not paid support, etc.

Thus, Miller and Sarat found that over 70% of those who experienced "middle range" grievances made claims for redress. n65 Aggrieved consumers make claims in about the same proportion. n66 Some claims may be granted outright, but a large number are contested in whole in part. It is this contest that Felstiner, *et al.* label a dispute. n67 Miller and Sarat found that about two-thirds of claims lead to disputes. n68 A large portion of disputes are resolved by negotiation between the parties. Almost half of the disputes in the Miller and Sarat survey ended in "agreement after difficulty" n69 which I take as indicating the occurrence of negotiation. "Negotiation" [\*17] ranges from that which is indistinguishable from the everyday adjustments that constitute the relationship to that which is "bracketed" as a disruption or emergency.

Some disputes are abandoned by their initiators. Ladinsky and Susmilch, who coined the term "clumpit" for those who make a claim but don't persist, found that more than one-quarter of all consumers with problems abandoned their claims. n70 Similarly, a study of medical malpractice claims found that 43% were dropped without receiving any payment. n71

Other disputes are heard by the school principal, the shop steward or the administrator -- i.e., in forums that are part of the social setting within which the dispute arose. n72 Such "embedded forums" range from those which are hardly distinguishable from the everyday decision making within an institution ("I'd like to see the manager") to those which are specially constituted to handle disputes which cannot be resolved by everyday processes.

We know that such forums process a tremendous number of disputes. We have no count of them, but we do have some idea of the conditions under which they flourish. Resort to embedded forums is encouraged where there are continuing relations between the disputants. Continuing relations raise the cost of exit, they increase the likelihood of some shared norms, and they supply opportunities for application of sanctions -- e.g., by direct withdrawal of beneficial relations or by damage to reputation that reduces prospects for other beneficial relations.

These data about disputing are taken from surveys of individuals or households. They tell us about the grievances, claims, and disputes of individuals in their non-business capacities (i.e., as [\*18] householder, consumer, citizen, spouse, neighbor, etc.) but not in their business or professional lives. There are other disputants: businesses, organizations and units of government. We have an even dimmer picture of their patterns of disputing. The Civil Litigation Research Project (CLRP) study gives us a first glimpse of organizational disputing. n73 A sample of 1,516 organizations in CLRP's five localities (18% of these organizations were large in the sense of having over 100 employees) was asked about disputes, excluding labor-management, with other non-governmental organizations during the past 12 months involving at least \$ 1,000. n74 Only 17.5% of these organizations reported having such a dispute, n75 but larger organizations had considerably more: 49% of organizations with over 100 employees had disputes, compared to just 16% of smaller organizations. n76 Inter-organizational disputes involve larger amounts of money than those of individuals -- 44% involved more than \$ 10,000. n77 Most of these disputes were settled bilaterally, without the invocation of any third party. n78

## 2. The Upper Layers: Lawyers and Courts

The pyramid imagery imparts to the process of dispute construction and transformation a stability and a solidity that are illusory. Changes in perceptions of harm, in attributions of responsibility, in expectations of redress, in readiness to be assertive -- all of these affect the number of grievances, claims and disputes. New activities, based on new technologies, and new

knowledge may change notions of causal agency. Some parts of the pyramid are more solid than others. In matters like automobile accident claims and post-divorce disputes, there are many cues about how to perceive the problems: it is "common knowledge" how to proceed; social support for complaining is readily forthcoming; there are occupational specialists ready to receive the matter and pursue it on a routine and standardized basis. Other parts are more volatile and shifting. We can imagine a frontier of perceived grievances moving over time. As the span of human control expands so do attempts to extend accountability. Claims for compensation for rainfall from cloud seeding and "wrongful birth" claims<sup>n79</sup> are examples of the growing edges of [\*19] the world of dispute, where the borders between fate, self-blame, and specific or shared human responsibility are blurred and disputed. These areas of blurring and contest are eventually resolved. But it should be noted that the area of recognized disputes contracts as well as expands. Claims may become subject to routine reimbursement and removed from the disputing process. Other sorts of claims may lose their standing, such as claims to honor or racial superiority, or claims to privacy by officials.

As we trace the movement of disputes up the pyramid and laterally from one forum to another, it is useful to recall that the dispute does not remain unchanged in the process. The disputes that come to courts originate elsewhere and may undergo considerable change in the course of entering and proceeding through the courts. Disputes must be reformulated in applicable legal categories. Such reformulation may restrict their scope. Diffuse disputes may become more focused in time and space, narrowed down to a set of discrete incidents involving specified individuals. Or, conversely, the original dispute may expand, becoming the vehicle for consideration of a larger set of events or relationships. The list of parties may grow or shrink; the range of normative claims may be narrowed or expanded; the remedy sought may change; the goals and audiences of the parties may alter. In short the dispute that emerges in the court process may differ significantly from the dispute that arrived there, as well as from "similar" disputes that proceed through other settings.<sup>n80</sup>

Lawyers are often viewed as important agents of this transformation process. They help translate clients' disputes to fit into applicable legal categories.<sup>n81</sup> But lawyers may also act as gatekeepers, screening out claims that they are disinclined to pursue. Macaulay, in studying the dissemination of consumer law to Wisconsin lawyers, found that lawyers tended to defuse consumer claims, diverting them into mediative channels rather than translating them into adversary claims.<sup>n82</sup> Just how lawyers perform this translation depends, of course, on the way that the profession is organized. The organization of legal services has powerful effects on just which disputes come to the attention of lawyers and which get through the filters imposed by the lawyer's case selection [\*20] process.<sup>n83</sup> Thus, Macaulay found that the organization of legal services in Wisconsin was such that information about opportunities under consumer legislation was delivered to businesses and to wealthy consumers but not to ordinary consumers.<sup>n84</sup>

Those disputes that are not resolved by negotiation or in some embedded forum may be taken to a champion or a forum external to the situation. Recourse to any such third party is relatively infrequent across the whole range of disputes. In the Milwaukee Consumer Dispute Study, Ladinsky and Susmilch found that the proportion of problems that were taken to *any* third party was 3%.<sup>n85</sup> This is in the same range as Best and Andreasen's finding that third parties were resorted to in only 1.2% of all cases in which consumers perceived problems (3.7% of all instances in which they voiced complaints).<sup>n86</sup> This included what we have called embedded forums like professional associations and the Better Business Bureau. Lawyers and courts made up only one sixth of the total number of third parties.

As stakes increase, so does resort to third parties. In the CLRP study, which dealt with grievances involving more than \$ 1,000, 23% of those with disputes consulted a lawyer. n87 In two areas the range was much higher: post-divorce disputes, for which involvement with a court was unavoidable and tort, where the contingent fee system provided ready access. In the inter-organizational disputes studied by CLRP, lawyers were used in 35% of the disputes. Use increased little in the larger disputes, reaching only 39% in disputes involving more than \$ 10,000. n88

Sixty-four percent of American adults have had at least one professional contact with a lawyer on matters other than those connected with their business. n89 This contact is not confined to disputes, but includes matters like purchasing property and preparing wills. Slightly more than half of those having contact used lawyers more than once, with an average of slightly more than two uses per user. n90 Use was higher by whites and by the more educated and wealthy. There was a dramatically higher rate of multiple use by those with higher education. n91 Yet for a very large portion of the population (47% of non-users; 40% of multiple [\*21] users) lawyers are regarded as a last resort that should not be used until one has "exhausted every other possible way of solving [the] problem." n92

Some of those who consult lawyers, as well as a few who don't, get to court. Miller and Sarat report that about 11% of disputants (approximately 9% when those with post-divorce problems are excluded) took their middle range disputes to court. n93 This comes to about 7% of all households in the survey. In the mostly smaller consumer disputes covered by Best and Andreasen n94 and by Ladinsky and Susmilch, n95 the use of courts virtually disappears.

Overall, 9% of American adults report having had experience in a major civil court and 14% in a minor civil court. This includes parties, witnesses, jurors and observers. Fewer acknowledge experience in criminal courts (major 6%, minor 9%; juvenile 7%) and more with traffic court (26%). Only 1% report experience with a highest appellate court. n96 In an earlier study Walker, *et al.* found that almost two-thirds of North Carolinians claimed personal experience with the courts; 10% had brought suit; 7.4% had been sued; 25.7% had been witnesses; 24% had served on juries and 48.1% had been spectators to court proceedings. n97 These scattered data suggest that a sizable minority -- probably less than one-fifth -- of American adults have sometime in their lives been a party to civil litigation. n98

What is at stake in the cases that get to court? The Civil Litigation Research Project studied a sample of 1649 cases in five federal courts and state courts of general jurisdiction in five locations. Cases involving less than \$ 1,000 were eliminated from the sample. The median stakes involved in a state court case was \$ 4,500. Only a quarter of state cases involved over \$ 10,000. The median stakes in a federal case was \$ 15,000. n99

[\*22] In the CLRP study of inter-organizational disputes n100 respondents were asked to estimate the percentage of their organization's disputes that went to courts. The median estimate was 5% but the mean was 17% suggesting that there are a small number of high frequency users of the courts. The median response on use of arbitration was two-tenths of a percent -- about one twenty-third the estimated use of courts. Again the higher mean response (6%) suggests that there is a group of frequent users of this device. But the great preponderance of disputes is dealt with bilaterally, without resort to any third party. The median estimate of no third party involvement was 90%. Thirty-onepercent of respondents reported that none of their disputes went to court and 68% reported that none went to arbitration.

There may be very little use of litigation to adjust relations among whole classes of major organizational actors such as large manufacturing corporations, financial institutions, educational and cultural institutions, political parties, etc. Macaulay found manufacturers reluctant to intrude litigation into relationships with their customers and suppliers. n101 Owen found that in two Georgia counties "opinion leaders and influentials seldom use the court except for economic retrieval." n102 Analyzing patterns of court use, Hurst remarks on:

the absence of sizeable numbers of legal actions in which individuals or firms of substantial or large means appear on both sides of lawsuits. Such potential suitors can afford, and are likely to make extensive use of skilled professional help to channel their affairs so as to prevent trouble. Similarly, when trouble emerges, they are likely to be equipped to make sophisticated choices of alternatives to litigation to resolve difficulties through bargaining, mediation or arbitration. Apart from these influences of resources available, they are likely to find their own interests deeply engaged in maintaining continuing relations with their potential opponents in litigation, so that the structure of the situation directs them away from the courts. Moreover, the larger the business firm and the more dependent its interests on long-term confident, harmonious relations with a network of others in the community -- investors, credit sources, suppliers, customers, elected officials -- the more likely it will shun the publicity that may attend lawsuits. n103

[\*23] Like other kinds of remedy-seeking, litigation requires information and skills. Complaints to all third parties come disproportionately from the better educated, better informed and more politically active households. n104 Consumers who participated in a massive class action recovery against manufacturers of antibiotics were the responsible, informed non-alienated mainstream. n105 The resources that enable courts to be used may be provided by means other than education and status. Thus Merry, detailing use of a court in an American slum, found that "those who turn to the court generally had some special, inside knowledge of court operations, either through a close friend or relative on the police force or past encounters of kin with arrests and court appearances." n106

In many American courts, plaintiffs are predominantly business or governmental units, while the defendants are overwhelmingly individuals. n107 Wanner's study of civil courts of general jurisdiction in three large American cities found that business and governmental units were plaintiffs in 58% of the cases filed in these courts, but defendants in only 33%. n108 The modal lawsuit pitted an organizational plaintiff against an individual defendant. A comparable pattern is found in Owen's study of two county courts. n109 The same configuration of organizational plaintiff versus [\*24] individual defendant is typical in small claims cases n110 which make up a very substantial proportion -- a quarter or more -- of the total civil caseload in the United States. n111 Criminal cases also typically pit an experienced professional who litigates for a living against a party for whom litigation is a more or less unique emergency involving high personal stakes. n112

However, studies of other general jurisdiction courts suggest that the preponderant configuration is individual plaintiff versus individual defendant. In four of the five state courts in the CLRP study, individuals are plaintiffs some 75% of the time. In the Arthur Young study of courts of general jurisdiction in five diverse counties, most suits in 1976-77 were by individual plaintiffs against individual defendants. n113 The percentages of suits by individuals against businesses (11.4%) and by businesses against individuals (9.9%) were roughly equivalent. n114 Similarly, McIntosh found that, in the period from 1940 to 1970, 70% of cases in St. Louis Circuit Court were

individuals vs. individual; 17% individual vs. organization; 4% organization vs. individual; and 9% organization vs. organization. n115

In order to understand the distribution of litigation, we must go beyond the characteristics of individual parties to consider the relations between them. Are the parties strangers or intimates? Is their relationship episodic or enduring? Is it single-stranded or multiplex?

In the American setting, litigation tends to be between parties who are strangers. Either they never had a mutually beneficial continuing relationship, as in the typical automobile injury case, or their relationship -- marital, commercial, or organizational -- is [\*25] ruptured. In either case, there is no anticipated future relationship. n116 In the American setting, unlike some others, resort to litigation is viewed as an irreparable breach of the relationship. n117 However, where parties are locked into a relationship with no chance of exit, such as divorced parents, or inmates and institutional managers, litigation may proceed side-by-side with the continuation of that relationship. n118 Litigation occurs where it is less costly in terms of its disruption of valued relations -- particularly multiplex and effective ties. n119 And the absence of such ties makes it less likely that alternative remedies -- either mediators or reputational [\*26] networks with shared norms and sanctions -- are available. But where disputes are about control of irreplaceable resources (land, power, reputation), disputants may be willing to sacrifice valued relationships and pursue the drastic remedies of litigation rather than resort to indigenous remedies. n120

### 3. The Litigation Process: Attrition, Routine Processing, Bargaining and Settlement

Of those disputes which are taken to court, the vast majority are disposed of by abandonment, withdrawal, or settlement, without full-blown adjudication and often without any authoritative disposition by the court. In fact, of those cases that do reach a full authoritative disposition by a court, a large portion do not involve a contest. They are uncontested either because the dispute has been resolved, as in divorce, or because only one party appears. n121 Over 30% of cases in American courts of general jurisdiction are not formally contested. This predominance of uncontested matters in American courts is long-standing. n122

Many cases are withdrawn or abandoned because the mere invocation of the court served the initiator's purpose of harassment, warning or delay. Police may make an arrest or file charges for purposes of control with no intention of pursuing prosecution. Similarly, Merry reports that is the issuance of the complaint and holding of the preliminary hearing that are the crucial goals of court use among residents in a poor neighborhood. n123 The invocation of official adjudicatory institutions does not necessarily express either a preference or an intention to pursue the dispute in official forums, to secure the application of official rules, or to obtain an adjudicated outcome. The official system may be invoked, or invocation may be threatened, in order to punish or harass, to demonstrate prowess, to force an opponent to settle, or to secure compliance with the decision of another forum.

The master pattern of American disputing is one in which there is actual or threatened invocation of an authoritative decision [\*27] maker. This is countered by a threat of protracted or hard-fought resistance, leading to a negotiated or mediated settlement, often in the anteroom of the adjudicative institution.

The best known instance of this pattern is the processing of criminal cases in the United States. The term "plea bargaining" is employed popularly and here to refer to a whole family of patterns of processing criminal cases. These patterns may involve protracted explicit bargaining or tacit

reference to established understandings. Agreement may take the form of submission to an abbreviated trial in which formal rules of evidence are suspended and a finding of guilt is foreordained -- e.g., it may involve a "slow plea" n124 or a "walk through" waiver trial. n125 More commonly, it takes the form of an agreement concerning the charges brought against the accused, the sentence to be imposed, subsequent behavior, restitution, etc.

These non-trial dispositions account for some 80 or 90% or more of criminal dispositions in almost every American jurisdiction. Local styles differ as to the stage of the process n126 and the role of the judge. The judge may be passive, merely ratifying deals arranged by the parties; he may actively participate in plea discussions; or he may play a dominant role, orchestrating the whole process and, in effect, imposing the "going rate" as in the Chicago system described by McIntyre. n127 Only one-quarter of American judges report that their typical role is one of active participation in plea bargaining discussions. n128 About two-third report that they do not participate but only ratify dispositions reached outside their presence. n129

Similarly, most civil cases in American courts are settled. That is, they terminate in an outcome agreed upon by the parties, sometimes formally ratified by the court, sometimes only noted as settled, and sometimes, from the court's viewpoint, abandoned. The settlement process may begin even before the suit is filed. For example, a great majority of automobile injury claims are settled before filing. n130 Of those claims that become lawsuits, settlement [\*28] is the prevalent mode of disposition. Of the cases in ten courts studied by the Civil Litigation Research Project, about 88% were settled; only 9% went to trial. n131

Just as "plea bargaining" on close inspection encompasses a cluster of distinct patterns, the umbrella term "settlement" encompasses a whole family of related but distinct processes. It includes bilateral negotiation among the parties n132 prior to or after filing that is more or less articulated to moves in the judicial arena. It also includes participation by third parties -- outside mediators, officials, even judges.

The participation of American judges in active promotion of settlements is increasing and increasingly respectable. The primary rationalization, like that for endorsement of plea bargaining, is that this departure from the adjudicative model is necessary to preserve the forum from unbearable pressures of caseload. But judges also justify active participation on the ground that such efforts provide greater satisfaction to litigants, repair relations between contesting parties, and avoid untoward results in particular cases.

This displacement of formal proceedings into mediation and bargaining in the anterooms and corridors is found in the administrative process as well as in the regular courts. The vast majority of matters brought to federal administrative agencies are addressed in "informal administrative hearings." n133

Which cases manage to survive the winnowing process and end up being fully adjudicated?

(1) Perhaps the single most common type is the case where a party needs the judicial declaration -- as in divorce or probate proceedings. In such cases there is typically no contest or, if there was a contest, it has been resolved by the parties before securing judicial ratification.

(2) Another very frequent kind of fully adjudicated case is one which is "cut and dried" and can be processed cheaply and [\*29] routinely, as in most collection cases where the defendant frequently does not appear. In both these types the element of contest is minimal.

(3) Other cases are adjudicated because of a premium placed on having an external agency make the decision. Thus, an insurance company functionary may want to avoid responsibility for a large payout. n134 A prosecutor may prefer that charges against the accused in an infamous crime be dismissed by the court rather than by his office. n135

(4) There may be value to an actor in showing some external audience (a creditor or the public) that no stone has been left unturned.

(5) Or an external decision may be sought where the case is so complex or the outcome so indeterminate that it is too unwieldy or costly to arrange a settlement. n136

(6) Settlement may be unappealing because the "settlement value" is insufficient. Ross describes the personal injury case in which damages are high but liability sufficiently doubtful to preclude a large settlement. n137 Similarly, criminal defendants facing mandatory sentences may find the available bargains unattractive.

(7) Even when the bargain is acceptable in itself, it may be spurned because of the effect accepting it would have on the bargaining credibility of a player in future transactions. A litigant or lawyer may want to display his commitment and thus enhance his credibility as an adversary in future rounds of play. n138

(8) Finally, a party may want to adjudicate in order to affect the state of the law. Some parties -- typically recurrent organizational litigants -- are willing to invest in securing from a court a declaration of "good law," or avoiding a declaration of "bad law," even where such a decision costs far more than a settlement in the case at hand since such a declaration will improve the litigant's position in any future controversies. n139

(9) Or parties may not seek furtherance of their interests, but vindication of fundamental value commitments. This is true, for example, of the organizations which have sponsored much [\*30] church-state litigation in the United States. n140 Parties disputing about value differences rather than about interest conflicts are less likely to settle.

(10) Related to this is the special case of government bodies whose notion of "gain" is often problematic and may seek from courts authoritative interpretations of public policy -- that is, redefinitions of their notion of gain. n141

The "litigation explosion" literature views Americans as "rights-minded" and possessed of an insatiable appetite for vindication. That the appetite for such vindication may be moderated is suggested by the very high rates of settlement in all civil litigation. The propensity to compromise is also suggested by some scattered bits of evidence. For example, Mayhew found that the proportion of respondents reporting serious problems who sought "justice" or legal vindication (as opposed to a satisfactory adjustment) was tiny in all areas other than discrimination. 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." n142

Litigants vary in the extent to which they seek justice or moral vindication instead of, or in addition to, a satisfactory solution of their immediate discomforts. Another reading of the public appetite for justice is provided by Steele's study of complaints to the Illinois Attorney General's Consumer Fraud Bureau. n143 Steele found that the desire for "public-oriented remedies" as opposed to private relief varied directly with income level. Only 4% of those with incomes of less

than \$ 12,000 requested a public remedy, in contrast to 28% of those with incomes over \$ 17,000. n144 The complainants to this Bureau were isolated individuals. There is some reason to think that individuals complaining in a setting of group activity will be more interested in public-oriented remedies than are unorganized individuals. n145

Although disputing in America has a predominantly instrumental character, litigation is sometimes regarded as a vehicle of [\*31] moral action involving matters of principle and thus compromise would be unseemly or unthinkable. n146 FitzGerald portrays the temporary marriage of litigation to an intense moral crusade in the case of the Contract Buyers League, a group of Chicago Blacks victimized by a discriminatory system of housing sales. n147 After a period of unsuccessful individual attempts to secure relief, intervention by outsiders precipitated formation of a group which, over a period of several years, engaged in picketing, withholding payments, and resisting attempts at eviction. FitzGerald describes the "intense experience of belonging and acting together," and the "intense feeling of altruism . . . and . . . intense loyalty to those who had joined the group which was 'fighting for justice.'" n148 This collective activity generated a powerful sense of communion that "overshadowed their instrumental and economic aim of having the contracts renegotiated" n149 and attracted considerable support from outsiders, including elite lawyers who mounted an innovative, and ultimately unsuccessful, campaign of litigation on behalf of the League.

The example illuminates by contrast the relatively restrained, narrowly focused, impersonal and professionalized character of most American litigation. Consider several very striking accounts of major injury litigation from Japan n150 -- in each instance people reportedly disinclined to pursue legal remedies in a calculating instrumental fashion engage in group litigation which becomes the focus of an all-out struggle of great moral intensity. n151 It is instructive [\*32] to compare this Japanese pattern with the more modulated or segmented struggle of the Buffalo Creek disaster victims. Six hundred victims of a flood caused by the collapse of a faulty mine dam sued the coal company. An intense, and ultimately profitable, pro bono effort by a major Washington law firm involved a massive deployment of legal resources, the development of innovative theories of recovery, strenuous and elegant maneuver -- and ultimately a substantial settlement. n152 In spite of the number and proximity of the plaintiffs, there was no direct encounter with the antagonists, or any form of collective action, or any sense that plaintiffs were caught up in a struggle outside the bounds of the lawsuit. n153 Their lawyers, notwithstanding their intense identification with the victims' cause, remained remote and professional. n154

#### 4. Courts as Sources of Bargaining and Regulatory Endowments

We have seen that courts resolve by authoritative disposition only a small fraction of all disputes that are brought to their attention. These in turn are only a small fraction of the disputes that might conceivably be brought to courts and an even smaller fraction of the whole universe of disputes. The observation of the limited use of courts in direct resolution of disputes should not be taken as an assertion that courts are unimportant in the whole matrix of disputing and regulation, however. The impact of litigation cannot be equated with the resolution of those disputes that are fully adjudicated. Adjudication provides a background of norms and procedures against which negotiation and regulation in both private and governmental settings takes place. This contribution includes, but is not exhausted by, communication to prospective litigants of what might transpire if one of them sought a judicial resolution. Courts communicate not only the rules that would [\*33]

govern adjudication of the dispute but possible remedies and estimates of the difficulty, certainty, and cost of securing particular outcomes.

The courts and the law they apply may thus be said to confer on the parties what Robert Mnookin and Lewis Kornhauser call a "bargaining endowment," that is, a set of "counters" to be used in bargaining between disputants. n155 In the case of divorce, for example,

[t]he legal rules governing alimony, child support, marital property and custody give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips -- an endowment of sorts. n156

Similarly, the rules of tort law provide bargaining counters which are used in the process of negotiating settlements. n157 The gravitation to negotiated outcomes in criminal cases is well-known. One astute observer concludes that "the actual significance of the sophisticated adversary process before the jury" in American criminal cases is "to set a framework for party negotiations, providing 'bargaining chips.'" n158 The negotiating dimension is found in the most complex as well as in the most routine cases. Thus, in "extended impact" cases, the involvement of the courts supplies standards and the setting for negotiations among the parties. n159

The bargaining endowment which courts bestow on the parties includes not only the substantive entitlement conferred by legal rules, but also the rules that enable those entitlements to be vindicated -- for example, a rule excluding evidence favorable to the other party of jeopardizing the claim of the other party. Rules, however, are only one part of the endowment conferred by the judicial forum. The delay, cost, and uncertainty of eliciting a favorable determination also confer bargaining counters on the disputants. Delay, costs, and uncertainty may themselves be the product of rules. For example, a discretionary standard involving the balancing of many factors, each requiring detailed proof, is more costly, time consuming, and uncertain in application than a mechanical rule. But cost, delay, and uncertainty also result from [\*34] such nonrule factors as the number and organization of courts and lawyers.

The meaning of the endowment bestowed by the law is of course not fixed and invariable, but depends on the characteristics of the disputants -- their preferences, negotiating skill, risk aversiveness, ability to bear costs and delay, etc. A different mix of disputant capabilities may make a given endowment take on very different significance.

Bargaining between the parties is not the only kind of "private ordering" that takes place in the law's capacious shadow. We can extend the notion of the bargaining endowment to imagine courts conferring on disputants a "regulatory endowment." n160 That is, what the courts might do (and the difficulty of getting them to do it) clothes with authority and immunity the regulatory activities of the school principal, the union officer, the arbitrator, the Commissioner of Baseball and a host of others. Such regulation may be exercised through various forums, including adjudicatory ones.

The relation of official adjudicatory forums to disputes is multi-dimensional. Decisive resolution, while important, is not the only link between courts and disputes. May be prevented by what courts do, for instance by enabling planning to avoid disputes or by normatively disarming a potential disputant. Also, courts may foment and mobilize disputes, as when their declaration of a right arouses and legitimates expectations about the propriety of pursuing a claim, or when changes in rules of standing suggest the possibility of pursuing a claim successfully. Further, courts may displace disputes into various forums and endow these forums with regulatory power. Finally,

courts may transform disputes so that the issues addressed are broader or narrower or different than those initially raised by the disputants. Thus courts not only resolve disputes, they prevent them, mobilize them, displace them, and transform them.

### 5. Adjudication Outside the Courts

Courts and other official institutions are not the only settings in which adjudication and related modes of disputing take place. The patterns of litigation in courts that we have examined must be understood in the context of the array of rival and companion institutions in which disputes are processed. Societies comprise a multitude of partially self-regulating spheres or sectors, organized along spatial, transactional or ethnic-familial lines. These range [\*35] from primary groups in which relations are direct, immediate, and diffuse to settings (e.g., business networks) in which relations are indirect, mediated, and specialized. Disputes and controls are experienced for the most part not in courts or other forums sponsored by the state, but at the various institutional locations of our activities -- home, neighborhood, school, workplace, business deal and so on -- including a variety of specialized remedial settings embedded in these locations. The enunciation of norms and application of sanctions in these settings may be more or less organized, more or less self-conscious, more or less removed from everyday activity in personnel, location, norms, etc. In some of these settings we can recognize counterparts or analogues to the institutions, processes and intellectual activities that characterize the "big" (national, public, official) legal system. Alongside the "big" legal system is a patchwork of lesser normative orderings which we comprehend by such rubrics as "semi-autonomous social fields," n161 "private government" n162 or "indigenous law." n163

The interconnections between disputing in these indigenous forums and in the courts are many. Which disputes get to which forums? Presumably there are many sorts of disputes that rarely appear in official courts precisely because they are disposed of in these other settings. Thus there may be whole areas of social life which are effectively insulated from the direct involvement of the courts. This does not exclude the possibility that there are important indirect effects. Disputes that do arrive in courts have often [\*36] been shaped by their transit other forums. Much of the business of courts is acting as a "court of appeal" from the decisions of prison officials, union bodies, stock exchanges, or sports commissioners. What courts do or refuse to do in such cases may bestow regulatory powers on these forums. Courts may empower indigenous forums explicitly or implicitly. The possibility of resort to courts may be a doomsday machine inducing acquiescence in indigenous regulation. Changes in litigation in the courts may reflect changes in the distribution of disputes among forums, rather than in the level of disputing in society.

#### C. *Compared to What?*

How can we tell whether the amount of disputing and litigation revealed by these accounts is too much -- or too little? In part this depends on our reading of the meaning of disputes and lawsuits -- are they evils which inevitably detract from social well-being? Or do they, some of them anyway, contain the seeds of vindication, justice, even social improvement? Such judgments could be applied to any quantity of disputes. But even if individual disputes or lawsuits may be harmless or even beneficent, having too many of them may be a bad thing. But how many are too many? Are we to measure this by the capacity of courts or other institutions? But how do we know *they* are the right size? We might instead measure the value of disputing by its measurable effects, but as we shall see this is a daunting and untried endeavor. As noted earlier, much of the literature expressing

concern about the litigation explosion finds a standard, at least implicitly, by comparing the present situation to our own national past or to more favored lands abroad.

### 1. Then and Now

Unfortunately for purposes of comparison, we have almost no data from earlier points in our own history that are comparable to our contemporary survey evidence. Hence we have only a dim picture of what the lower layers of the dispute pyramid used to be like. But there is one kind of evidence that we can compare across time -- data on the number of cases brought in the courts. By combining this with population figures we can derive a litigation rate for various populations and see if this rate has increased over time. This procedure has a number of infirmities if we are using it to estimate the disputations or contentious character of the population. For example, are all the cases counted really disputes or contests, and how comparable are the figures from time to time as recording systems change, jurisdictions are altered, etc. Again, our rate does not reflect the portion of disputes that comes before [\*37] agencies other than regular courts -- administrative agencies, zoning boards, licensing bodies, small claims courts, justices of the peace and others -- whose number and identity have changed over time. Thus our rates tell us about the use of the regular courts rather than about the entire use of official third party dispute institutions. This is troubling because we don't know how much changes in rates reflect changes in the population of dispute institutions and the flow of traffic among them, and how much reflects changes in the tendency to litigate in the broad sense of taking disputes to governmental third parties. Nevertheless, let us see what litigation rates tell us.

Federal courts handle only a tiny fraction of all the cases filed in the United States. In 1975 there were approximately 7.27 million cases (civil, criminal, and juvenile) filed in state courts of general jurisdiction n164 and about 160,000 in the federal district courts. n165 There has been a dramatic rise in federal court filings in recent decades. Filings in the district courts increased from 68,135 in 1940 to 89,112 in 1960, and to 198,710 in 1980. n166 From 1940 to 1960, the absolute rise barely kept pace with population growth, but from 1960 to 1980 there was a pronounced per capita increase in filings from 0.5 per thousand population to 0.9 per thousand. n167

These higher rates of filings are frequently cited as evidence of feverish litigiousness. But other evidence provides little support for the notion that these are linked with desperate congestion and crushing caseloads. David Clark's revealing analysis of federal district court activity from 1900 to 1980 shows a dramatic reduction in the duration of civil cases from about three and a half years at the beginning of the century to 1.16 years in 1980. n168 The number of cases terminated per judge has been steady since World War II and remains considerably lower than in the interwar period. n169 Not only has the increase in judges kept up with the caseload, but there has been a massive increase in the support staff. While the average number of cases terminated per judge was approximately the same in 1980 as in 1960, the total employment of the federal judiciary rose during that period from 27.7 for every million people to 65.6 per million. n170

[\*38] However, there has been a striking growth of appeals in federal courts. The rate at which those eligible to press appeals have exercised that right has risen, especially in criminal cases. n171 The number of appeals filed in the federal courts of appeal almost quintupled from 1960 to 1980, while the number of judges nearly doubled. n172 Understandably, it is the Supreme Court, whose filings during this period more than doubled, and the courts of appeal that are the provenance of much of the imagery of catastrophic overload.

Federal courts aside, the official statistics on the work of the courts are not readily usable for the purpose of measuring trends over time. Fortunately a number of scholars have in the past decade developed a technique of sampling the work of courts at intervals and using these successive portraits to give us a picture of the change in the work of these courts over time. These studies provide us with a periodic measure of the resort to the courts. The longest series of measurements of this type is from the very comprehensive work of McIntosh, tracing the work of the St. Louis Circuit Court since 1820. As Figure I and the accompanying table show, filings in that court have grown more than twenty-seven times from the 1820's to the 1970's, but the litigation rate in the 1970's is about half of what it was during the early nineteenth century. There has been a long slow rise in the per capita use of the court since the beginning of the present century.

[\*39] *Figure I: Average number of civil cases filed and average rate of litigation (cases filed per 1000 population) in the St. Louis Circuit Court for each decade between 1820 and 1977* [SEE ILLUSTRATION IN ORIGINAL]

Decade	Average Number of Cases Filed	Average Litigation Rate	Decade	Average Number of Cases Filed	Average Litigation rate
1820-29	352.80	31.31080	1900-09	4821.00	7.65458
1830-39	677.10	28.26363	1910-19	6577.00	9.05420
1840-49	1854.70	35.86587	1920-29	11869.90	14.91903
1850-59	1956.30	13.91703	1930-39	10223.50	12.47404
1860-69	2665.00	10.53126	1940-49	10311.40	12.36300
1870-79	3719.20	10.45976	1950-59	10321.10	12.83341
1880-89	2874.40	7.32715	1960-69	11000.10	15.99835
1890-99	4394.40	6.94947	1970-77	9775.75	16.85843

SOURCE: U.S. Census Bureau

St. Louis Circuit Court, Archives Department, Microfilms and Current Files Department

NOTE: Reproduced by permission of Prof. Wayne McIntosh.

TABLE 1  
CIVIL CASES FILED IN COURTS OF GENERAL JURISDICTION  
OF VARIOUS UNITED STATES JURISDICTIONS  
(PER THOUSAND POPULATION)

	Alameda Cty., California	San Benito Cty., California	Menard Cty., Illinois	Five Counties a	Federal District Cts.
1870			16.4		
1890	7.6	4.8	5.5		
1902					0.199
1903-04				36.8	
1910	13.5	3.6	6.3		
1912					0.158
1918-19				34.5	
1922					0.265
1930	10.8	8.9	8.5		
1932					0.444

1933-34				36.9	
1942					0.223
1948-49				36.7	
1950	9.5	10.4	3.9		
1952					0.309
1962					0.291
1963-64				42.2	
1970	11.0	10.2			
1972					0.439
1976-77				55.2	

SOURCES: Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *LAW & SOC'Y REV.* 267 (1976); S. Daniels, *The Trial Courts of Spoon River: Patterns and Changes, 1870 to 1963*, at 31 (June 11-14, 1981) (paper prepared for delivery at the 1981 Meeting of the Law and Society Association) (Menard, Illinois); ARTHUR YOUNG & CO. & PUBLIC SECTOR RESEARCH, INC., *supra* note 112 (five counties); Grossman & Sarat, *Litigation in the Federal Courts: A Comparative Perspective*, 9 *LAW & SOC'Y REV.* 321, 335 (1975) (Federal District Courts).

NOTE:

a. The higher range of figures from this source is partly explained by a difference in what is being measured. All the other studies compute rates on the basis of total population; Arthur Young, et al., compute a rate for the adult population only.

[\*40] Data on changes in overall civil litigation rates from several studies are summarized in Table 1. As we can see, there have been recent increases in most localities in the per capita filing of civil cases. n174 The pattern in federal courts is more accentuated, [\*41] but these rates are not marked by abrupt and extreme departures from past patterns. In several instances overall litigation rates have been higher in the past. Indeed, the glimpse of the remote past we get from McIntosh suggests sustained periods at much higher levels than we now have. n175 What we know of law in the even more remote colonial past suggests that our predecessors were less reluctant to go to court. In Accomack County, Virginia, in 1639 the litigation rate of 240 per thousand was more than four times that in any contemporary American county for which we have data. n176 In a seven year period, 20% of the adult population appeared in court five or more times as parties or witnesses. n177 In Salem County, Massachusetts, about 11% of the adult males were involved in court conflicts during the year 1683. "[M]ost men living there had some involvement with the court system and many of them appeared repeatedly." n178

To understand the meaning of the recent trend to higher per capita filings, we have to examine the kinds of cases that are filed and what happens once they come to the courts. These filing statistics treat cases as interchangeable units, but cases are of different sizes and shapes. Some represent hotly contested disputes; others (like most divorce or debt or probate cases) are seeking administrative confirmation of a resolution, a claim, or some action taken. Some represent a major involvement by a court in which a judge actually decides the controversy; others represent little more [\*42] than registration at the court. We have no figures on the quantum of contest or of judicial decision in these cases, but we can try to refine our picture by indirect evidence.

Over the past century there has been a pronounced shift in the make-up of the cases being brought to regular trial courts in the United States. There has been a shift from civil to criminal in the work of these courts. On the civil side, there has been a shift from cases involving market transactions (contract, property, and debt collection) to family and tort cases.

Domestic relations cases in the five counties studied by Arthur Young, *et al.*, rose from 21.8% of filings in 1903-1904 to 49.1% in 1976-1977. n179 In Alameda County they went from 18% in 1890 to 51.7% in 1970; n180 in San Benito from 19.3% to 61.7%, n181 In St. Louis, family (including estate) cases rose from 23.9% of filings in 1895 to 45.9% in 1970. n182

There was a comparable growth in torts as a percentage of filings. In the five counties studied by Arthur Young, *et al.*, torts were 1.2% of the filings in 1903-1904 and 12.4% in 1976-1977. n183 In Alameda they grew from 6.0% in 1890 to 27.1% in 1970; n184 in San Benito from 3.2% to 19.2%. n185 In St. Louis torts went from 7.7% of filings in 1895 to 35.3% in 1970. n186

There was a corresponding decline in the portion of the caseload composed of commercial, contract, and property matters. In the five counties, commercial and property cases fell from 71.7% of filings in 1903-1904 to 32.3% in 1976-1977. n187 In Alameda County contracts and property fell from 57% in 1890 to 18% in 1970; n188 in San Benito the decline was from 58.1% to 12.3%. n189 In St. Louis contract and property cases fell from 54.5% in 1895 to 21.4% in 1970. n190

Notwithstanding the differences in method among the studies from which these data are drawn, the similarity in the trends is strikingly evident. Regular civil courts in America are being [\*43] called on to deal with a very different mix of matters than they formerly did. These shifts are reflected in the make-up of appellate caseloads. Studies of state supreme courts n191 and of federal courts of appeals n192 trace a parallel movement from business and property cases to tort, criminal law, and public law.

Not only has there been a shift in the pattern of cases coming into the courts, there have been changes in what has transpired once they are filed. The available evidence requires more detailed analysis than space or time allows, so let me confine myself to a few general observations. First, it is evident that in all these courts most cases for the entire span of time in question have been disposed of without a full adversary trial. Voluntary dismissal (presumably the result of settlement) and uncontested judgment are the most common dispositions recorded in these courts. There is no evidence to suggest an increase in the portion of cases that runs the whole course. Several studies suggest that while litigation rates have risen, there has been a decline in the per capita rate of contested cases. n193 Similarly, there has been a decline in the per capita rate of cases eliciting written opinions from state supreme courts. n194

One measure of the change in disposition patterns is the diminishing percentage of cases that go to trial. While federal court filings have risen dramatically, the percentage of cases reaching trial has diminished. n195 (Note that this is a measure of the number of trials begun, not of trials completed: many cases are settled after trial has begun.) Similarly, from the early 1960's to 1980 -- a period of increased filings and larger jury awards -- the number of jury trials actually held fell in both Cook County and San Francisco [\*44] County. n196

TABLE 2  
 PERCENTAGE OF CIVIL CASES TERMINATED DURING OR  
 AFTER  
 TRIAL IN UNITED STATES DISTRICT COURTS

Year	Percentage	Source
1940	15.2	(1940: 49)
1950	11.2	(1950: 149)
1960	10.3	(1960: 100)
1970	10.0	(1970: 245a)
1980	6.5	(1980: A-26)

SOURCE: ANNUAL REPORTS OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (year and page as indicated).

There have been other changes in the character of what courts do. Less of their work is the direct, decisive resolution of individual disputes; more of it is routine administration and supervised bargaining. Courts contribute to the settlement of disputes less by imposing authoritative resolutions and more by pattern setting, by distribution of bargaining counters, and by mediation. n197 Courts produce effects that radiate widely: rulings on motions, imposition of sanctions and damage awards become signals and sources of counters used for bargaining and regulation in many settings. The portion of cases that run the whole course has declined. But for the minority of matters that run the full course, adjudication is more protracted, more elaborate, more exhaustive, and more expensive. The process is more rational in the sense that it is free of antiquated and arbitrary formalities. Concealment is discouraged; litigants have access to more information. It is open to evidence of complicated states of facts and responsive to a wider range of argument.

Criminal trials have evolved from rough perfunctory proceedings in which accused persons were summarily tried without benefit of counsel into an intricate ballet in which the accused enjoys a guaranteed right to counsel and elaborate procedural protections, such as the right to select a representative jury. n198 Not only is the trial itself more elaborate, but it is surrounded by an [\*45] entourage of formal proceedings at other stages -- arraignments, motions to quash evidence, proceedings to determine fitness to stand trial, pre-sentence hearings, etc.

We find a similar proliferation of collateral issues on the civil side. There is more formal law and with it a multiplication of decision points which spawn "lawsuits before lawsuits" n199 -- for example, in proceedings concerning the composition or notification of a class, or what is unconscionable under Section 2-302 of the Uniform Commercial Code. With the elaboration of remedial means and procedural safeguards, the original disputes spawn what Damaska calls "companion litigation" which proceeds alongside or supersedes the original substantive controversy. n200

With this burgeoning of pre-trial and post-trial activities like motions, discovery, hearings, conferences, post-conviction proceedings, hearings about lawyer's fees, etc., the trial is no longer the center of gravity of common law litigation. This diffusion is marked by the fact that an American lawyer might describe himself as a "litigator" in contrast to a "trial lawyer." n201 Full-blown adversary adjudication becomes rarer as it becomes more refined and elaborate. In its appointed precincts, we find vast amounts of negotiation "in the shadow of the law," routine administrative processing, and abbreviated forms of adjudication such as the "trial on the

transcript," n202 the settlement conference, the preliminary hearing, n203 "informal administrative hearings," n204 and active mediation on the part of officials clothed with arbitral powers.

Changes that make law more elaborate and more "rational" (for example, turning on questions of fact, which can be ascertained by experts or by discovery) require higher investments, create new possibilities of maneuver (for example, using discovery to run up the expenses or disrupt the operations of the other side), and involve new risks. As the cost and complexity of trial increases, the possible outcome of the trial becomes a source of bargaining counters that can be used at other phases of the process. An enlarged right of appeal, for example, is not only a possibility that is encountered at a late stage of the proceedings. It is a source of counters and stratagems throughout the process. n205 But as the process becomes more complex, increasingly it can be used effectively [\*46] only by players who can deploy the resources to play on the requisite scale.

The authoritative legal learning becomes more massive and elaborate. There are more legislation and more administrative regulation and more published judicial decisions. But rules propounded by legislatures, administrative bodies and appellate courts do not carry a single determinate meaning when "applied" in a host of particular settings. Variant readings are possible in any complex system of general rules. Damaska observes that "there is a point beyond which increased complexity of law, especially in loosely ordered normative systems, objectively increases rather than decreases the decision maker's freedom. Contradictory views can plausibly be held, and support found, for almost any position." n206 As the authoritative learning produced at the top of the system becomes more complex and refined, decision-makers and other actors are both constrained and supplied with resources for innovative combination. Of course, whether they will use them depends on their other resources.

[T]he discovery of a unique issue is likely to be a function of the amount of time that lawyers devote to a case, and thus of the amount of money that the client spends on lawyers. If the stakes are high, the problems can become very complex; if the client lacks money, his problems are likely to be routine. n207

If full-blown adjudication is relatively less common, absolutely there is more of it. This minority includes a growing component of large and complex cases that involve investments of immense amounts of time, exhaustive investigation and research, lavish deployment of expensive experts, and prodigious use of court resources. n208 It also includes a growing number of what have been called "public law" or "structural" or "extended impact" cases involving public policies and institutions such as prisons, mental hospitals, or schools, in which many contending groups are locked together in an enduring relationship. In such cases the traditional format of the lawsuit is stretched in various ways n209 and this extension of the scope of adjudication is connected [\*47] with development of an expansive style of judging. n210 Litigation on this enlarged scale also reflects the presence of larger aggregations of specialist lawyers with enduring relations to the parties, able to assemble factual materials, coordinate experts, and monitor performance. n211

In other ways, too, courts are less inclined to shrink from promethean responses. They burst through older ceilings on the scope of remedy: there is an increase in the frequency and the order of magnitude of the highest awards; n212 doctrinal cut-offs such as charitable immunity and contributory negligence that once prevented recovery have been almost effaced.

Litigation concerning areas previously untouched by the courts mirrors a massive extension of governmental concern into areas of life which until recently were unregulated by the state (as in the great proliferation of environmental, health, safety and welfare regulation) or where regulation was not closely linked with the application of legal principles. As many activities and relationships not earlier subject to governmental control have become the subject of legislative and administrative concern, they have come before the courts as well. J. Willard Hurst points out that "[o]nly limited and episodically selected aspects of these reaches of statute and administrative law come into litigation at all." n213 Although the judicial role in shaping public policy is overshadowed, there has been an extension of judicial oversight and the consequent legalization of whole areas of government activity that were not previously thought needful of close articulation with legal [\*48] principles. n214 These include large sections of the criminal justice system n215 including police, n216 prisons, and juvenile justice, and other institutions dealing with dependent clients, such as schools, n217 mental hospitals, and welfare agencies. n218

If a smaller proportion of the population are direct participants in contested adjudication, more people have what they perceive to be legal problems and they increasingly use lawyers to deal with them. n219 The number of lawyers has increased much faster than the population. There were approximately 114,000 lawyers in 1900 (just over 150 per million). n220 Through much of this century, the number of lawyers grew more slowly than the population and their relative presence declined. The proportion of lawyers in 1900 was surpassed only in 1955. Since then there has been a sharp increase in the number of lawyers. In 1960 there were about 286,000 lawyers; by 1980 this had doubled and there were over 250 lawyers per million. n221 From 1960 to 1978 the portion of national income contributed by legal services increased by fifty percent -- from six-tenths of one percent in 1960 to nine-tenths of one percent in 1978. n222 There is some indication that legal expenses form an increasing portion of operating expenses for many businesses. For example, the president of a Chicago bank reported that the bank's legal expenses rose from 2% of net income in 1971 to 5% in 1976. n223

This army of lawyers works in larger units, with more specialization [\*49] and coordination than were present earlier. By the 1970's, firms with hundreds of lawyers were an unremarkable part of the American scene. A 1983 survey counted 183 firms with 100 or more lawyers. n224 A survey of the twenty largest firms in 1968 provides a useful baseline by which to measure recent growth at this peak of the profession. n225 The largest firm in 1968 had 169 lawyers and the twentieth largest had 106 lawyers; the twenty firms had a total of 2,568 lawyers. n226 In 1983 the twenty largest firms, ranging in size from 236 to 658 attorneys had a total of 6,310 lawyers. The average size of the twenty largest firms had increased from 128 to 315 lawyers -- an increase of 146%. In the 1983 survey there were 167 firms as large as the top twenty of fifteen years before, and there were seventy-two firms larger than the largest firm of the earlier period.

This growth at, and of, the peak is part of a general shift to larger units of practice. In 1956 units with three or fewer employees made up nearly 90% of the units in the private legal services industry; ten years later, in 1967, this had dropped to 82% and by 1973 it was down to 73%. n227 In 1951, sixty percent of all lawyers in private practice practiced alone; twenty-six years later it was estimated that only one-third of a much swollen private bar was in solo practice. n228 Larger firms have been receiving an expanding share of expenditures for legal services. n229

But if adjudication declines as part of direct personal experience, it becomes more prominent as a symbolic presence. There is [\*50] more big time, major league litigation involving major

institutions and/or pathbreaking claims. There is absolutely, if not proportionately, more "law stuff" that invites media coverage with its built-in bias toward the dramatic, the novel, the deviant, toward innovation and conflict.

There has been a dramatic increase in the amount of media coverage of law and lawyers, apart from the always popular criminal law. The magazine *Time's* "The Law" (later "Law") section, established in 1963, was joined by *Newsweek's* "Justice" section in 1973. Self-help books of legal advice and books debunking lawyers and courts are joined by a steady flow of popular news about lawyers, and even by a prime time situation comedy about a Wall Street law firm. The early 1980's saw the first feature films revolving around civil litigation (e.g., *Kramer vs. Kramer* and *The Verdict*). There has been an even more dramatic shift in the tenor of that coverage. In 1978-1979 there was what one observer called "an explosion of information about law and lawyers" n230 with the founding of three publications (two weeklies, one monthly) devoted to "inside" news and gossip about firms, fees and fights. A public relations counselor noted that:

[t]he National Law Journal, The American Lawyer, Legal Times, and writers on the law in newspapers and magazines such as Fortune, Business Week, and the New York Times are all writing spicy, hair-raising articles on the legal profession that sometimes read like vintage New York Daily News matrimonial or gangster coverage. n231

Lawyers are not only avid consumers of this fare, but they also cooperate with increasing willingness in producing it. The cloistered private quality of law practice has declined. Genteel reticence may still be the norm in some quarters, but it has been overtaken in others by ardent courtship of media exposure. Management of the client's public exposure is often seen as part of the lawyer's job; the lawyer's press conference is a common and unremarkable event. While the confidentiality of the lawyer-client relationship remains a central professional norm, commitments to preserving the confidentiality of the interior working of other legal institutions have eroded -- as evidenced by "leaks" from and about courts.

The collapse of restrictions on lawyer advertising during the last ten years has accentuated the visibility of lawyers and increased dissemination of information about legal opportunities. And [\*51] a more educated and more informed public is more capable of receiving this richer fare.

Thus litigation proliferates. It becomes more complex and refined, but at the same time most of it is truncated, decomposing into bargaining and mediation, or administration. Courts and big cases are more visible. For many in the society courts occupy a larger part of the symbolic universe even when their relative position in the whole governmental complex diminishes. Cost and remoteness remove the courts as an option in almost all disputes for almost all individuals. When courts are available, they may be found flawed. But courts are ever present as promulgators of symbols of entitlement, enlivening consciousness of rights and heightening expectations of vindication.

## 2. Elsewhere, Perhaps

Local differences in recording practices, differences in the jurisdiction of courts and other tribunals, and differences in what is recorded as a case all add to differences in substantive law, making comparison of litigation across societies extremely treacherous. The figures in Table 3, below, must be taken with appropriate caution. They suggest great variation in litigation rates. These are rates for the ordinary courts, so the variation they show may be amplified or diminished by controlling for the handling of similar disputes in other forums. To varying degrees, most industrialized states have curtailed the jurisdiction of ordinary courts, diverting routine and/or

sensitive matters into special courts or tribunals. n232 Since the proceedings in such tribunals are often analytically indistinguishable from litigation in court, these figures may tell us about the location rather than about the amount of adjudicative disputing in society. At the least we get an indication of the very different uses to which the ordinary civil courts are put in various societies. I have also included some data on the number of judges and the number of lawyers in the hope [\*54] that these figures, as problematic as they are, n233 will give another reading on the amount of resources devoted to handling disputes.

TABLE 3  
JUDGES, LAWYERS AND CIVIL LITIGATION IN SELECTED  
COUNTRIES

Country	Judges		Lawyers		
	Source & Date	Number per Million *	Source & Date	Number per Million *	
Australia	C	1977 \$ 41.6	F	1975	a 911.6
Belgium	E	1975 105.7	B	1972	\$ 389.7
Canada	H d	1970 \$ 59.3	G	1972	e 890.1
Denmark					
England/Wales	H d	1973 \$ 50.9	h H	1973.	i 606.4
France	H d	1973 \$ 84.0	h H	1973	206.4
Italy	H d	1973 100.8	h H	1973	792.6
Japan	J	1974 \$ 22.7	R	1973	191.2
Netherlands	E d	1975 \$ 39.8	B	1972	170.8
New Zealand	P	1976 \$ 26.8	O	1975	o 1081.3
Norway	R	c.1977 q 60.8	R	c.1977	450.0
Spain	K	1970 31.0	B	1972	893.4
Sweden	Hd	1973 99.6	h H	1973	192.4
United States	A,I,N	1980 v 94.9	V	1980	w 2348.7
W. Germany	H d	1973 213.4	h H	1973	417.2

TABLE 3  
JUDGES, LAWYERS AND CIVIL LITIGATION IN  
SELECTED  
COUNTRIES

Country	Civil Cases		Number per * 1000
	Source & Date		
Australia	D	1975	b 62.06
		[Western Australia only]	
Belgium	E	1969	c 28.31
Canada	M	1981-2	f 46.58
		[Ontario only]	
Denmark	E	1970	g 41.04

England/Wales	H	1973	j 41.1
France	L	1975	k 30.67
Italy	H	1973	j 9.66
Japan	T	1978	m 11.68
Netherlands	E	1970	n 8.25
New Zealand	Q	1978	p 53.32
Norway	U	1976	r 20.32
Spain	K	1970	s 3.45
Sweden	H	1973	j 35.0
United States		1975	t c.44.0
W. Germany	S	1977	u 23.35

*NOTES:*

\* Unless noted otherwise, all population data taken from WORLD POPULATION 1979 (Washington, D.C.: U.S. Dept. of Commerce, Bureau of the Census, 1980).

a. Disney, *et al.*, *supra* at 78, define lawyers as: practicing barristers, principal solicitors in private practice, solicitors employed by principal solicitors, and persons admitted as lawyers who are employed by government, by corporations or by other private organizations primarily for the purpose of providing legal services. This definition excludes judges, court officials, law professors and law book publishers.

b. Figure based on filings in local courts, District Court and first instance bankruptcy, divorce and other proceedings filed in the Supreme Court of Western Australia. Western Australia's population in 1975 was 1,146,700 as reported in *Year Book Australia: No. 66, 1982*.

c. Figure based on the number of cases brought in 1969 in civil courts; Magistrates' Courts, Courts of First Instance, Commercial Courts, Courts of Appeal, Courts of Cassation. All courts except Magistrates' Courts (15.78 cases brought per 1,000 population) hear both cases of first instance and appeals.

d. Johnson, *et al.*, *supra* at 9-1, attempt to measure "career judges." They explain, "the functions of a judge vary considerably among the judicial systems embraced in this study . . . . While part-time judges and 'honorary judges' (generally law assessors) are common in some of . . . [the nations studied], they are rare in the United States. As much as possible, every attempt has been made to control for these particular variations by deleting 'honorary judges' from our manpower totals, and by combining part-time judgeships into equivalent full-time positions."

e. Law Society membership includes retired, non-active, those in business, government, court officials; some may be members of more than one society.

f. Figure based on filings in the Family Courts, County and District Courts, Small Claims Courts, Surrogate Court and Supreme Court. The total may be inflated by an admixture of appeals in the docket of the Supreme Court. Ontario's population in 1981 was 8,664,600 as reported in *the World Almanac and Book of Facts, 1983*.

g. Figure based on cases brought before the District Courts and High Courts as courts of first instance.

h. Johnson, *et al.*, *supra*, delete the judiciary and certain members of the profession not performing an advocacy or representational function, such as government and corporate employees whose possession of a law degree is only incidental. Counted are the private lawyers available to represent clients for a fee, the state prosecutors, salaried lawyers or private attorneys paid by government to handle criminal cases or to assist individual citizens with non-criminal legal problems.

i. Includes 27,379 solicitors and 2,485 barristers.

j. Figure based on judicial filings per 1,000 population.

k. Figure based on civil cases, family matters, landlord-tenant cases, garnishments and orders to pay filed in the Tribunaux d'instance and Tribunaux de grande instance. France's population in 1975 was 52,655,800, as reported in the *Annuaire statistique de la France*, (1981). Calculation based on continental French data only.

l. Lawyers registered with the bar association.

m. Figure based on ordinary litigation cases, administrative cases, conciliation cases, domestic cases, executions, auctions, bankruptcies, provisional attachments, collection and compromise cases received by the Summary and District Courts, but does not include non-penal fines. Including the latter brings the rate to 13.18. Japan's population in 1978 was 114,898,000, as reported in the *Japan Statistical Yearbook*, (1982).

n. Based on contentious civil proceedings heard by the Supreme Court, Court of Appeals, Regional Courts and District Courts in 1970.

o. Members of New Zealand Law Society holding practicing certificates.

p. Figure based on civil cases filed in the Magistrates' Courts, the Supreme Court as a court of first instance, domestic proceedings and divorce petitions.

q. This figure does not include members of mediation councils, which exist in each municipality. Disputes must be brought before the councils before going to court. Council members are often not lawyers.

r. Figure based on cases *disposed of* by Conciliation Boards (71,490) and City and District Courts (10,318).

s. Total number of first instance civil cases filed per 1,000 population.

t. Estimate explained in text, *infra*.

u. Figure based on cases received in the Municipal, District and Administrative Courts. The latter court has jurisdiction over cases with a public authority as defendant.

v. Figure based on state and federal totals including 354 associate or assistant state judges. Figure does not include 263 part-time federal magistrates, 22 combination federal magistrates, 6,022 part-time state judges and magistrates, and 105 non-judicial state magistrates. When these judges are included the figure is 123.25. The U.S. Census of 1980 reported a population of 226,504,825.

w. The U.S. Census of 1980 reported a population of 226,504,825.

[\*52] *SOURCES:*

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O. New Zealand Dep't of Statistics, *New Zealand Official Yearbook 1976* (81st Annual Ed. 1976).

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S. STATISTISCHES BUNDESAMT [Federal Republic of Germany], *Statistisches Jahrbuch 1980 für die Bundesrepublik Deutschland*. Wiesbaden: Statistisches Bundesamt, tables 15.4.1, 15.4.5, 15.7.1 & 15.9 (1980).

T. STATISTICS BUREAU, PRIME MINISTER'S OFFICE [Japan], *Japan Statistics Yearbook, 1982*, Tokyo: Japan Statistical Association, 1982, tables 482, 483, 484 (1982).

U. STATISTIK SENTRALBYRA [Norway] n.d. *Sivilretts-Statistik 1976* (Civil Judicial Statistics 1976), Oslo: Statistik Sentralbyra, table 10.

V. U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, *Labor Force Statistics Derived From the Current Population Survey: A Datebook, Vol. 1*, Washington, D.C.: U.S. Department of Labor, Bureau of Labor Statistics, table B-20 (1982).

The rate given here for the United States is a crude estimate arrived at by the following procedure. The most complete -- and admittedly very rough -- compilation of data on cases filed in state courts of general jurisdiction (based on data from 44 states) [\*55] enables us to derive a rate of 21.6 cases per thousand in 1975. n234 Reassuringly, this rate falls roughly in the middle range of rates for the counties we know from the studies of individual scholars. n235 But this figure includes only filings in courts of general jurisdiction. Just how large a portion of all American litigation is in courts of limited jurisdiction is not known, but we can make a guess on the basis of the following computation. For the fourteen states for which data are available, the median percentage of the state's total civil caseload handled by courts of limited jurisdiction is 52%. n236 If we assume that these fourteen states are not unrepresentative in this, then roughly half of American state civil litigation is filed in courts of limited jurisdiction. We should, then, double the 21.6 rate to obtain a comprehensive estimate of the rate of civil litigation in state courts. To this we should add the 1975 rate of civil filings in federal courts, 0.55 per thousand. n237

If we do this, the United States rate of per capita use of the regular civil courts in 1975 was just below 44 per thousand. This is in the same range as England, Ontario, Australia, Denmark, New Zealand, somewhat higher than Germany or Sweden, and far higher than Japan, Spain or Italy. It is difficult to know what to make of these rates until we supplement them with data about recording practices and about the other forums and tribunals which handle disputes in each of these societies. Given the serious problems of comparison, it would be foolhardy to draw any strong conclusions about the relative contentiousness or litigiousness of populations from these data.

The contrasts in other parts of the legal system are as striking as are differences in litigation rates. The United States has many more lawyers than any other country -- more than twice as many per capita as its closest rival. In contrast, the number of judges is relatively small. The ratio of lawyers to judges in the United States is the one of highest anywhere; the private sector of the law industry is very large relative to the public institutional sector. (Perhaps this has some connection with the feeling of extreme overload expressed by many American judges.)

If the figures themselves are inconclusive, does examination [\*56] of our legal culture suggest that Americans are particularly given to litigation? Those who report on the litigation explosion credit Americans with a hair trigger readiness to file suit. Yet the survey evidence we have examined, the high rates of settlement, and personal experience suggest a picture quite different than in notably litigious societies. For a population with a greater propensity to litigation, consider the following account of contemporary Yugoslavia:

Yugoslavs often complain of a personality characteristic in their neighbors that they call *inat*, which translates roughly as "spite" . . . .

. . . .

One finds countless examples of it chronicled in the press . . . .

. . . .

[T]he case of two neighbors in the village of Pomoravije who had been suing each other for 30 years over insults began when one "gave a dirty look" to the other's pet dog.

Last year the second district court in Belgrade was presented with 9000 suits over alleged slanders and insults . . . .

Often the cases involve tenants crowded in apartment buildings. In one building in the Street of the October Revolution tenants began 53 suits against each other.

Other causes of "spite" suits . . . included "a bent fence," and "a nasty look." Business enterprises are not immune and one court is handling a complaint of the Zastava Company of Knic over a debt of 10 dinars (less than 1 cent).

In the countryside spite also appears in such petty forms as the brother who sued his sister because she gathered fruit fallen from a tree he regarded as his own . . . .

. . . .

Dr. Mirko Barjakterevic, professor of ethnology at Belgrade University . . . remarked that few languages had as many expressions for and about spite as Serbian and that at every turn one hears phrases like "I'm going to teach him a lesson," and "I don't want to be made a fool of." n238

According to a recent report, some five million cases are filed in Yugoslavia each year, n239 an astonishing figure for a country of 22 million persons. n240

[\*57] Or consider Fallers' report that among the Soga "something like one in ten adult males is likely to appear in courts as a principal . . . every year." n241 DuBow, studying another East African society, reports that in the Arusha district of Tanzania, "about one out of the ten adults appeared in the court as litigants" in a single year. n242 Or recall the litigation rates from 17th-century colonial America. n243

One comparison with a less litigious society merits closer examination because it is often made as part of the diagnosis of American hyperlexis. The American situation is juxtaposed with that of Japan, which appears in contrast as a peaceful garden that has remained uncorrupted by the worm of litigation. n244 The Japanese [\*58] have few lawyers, few judges and a low rate of litigation. n245 It strikes many outsiders as a society that is free of the appetite to transform grievances into adversary contests. Social harmony promotes, and is reinforced by, the resolution of disputes through conciliatory means. In this view the small number of lawyers and judges in Japan reflects the low level of demand for their services, which in turn reflects an inbred cultural preference for harmonious reconciliation and disapproval of the assertiveness and contentiousness that are associated with litigation. n246

In assessing this "cultural" explanation for Japan's low litigation rates, we should recall (from table 3) that the Dutch, Spanish and Italian rates may be even lower. Few observers have associated Italian society with lack of contentiousness! This suggests that we should be wary of assuming that

litigation rates are directly reflective of cultural preferences. n247 How else might they be explained?

Professor John Haley provides a reading of the Japanese scene that argues the inadequacy of the classic view of Japan as anti-litigious. Haley contends that the much-cited preference for conciliation in Japan reflects the deliberate constriction of adjudicative alternatives by successive Japanese regimes. n248 Summarizing Henderson's research, Haley recounts that:

Tokugawa officialdom had constructed a formidable system of procedural barriers to obtaining final judgment in the Shogunate's courts. The litigant was forced each step of the way to exhaust all possibilities of conciliation and compromise and to proceed only at the sufferance of his superiors. . . . Conciliation was coerced . . . not voluntary. Yet . . . litigation still increased. n249

Modern statutes providing for formal conciliation were not "the product of popular demand for an alternative to litigation more in keeping with Japanese sensitivities." n250 Rather "they reflected a conservative reaction to the rising tide of lawsuits in the 1920's and early 1930's and a concern on the part of the governing elite that litigation was destructive to a hierarchical social order [\*59] based upon personal relationships." n251 Mandatory conciliation brought about not a decrease in litigation, but an even greater increase in the number of cases channeled in the formal process, now enlarged to include additional remedial tracks.

The real check on Japanese on Japanese litigation is the deliberate limitation of institutional capacity: the number of courts and lawyers is kept small. Haley asserts that maintenance of a small judicial plant in Japan reflects a government policy of restricting access to judicial remedies.

[T]he number of judges in Japan has grown but little for the entire period from 1890 to the present. Thus as the population has grown the ratio of judges to the population has declined from one judge to 21,296 persons in 1890 to . . . one judge to 56,391 persons in 1969. n252

Of course many jobs done by lawyers in the United States are done by non-lawyers in Japan n253 -- and practically everywhere else. The small number of lawyers in Japan, however, reflects not an aversion to law, but a severe constriction of opportunities to enter the profession. There is a single institute from which graduates may enter bench, bar or prosecution. Places are limited to about 500 per year. n254 Haley notes that "the number *per capita* of Japanese taking the judicial examination in 1975 was slightly higher than that of Americans taking a bar examination; . . . in the United States, 74% passed, compared to 1.7% in Japan." n255 In sum, the low rate of litigation in Japan evidences not the preferences of the population, but deliberate policy choices by political elites.

The Japanese comparison proves less revealing than appears at first glance, not least because the society is so vastly different than our own. But we may learn more about our supposed litigiousness from a society much more similar to ours. Dr. Jeffrey FitzGerald, an Australian researcher, has replicated in the State of Victoria the Civil Litigation Research Project's household survey -- the basis for the analysis of Miller and Sarat. n256 This affords [\*60] a remarkable opportunity to compare the whole dispute pyramid, not just imponderable litigation rates. FitzGerald asked about the same types of problems as did CLRP and found Australians to be overall "more frequent perceivers of 'middle range' grievances than their American counterparts." n257 He found an overall similarity in the shape and structure of the disputing pyramids in the two countries -- that is, the extent to which different kinds of grievances gave rise to claims, in which claims gave rise to disputes, and disputes to consultation of lawyers. n258 Overall, the Australian pyramid was

more "bottom-heavy" "with more claims and fewer appeals to courts per 1000 grievances." n259 In other words, "Australians are substantially more likely to complain of troubles than are their U.S. counterparts and somewhat more likely to engage in an actual dispute." n260

The role of lawyers in the maturation of disputes is different. In Australia, 19% of the instances in which a lawyer was consulted in a grievance did not mature into a dispute. The U.S. figure is 24%. In other words, American lawyers are more likely to dampen disputes. At the same time they are more likely to invoke a court -- at least by filing. n261 Americans are twice as likely to take middle range disputes to court. n262 Thus, American lawyers are involved in more "lumping it" as well as in going to court more. But "going to court" may mean something different in Australia. From what we have seen about settlement rates in the United States, we know that filing suit is often part of negotiation, so the meaning of this difference in filings is not clear. But it at least suggests that the way the negotiation game is played in Australia is different and that lawyers can conduct it without playing the court card. It also may reflect differences in the state of the law (more settled), in the organization of the profession (divided), and in fee arrangements (no contingency).

FitzGerald's research reminds us of the dissociation between litigation and other levels of disputing, so that we cannot take the former as representative of the larger whole. It points to the need to explore the way in which grievances are transformed into disputes and lawsuits. It also suggests that these processes are not explainable either by global and pervasive cultural traits, or by characteristics of individual disputants. As in the American study, [\*61] education, income, occupation and ethnicity seem to explain little of the variation in grievance rates. n263 In both countries "by far the most powerful explanatory factor" for the career of the dispute was the type of grievance involved. n264 In other words, what happens depends on institutionalized ways of handling different kinds of disputes, not on broader cultural propensities to dispute.

#### *D. The "Litigation Explosion" as a Social Problem*

We have seen that disputes are not a primal, given element of social life, waiting passively to be counsed. Rather, they are constructed through the interpretation of events in the light of the actor's ideas and opportunities. Much the same can be said of our knowledge of disputing: it is not the mechanical recording of something out there -- it is an interpretation of what we encounter, informed by our hopes and fears and by our pictures of how the world is. Disputes and knowledge about disputes are kindred social constructions. Just as patterns of disputes may reveal something of the changing contours of the social world, so may patterns of social knowledge about disputes. The earlier sections of this paper assembled some evidence relevant to that set of notions about disputing and litigation in America that I labelled the "litigation explosion" or "hyperlexis" view. Now I want to focus on that reading of the dispute landscape -- what does it tell us about the legal world in which it arose and persists?

Here we treat the "explosion" response not only as an assessment of events but as part of the story it tells, part of the landscape that it describes. The same factors that have changed the incidence of disputes and the character of litigation frame the emergence of this response. To fill out our sense of the context, let us examine some of the characteristics of this knowledge about disputing.

The scholarly foundation of the "litigation explosion" view is the product of a narrow elite of judges (mostly federal), professors and deans at eminent law schools, and practitioners who practice

in large firms and deal with big clients about big cases. Because they are attuned to the "top" of the system -- to appellate courts, to federal courts, to that small segment of law practice that deals in large cases, and thus to the concerns of large clients -- such elites tend to have a limited and spotty grasp of what the bulk of the legal system is really like. For example, they tend to identify as general problems things such as discovery abuse that apply only in a tiny minority of cases. As does everyone else, they have an [\*62] even dimmer perception of those largest and largely invisible layers of the dispute pyramid that do not involve resort to lawyers and courts.

The only systematic empirical base that played a role in these formulations was the statistics on the growth of caseloads in the federal courts, including the growth of appeals. Typically, only gross figures on filings were cited. The fact that little of this was full-blown adjudication was ignored. It was often assumed that what was going on in federal courts was typified by large, highly visible cases. It was further assumed that one could generalize from what was happening in the federal courts to what was happening in courts generally. The top layers of the system -- appellate courts, federal courts -- are more visible and familiar to the elite producers of this knowledge. It was therefore easy to assume that a selection of things observed at the top provided insight into the whole world of disputing.

The literature displays little effort to offset these biases of perspective. The "explosion" theme was introduced by several thoughtful and modulated discussions. n265 But beginning with Barton's 1975 article, there is strong admixture of naive speculation and undocumented assertion. n266 Appearing in prominent law reviews, publications in which, notwithstanding their prestige, there is no scrutiny for substantive, as opposed to formal, accuracy, these polemics were quickly taken as authority for what they asserted. n267 There has been little sustained examination of the assertions contained in this literature. n268

But if the literature is not cumulative in refinement of analysis or addition of data, it is cumulative in its citation of authority. One who reads through it soon begins to find familiar nuggets and favorite horror stories. The most remarkable of these is Barton's [\*63] naive straight-line extrapolation of gigantic 21st century caseloads, n269 which continues to ricochet through the literature, exercising an irresistible fascination. n270 How such assertions pass without critical examination and how they are conflated with direct experience to produce frightening shadows are nicely illustrated by the observations of a Chief Judge of a federal court of appeals, who told a 1978 Symposium on "The Crisis in the Courts" that

The serious backlog of cases is by no means confined to the Sixth Circuit. As one of the speakers at the Pound Conference [ n271 ] noted a recent law review article predicts that if the number of federal appellate cases continues to increase over the next forty years at the same rate at which it has grown during the last decade, we can expect to have well over one million federal appellate cases annually by the year 2010. Five thousand federal appellate judges would be needed to decide such a huge caseload, and one thousand new volumes of the *Federal Reporter* would have to be published each year to report the decisions.

In the face of this litigation explosion . . . [ n272 ]

Recently Chief Justice Burger in discussing "increased litigiousness" repeated Barton's figures as a caution. n273 Pronouncement from exalted quarters, of course, adds authority to these speculations, which are then retailed by journalists to wider publics. n274

The elites that preside over the heights of anxiety about the legal system project their discontents to the wider public. For example, the 1976 Pound Conference was called, after Pound's 1906 article, "The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice." But there is little evidence of "popular dissatisfaction" with public overuse of the legal system. Only a tiny minority of Americans agree that "most [\*64] people who go to lawyers are troublemakers." n275 Both the general public and community leaders, however, had far lower levels of confidence in courts than had lawyers and judges. n276

Lack of scholarly development, the pattern of repetition and cross-citation, reappearance of the same atrocity stories, n277 all suggest that the "litigation explosion" might be thought of as an item of elite folklore, resembling what Brumvand calls "urban legends." n278 To think of popular litigiousness as folklore is not to deny that there have been increases, even dramatic ones, in litigation rates or in the occurrence of lawsuits unlike those brought earlier. It is meant to suggest that elite ways of interpreting these phenomena are also part of the story. n279 The "litigation explosion" [\*65] and the "litigious society" are not objective "facts" that exist independently, but interpretations based on the perceptions and judgments of the observer. Examination of the literature gives us a notion of the kinds of judgments these observers bring to this process.

Images of a destructive, elemental force pervade the literature. We are told of an epidemic, avalanche, flood, tidal wave or deluge of litigation, threatening to culminate in an "apocalypse" or "doomsday." Previously healthy systems have become pathological and the world is heading toward catastrophe on a trajectory of relentless decline, to be diverted only by heroic intervention by knowledgeable and benevolent elites. This bears a resemblance to the gloomy forecasts of uncontrollable population growth and general environmental exhaustion and degradation that have caused temporary excitement in recent decades. n280 Like other "doomsday" scenarios the litigation apocalypse depends on linear projections of short-term trends, selection and overinterpretation of unrepresentative indicators, and failure to appreciate the historic lessons of human adaptation and [\*66] innovation. n281

The literature is pervaded by a sense of recoil from the extravagant, overreaching quality attributed to this excessive litigation. Litigants are variously portrayed as petty, exploitative, oversensitive, obsessed, intoxicated, and despairing. Of the atrocity stories that recur over and over again -- the woman who sued when denied the right to breast-feed her infant; the child suing for parental malpractice; the suitor suing the date who stood him up; the girl suing the little league -- none seems obviously to violate the conventional forms of the lawsuit. Each involves specific grievances of specific individuals against identifiable malefactors, for harm of a kind courts address and remedies of a kind courts customarily give. None is diffuse or polycentric; nor do they demand heroic extensions of remedial machinery by the courts. Yet they provide a profound sense of boundaries being overstepped, restraints being violated. By demanding redress for the unremedied slights and injuries of life, the litigants not only depart from commendable norms of self-reliance, but raise a spectre of unlimited claims for protection and remedy. n282

But if litigation marks the decline of rugged self-reliance and stoic resignation, it is also taken to mark the demise of vibrant self-regulating community. Barton attributes the litigation explosion to the uncoupling of law from a common ethos thought to have existed until quite recently. n283 Most commentators locate lost community in specific institutions rather than a global ethos. Current turning to the courts is

the result of the diminishing ability of other less formal institutions to authoritatively perform decision-making roles. The family, the church, the school and the neighborhood are losing their authority. . . . The schools are no longer effectively engaged in the disciplining of young people; the extended family has ceased to play a decisive role in resolving marital and other family disputes; the churches are no longer the principal place where moral precepts are enforced; and the local communities and neighborhoods no longer constrain anti-social behavior. Similarly, the chambers of commerce and trade associations seem no longer equipped to mediate and settle commercial disputes. The [\*67] inability of these institutions to continue to perform the decision-making role which was characteristic in the not distant past leaves no alternative in many cases but to submit disputes to the legal system . . . . n284

Whether or not such a golden age of institutional regulation existed, there is wide agreement that a decline of such controls has unleashed demands on the courts.

The decline of church, schools and family are well documented in the sociological literature. . . . Their decline has resulted in increased societal reliance on the courts to perform their functions. n285

From the vantage point of those concerned with hyperlexis, excessive litigation is also unsettling because it violates their notion of what courts and lawyers are and should be. Swollen caseloads render courts unable to lavish on cases the deliberation and craftsmanship that should distinguish courts from other decision makers. n286 The novel demands inspired by overheated individualism and/or the collapse of community threaten to efface the boundaries of the legal realm. If law is unbounded, what is the character of the expertise of its professionals? As one eminent observer complained: "[O]ur courts have become the handymen of our society. The American public today perceives courts as jacks-of-all-trades, available to furnish the answer to whatever may trouble us . . . ." n287 If law is about everything and judges are "jacks-of-all-trades," can law really be a well-demarcated realm in which rewards are allocated and justified by proficiency in some distinctive body of techniques that makes judges different from political decision makers and lawyers different from lobbyists or social workers? The impulse is not just one of protecting professional turf but of protecting precarious professional identity. n288

[\*68] To identify litigiousness as a problem suggests that any disarray or ineffectiveness in legal institutions is traceable to the indiscipline of the public -- perhaps abetted by some greedy or misguided lawyers. It is not to be blamed on the institutional incumbents who are struggling manfully to deal with overwhelming caseloads, to devise reforms, etc.

Beyond the concern with the concrete problems of courts and litigants, the denunciation of litigation resonates with a more diffuse and global concern with the moral balance of society. Compare Engle's account of a small Illinois county in which concern about litigiousness was high although there was relatively little litigation. He found that although contract actions were almost ten times as frequent as personal injury cases, it was the latter that provoked concern because they controverted the core values of self-sufficiency and stoic endurance. "Lawsuits brought for breaches of contract [typically by members of the local establishment] were generally approved. Lawsuits brought for personal injuries [typically by newcomers and outsiders to the community] were generally condemned and stigmatized." n289 Engel concludes that denunciation of litigiousness

... bore little relationship to the frequency with which personal injury lawsuits were actually filed, for the local ecology of conflict resolution still suppressed most such cases long before they got to court and personal injury litigation remained rare and aberrational. Rather, the denunciation of personal injury litigation in Sander County was significant mainly as a symbolic effort by members of the traditional community to preserve a sense of meaning and coherence in the face of social changes they found threatening and confusing. It was in this sense a solution -- albeit a partial and unsatisfying one -- to a problem basic to the human condition, the problem of living in a world that has lost a simplicity and innocence it is thought once to have had. The outcry against personal injury litigation in Sander County was part of a broader effort by traditional residents to exclude from their moral universe that which they could not exclude from the physical boundaries of their community and to recall and reaffirm an untainted world that existed nowhere but in their imaginations. n290

The problem is not only one of concrete actions and palpable consequences; it is a problem of the authoritative meanings broadcast by public institutions. As Gusfield observes, "law purports to construct an orderly and predictable world, intelligible and legitimate, [\*69] a world of authority." n291 It reflects to us that "there is a society of consistent values in a culture of logical and morally satisfying meanings." n292 It inspires a satisfying sense that the law expresses and guides relations of authority and patterns of practice. What is distressing about litigation is that it is constantly exposing the problematic and fictive quality of the congruence between law, authority, and practice. It exposes us to "the awesome skepticism of unending alternatives, ambiguous facts, and the confusion of the concrete and the particular." n293

## CONCLUSION

In the course of this quick tour of disputing and litigation in the United States, I have tried to suggest a reading of the landscape that differs radically from the "litigation explosion" reading. This "contextual" reading differs in its view of the source and career of disputes and in its view of their significance. n294 It does not view contemporary litigation as an eruption of pathological contentiousness or a dangerous and unprecedented loosening of needed restraints or the breakdown either of a common ethos or of community regulation. Instead, I see contemporary patterns of disputing as an adaptive (but not necessarily optimal) response to a set of changing conditions. There have been great changes in the social production of injuries as a result of, among other things, the increased power and range of injury-producing machinery and substances. There has been a great increase in social knowledge about the causation of injuries and of technologies for preventing them; there has been a wide dissemination of awareness of this knowledge to an increasingly educated public. There is an enhanced sense that harmful and confining conditions could be remedied. At the same time more of the interactions in the lives of many are with remote entities over which there are few direct controls. Government is used more to regulate these remote sources of harm and to assuage previously unremedied harms. Legal remedies become available to large segments of the population who earlier had little occasion to use the law. It may be easier [\*70] to mobilize social support for disputing. In the light of all these changes, the pattern of use is conservative, departing relatively little from earlier patterns.

But overshadowing the change in actual disputing patterns are changes in the symbolic aspects of the system. There is more law, and our experience of most of it is increasingly indirect and mediated. Even while most disputing leads to mediation or bargaining, rather than authoritative

disposition by the courts, the courts occupy a larger portion of the symbolic universe and litigation seems omnipresent.

Is more and more visible litigation the sign and agent of the demise of community? This view of litigation as a destructive force, undermining other social institutions, strikes me as misleadingly one-sided. If litigation marks the assertion of individual will, it is also a reaching out for communal help and affirmation. n295 If some litigation challenges accepted practice, it is an instrument for testing the quality of present consensus. It provides a forum for moving issues from the realm of unilateral power into a realm of public accountability. n296 By permitting older clusters of practice to be challenged and new ones tested and incorporated into the constellation it helps to "create a new paradigm for the establishment of stable community life." n297 If we relinquish the notion of community as some unchanging and all-encompassing *gemeinschaft* in favor of the multiple, partial and emergent community that we experience in contemporary urban life, n298 we need not regard litigation as an antagonist of community.

I have argued that, like disputes themselves, knowledge about disputes is the product of interpretive acts, informed by the preconceptions and values of the observer. If so, the contextual [\*71] response is as much an act of interpretation as the hyperlexis response. Obviously, I think that the former is more adequate than the latter. If interpretation is inevitable, how can one be superior to another? This shouldn't be much of a puzzle for lawyers. We are in the business of assessing competing interpretations. We know that just because *something* can be said for one reading of a matter, it is not automatically a toss-up between that and some other view.

I have argued that the hyperlexis reading of the dispute landscape displays the weakness of contemporary legal scholarship and policy analysis. We have seen the announcement of general conclusions relevant to policy on the basis of very casual scholarly activity. The information base was thin and spotty; theories were put forward without serious examination of whether they fit the facts; values and preconceptions were left unarticulated. Portentous pronouncements were made by established dignitaries and published in learned journals. Could one imagine public health specialists or poultry breeders conjuring up epidemics and cures with such cavalier disregard of the incompleteness of the data and the untested nature of the theory? If the profession's claim to expertise in such matters as disputes and litigation is to be taken seriously, it will need to adopt ground rules to require more respectful touching of the data bases. It will have to recognize that the collection of data and the development of coherent and tested theories for interpreting it are an inescapable collective responsibility of a group that purports to proffer expert opinions about the arrangements for public life. The career of the "litigation explosion" literature does not offer much reassurance that the legal profession and legal education are prepared to exercise such responsibility.

#### FOOTNOTES:

n1. Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970).

n2. Ehrlich, *Legal Pollution*, N.Y. Times, Feb. 8, 1976, (Magazine) at 17.

n3. Glazer, *Towards an Imperial Judiciary*, 41 THE PUBLIC INTEREST 104 (1975).

n4. Noteworthy contributions to this literature (in addition to those cited in the remainder of this section) include Ehrlich, *supra* note 2; Fleming, *Court Survival in the Litigation Explosion*, 54

JUDICATURE 109 (1970); Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. CAL. L. REV. 901 (1971); Kline, *Law Reform and the Courts: More Power to the People or to the Profession*, 53 CAL. ST. B.J. 14 (1978); Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATL. MONTHLY, July 1979, at 25, 25-30; *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, t 42, 42-47. The theme of excessive disputing and litigation is entwined with other "hyperlexis" themes addressed in a larger literature -- the caseload crisis in the courts, see, e.g., Bork, *Dealing With the Overload in Article III Courts*, 70 F.R.D. 231 (1976); the over-tension of judicial power, see, e.g., Glazer, *Towards an Imperial Judiciary*, 41 THE PUBLIC INTEREST 104 (1975); and generally the legalization of American life, see, e.g., Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.-Apr. 1978, at 15, 15-22, 44. The "litigation explosion" reading is viewed skeptically in more recent literature. See *infra* note 294.

n5. Contemporaneously, other observers of our legal institutions have decried the lack of remedies for the grievances of poor and middle-class Americans and the need for additional channels of access. See, e.g., Nader & Singer, *Dispute Resolution . . .*, 51 CAL. ST. B.J. 281 (1976). The concern about improved access and more appropriate remedies may be found in the company of concern about excessive legalization and litigiousness. See Auerbach, *A Plague of Lawyers*, HARPER'S, Oct. 1976, at 37, 37-44. Kline, *supra* note 4, at 14-23. The two concerns converged in the movement to provide "alternative" to the courts. See 1 THE POLITICS OF INFORMAL JUSTICE: THE AMERICAN EXPERIENCE (R. Abel ed. 1982).

n6. Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

n7. This theme is, I believe, a new one. Earlier reformers, addressing themselves to problem of overloaded courts, high costs and delay, saw the problems in terms of institutional failure rather than of excessive use of the courts. See, e.g., A. VANDERBILT, THE CHALLENGE OF LAW REFORM 81, 132 (1955). John Frank thought we were "approaching the total bankruptcy of our remedy system . . . a legal doomsday." J. FRANK, AMERICAN LAW: THE CASE FOR RADICAL REFORM xxi (1969). But for these earlier commentators the problem was one of poorly designed and managed institutional machinery rather than of inappropriate and insatiable demands upon that machinery.

n8. Rosenberg, *Contemporary Litigation in the United States*, in LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 152, 152 (H. Jones ed. 1977).

n9. *Id.* at 153 (emphasis in original).

n10. *Id.* Perceptions differ as to the onset of litigation fever. See *infra* text accompanying note 17 for Chief Justice Burger's estimate.

n11. McGill, *Litigation-Prone Society: Protection of Professional Life*, 78 N.Y. ST. J. MED. 658, 661-62 (1978).

n12. Manning, *supra* note 6, at 773.

n13. L. FORER, THE DEATH OF THE LAW 133 (1975).

n14. Kurland, *Government By Judiciary*, 2 U. ARK. LITTLE ROCK L.J. 307, 319 (1979).

n15. Auerbach, *supra* note 5, at 42.

n16. Aldisert, *An American View of the Judicial Function*, In LEGAL INSTITUTIONS TODAY: ENGLISH AND AMERICAN APPROACHES COMPARED 31, 55-56 (H. Jones ed. 1977).

n17. Burger, *Isn't There a Better Way?*, 68 *A.B.A.J.* 274, 275 (1982).

n18. Taylor, *ABA Issue: Public Good v. Its Own*, N.Y. Times, Aug. 13, 1982, at A26, col. 4.

n19. *Why Everybody is Suing Everybody*, U.S. NEWS & WORLD REP., Dec. 4, 1978, at 50, 50.

n20. *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58, 58 [hereinafter cited as *Chilling Impact*].

n21. Kilpatrick, "How Goes the Law? Sadly, Not Too Well," Chicago Sun Times, May 1, 1982, at 26. See also Taylor, *On the Evidence, Americans Would Rather Sue than Settle*, N.Y. Times, July 5, 1981, § 4, at 8E, col. 1.

n22. Breitel, *The Quandary in Litigation*, 25 *MO. L. REV.* 225, 225 (1960).

n23. *Id.*

n24. *Id.* at 232.

n25. *Id.* at 233.

n26. Rosenberg, *Court Congestion: Status, Causes and Proposed Remedies*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 29 (H. Jones ed. 1965). Cf. the same observer's later assessment in Rosenberg, *supra* note 8.

n27. Burger, *The State of the Judiciary -- 1970*, 56 *A.B.A.J.* 929 (1970). There is some ambivalence about the scope of this "annual" report, as indicated by the instability of its name: in 1970, 1975, 1976, 1978, 1980, 1982, and 1983 the title referred to "the state of the judiciary," but it was the "federal judiciary" in 1971, 1972, and 1979 (and the "federal judicial branch" in 1973 and 1974). In 1977 and 1981, it was merely entitled the Chief Justice's Report to the American Bar Association. Examination of the reports subsequent to 1970 reveals recurrent concern with the crushing caseload of the federal courts, but not until 1982 did the Chief Justice's report suggest that this was attributable to untoward litigiousness on the part of the American public. See Burger, *supra* note 17, at 275.

n28. Warren E. Burger, remarks at the American Bar Association Minor Disputes Resolution Conference (May 27, 1977), reprinted in SUBCOMM. ON COURTS, CIVIL LIBERTIES AND THE ADMINISTRATION OF JUSTICE OF THE HOUSE COMM. ON THE JUDICIARY, 95TH CONG., 1ST SESS., STATE OF THE JUDICIARY AND ACCESS TO JUSTICE 287 (1977).

n29. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTIC SERV., U.S. DEPT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMIN., STATE COURT CASELOAD STATISTICS: THE STATE OF THE ART, Chap. 2 (1978).

n30. Buffalo Courier Express, Jan. 21, 1979, at E-1.

n31. *Why Everybody is Suing Everybody*, *supra* note 19, at 50; Taylor, *supra* note 21.

n32. *Why Everybody is Suing Everybody*, *supra* note 19, at 50; Buffalo Courier Express, *supra* note 30.

n33. See *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) and its progeny; *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42.

n34. Auerbach, *A Plague of Lawyers*, HARPER'S, Oct. 1976, at 37; Taylor, *supra* note 21; *Why Everybody is Suing Everybody*, *supra* note 19.

n35. *Americans Filing More Legal Suits*, Chicago Tribune, Nov. 26, 1982, § 1, at 4.

n36. *Chilling Impact*, *supra* note 20, at 58.

n37. Adelson, *What Happened to the Schools*, 71 COMMENTARY 36 (1981); Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, FORTUNE, Apr. 1973, at 65, 87; Phelps, *Legal Actions Against Officers and Employees Involving Company Activities*, 34 BUS. LAW. 905 (1979); *Costly Counsel: Regulations and Fees Boost Legal Expenses; Firms Try to Cut Them*, Wall St. J., Apr. 13, 1981, at 1, Col. 1.

n38. Those critics of American legalism who stress access to legal remedies, *see supra* note 5, also have their own list of foreign exemplars -- places where law is communal, responsive, informal, etc. *See, e.g.,* Danzig, *Toward the Creation of a Complementary, Decentralized System of Criminal Justice*, 26 STAN. L. REV. 1 (1973) (the Kpelle); Lowy, *Modernizing the American Legal System: An Example of the Peaceful Use of Anthropology*, 32 HUM. ORGANIZATION 205, 205-08 (1973) (Ghana); Nader, *Styles of Court Procedure: To Make the Balance*, in LAW IN CULTURE AND SOCIETY 69 (L. Nader ed. 1969) (the Zapotec).

n39. *See infra* notes 244-46 and accompanying text.

n40. Cartwright, *Conclusion: Disputes and Reported Cases*, 9 LAW & SOC'Y REV. 369 (1975).

n41. Abel, *Western Courts in Non-Western Settings: Patterns of Court Use in Colonial and Neo-Colonial Africa*, in THE IMPOSITION OF LAW 167, 184, 189 (S. Burman & B. Harrell-Bond eds. 1979).

n42. Felstiner, Abel & Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631 (1980-1981).

n43. Again there is an ambivalence here -- perceived by whom? The temperance worker or safety crusader may have different perceptions than the drinker or the driver. Presumably Felstiner, *et al.* confine this category to the perceptions by the injured. *Id.* at 631, 633.

n44. *Id.* at 635.

n45. *Id.* at 635-36.

n46. *Id.* at 636.

n47. Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 527 (1980-1981). A different terminology is employed by other researchers: Mather and Yngvesson use the term "dispute" to refer to a "conflict between two parties (individuals or groups) [that] is asserted publically -- that is, before a third party." Mather & Yngvesson, *Language, Audience, and the Transformation of Disputes*, 15 LAW & SOC'Y REV. 775, 776 (1980-1981). *Cf.* P. GULLIVER, DISPUTES AND NEGOTIATIONS: A CROSS-CULTURAL PERSPECTIVE 75-76 (1979 (a dispute occurs when the parties are unable to resolve their disagreement and one of them decides to take it into the public domain); THE DISPUTING

PROCESS -- LAW IN TEN SOCIETIES 15 (L. Nader & H. Todd eds. 1978) (a dispute results when a personal conflict escalates and is made public).

n48. For a refined analysis of the recognition of injuries and the formation of claims, see Boyum, *Theoretical Perspectives on Court Caseloads: Understanding the Earliest Stages, Claim-Definition*, in EMPIRICAL THEORIES ABOUT COURTS (K. Boyum & L. Mather eds. 1983).

n49. Best & Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 *LAW & SOC'Y REV.* 701, 707, 722-23 (1977).

n50. B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: A FINAL REPORT OF A NATIONAL SURVEY 126 (1977).

n51. Miller & Sarat, *supra* note 47. 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 any of a long list of problems in the preceding three years. Only "middle range" problems were recorded -- those estimated to involve a value of more than \$ 1,000. *Id.* at 534-35. This method of starting with a finite list of troubles conventionally associated with civil litigation produces a conservatively biased under-estimation of the extent of troubles and grievance. Marks, *Some Research Perspectives for Looking at Legal Need and Legal Services Delivery Systems: Old Forms or New?*, 11 *LAW & SOC'Y REV.* 191, 195 (1976).

n52. Miller & Sarat, *supra* note 47, at 537, table 2.

n53. J. Ladinsky & C. Susmilch, Community Factors in the Brokerage of Consumer Problems 24 (May 14-15, 1982) (paper prepared for the Conference in Honor of Morris Janowitz, University of Chicago) (on file at *UCLA Law Review*).

n54. D. KING & K. MCEVOY, A NATIONAL SURVEY OF THE COMPLAINT HANDLING PROCEDURES USED BY CONSUMERS (1976).

n55. Ross & Littlefield, *Complaint as a Problem-Solving Mechanism*, 12 *LAW & SOC'Y REV.* 199 (1978).

n56. P. ENNIS, CRIMINAL VICTIMIZATION IN THE UNITED STATES: A REPORT OF A NATIONAL SURVEY 41-49 (1967).

n57. D. CAPLOVITZ, THE POOR PAY MORE: CONSUMER PRACTICES OF LOW-INCOME FAMILIES 171 (1963).

n58. On the contours of inaction see P. ENNIS, *supra* note 56; Best & Andreasen, *supra* note 49; Hallauer, *Low Income Laborers as Legal Clients: Use Patterns and Attitudes Toward Lawyers*, 49 *DEN. L.J.* 169 (1972); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963); Mayhew & Reiss, *The Social Organization of Legal Contacts*, 34 *AM. SOC. REV.* 309 (1969).

n59. See F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME (1969) and Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 *STAN. L. REV.* 1036 (1972) (prosecutors); W. LAFAVE, ARREST:

THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965) and Black, *The Social Organization of Arrest*, 23 *STAN. L. REV.* 1087 (1971) (police).

n60. See A. HIRSCHMAN, *EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES* (1970).

n61. That is, a credible threat, explicit or implicit, to sever relations may be instrumental in securing a remedy from a landlord or supplier without departure actually occurring. Hence, the presence of exit as a threatened sanction may be conducive to the operation of other remedial processes.

n62. Felstiner suggests that the same social developments that enlarge opportunities for exit erode devices for mediation. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 *LAW & SOC'Y REV.* 63 (1974). The inverse association of exit and resort to third parties is neatly displayed in Baumgartner's study of resort to courts in an American town. M. Baumgartner, *Law and the Middle Class: Evidence from a Suburban Town* (June, 1980) (Paper delivered at the Annual Meeting of the Law and Society Association) (on file at *UCLA Law Review*). Less frequent use of courts in interpersonal disputes by the middle class than by lower class residents is explained by the greater mobility of the former, which prevents the accumulations of disputes and provides exit remedies. *Id.*

n63. D. Black & M. Baumgartner, *On Self-Help in Modern Society*, in D. BLACK, *THE MANNERS AND CUSTOMS OF THE POLICE* (1980).

n64. Merry, *Going to Court: Strategies of Dispute Management in an American Urban Neighborhood*, 13 *LAW & SOC'Y REV.* 891, 912 (1979); Buckle & Thomas-Buckle, *Doing unto Others: Disputes and Dispute Processing in an Urban American Neighborhood*, in *NEIGHBORHOOD JUSTICE: ASSESSMENT OF AN EMERGING IDEA* 78, 86 (R. Tomasic & M. Feeley eds. 1982).

n65. Miller & Sarat, *supra* note 47, at 537.

n66. D. KING & K. MCEVOY, *supra* note 54, at 46; Ross & Littlefield, *supra* note 55, at 205; J. Ladinsky & C. Susmilch, *supra* note 42, at 636.

n67. Felstiner, Abel & Sarat, *supra* note 42, at 636.

n68. Miller & Sarat, *supra* note 47, at 528, 541-42.

n69. *Id.* at 537.

n70. J. Ladinsky & C. Susmilch, *supra* note 53, at 24.

n71. P. DANZON & L. LILLARD, *THE RESOLUTION OF MEDICAL MALPRACTICE CLAIMS* 4 (1982).

n72. Such embedded systems of dispute processing may be relatively independent of the official system as to norms, sanctions, procedures and personnel. Such systems are found, for example, in religious groups, gangs or the Chinese community in American cities. Other systems are normatively and institutionally dependent upon the official system, such as the settlement of automobile injuries or bad checks. This distinction between freestanding and appended remedy systems should not be taken as a sharp dichotomy, but as marking points on a continuum. See Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW*

& *SOC'Y REV.* 95, 124-60 (1974). The indigenous regulatory activity of universities and of groups of businessmen are neither independent of official norms and sanctions, nor are they entirely dependent upon them, Macaulay, *supra* note 58, at 62-63; Mentschikoff, *Commercial Arbitration*, 61 *COLUM. L. REV.* 846 (1961); Moore, *Law and Social Change: the Semi-Autonomous Social Field as an Appropriate Subject of Study*, 7 *LAW & SOC'Y REV.* 719 (1973). Generally, the more inclusive in life-space and the more enduring a relationship between a set of parties, the less likely it is that disputes will be taken to an official forum or regulated by official norms.

n73. D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report, Vol. I: Studying the Civil Litigation Process: The CLRP Experience, I-87 *et seq.* (1983) [hereinafter cited as CLRP].

n74. *Id.* at I-89-91.

n75. *Id.* at I-91.

n76. *Id.* at I-92.

n77. *Id.* at I-95.

n78. The use of third parties in these disputes is discussed in the following section.

n79. Harper, *Playing for Birth Risks*, Nat'l L.J., Apr. 12, 1982, at 1, col. 1.

n80. See Engel, *Legal Pluralism in an American Community: Perspectives on a Civil Trial Court*, 1980 AM. B. FOUND. RESEARCH J. 425; Felstiner, Abel & Sarat, *supra* note 42; Mather & Yngvesson, *supra* note 47.

n81. Cf. Cain, *The General Practice Lawyer and the Client: Towards a Radical Conception*, 7 INT'L J. SOC. LAW. 331 (1979) (characterizing lawyers as "conceptive ideologists" who translate the facts brought to them by clients into legal issues formulated "in terms of a legal discourse which has trans-situational applicability").

n82. Macaulay, *Lawyers and Consumer Protection Laws*, 14 *LAW & SOC'Y REV.* 115, 116-17 (1979).

n83. Cf. Mayhew, *Institutions of Representation*, 9 *LAW & SOC'Y REV.* 401, 403-04, 406, 409-11 and *passim* (1975).

n84. Macaulay, *supra* note 82, 130.

n85. J. Ladinsky & C. Susmilch, *supra* note 53, at 19.

n86. Best & Andreasen, *supra* note 53, at 19.

n87. See Miller & Sarat, *supra* note 47, 537 (table 2).

n88. CLRP, *supra* note 73, I-94.

n89. B. CURRAN, *supra* note 50, at 185.

n90. *Id.* at 190.

n91. *Id.* at 193.

n92. *Id.* at 235.

n93. Miller & Sarat, *supra* note 47, at 543.

n94. Best & Andreasen, *supra* note 49, at 713, 722.

n95. J. Ladinsky & C. Susmilch, *supra* note 53, at 19.

n96. NATIONAL CONFERENCE ON THE STATE JUDICIARY, THE PUBLIC IMAGE OF COURTS 15 (1978) [hereinafter cited as PUBLIC IMAGE].

n97. Walker, Richardson, Denyer, Williams & McGaughey, *Contact and Support: An Empirical Assessment of Public Attitudes Toward the Police and the Courts*, 51 N.C.L. REV. 43, 71-72 (1973).

n98. This estimate is confirmed by a 1983 telephone survey, which found that 20% of adult Americans reported that they had been parties to a civil suit. F. Bennack, Jr., *The American Public, The Media & The Judicial System: a national survey on public awareness and personal experience* 23 (Hearst Corporation Report, Oct. 21, 1983).

n99. D. Trubek, J. Grossman, W. Felstiner, H. Kritzer & A. Sarat, *Civil Litigation Research Project: Final Report, Volume II: Civil Litigation as the Investment of Lawyer Time II-53-56* (1983) [hereinafter cited as CLRP II]. "Stakes" are defined as the lawyer's view of what the client would be willing to take or do to settle the case. *Id.* at II-198.

n100. CLRP, *supra* note 73, at I-95 *et seq.*

n101. Macaulay, *supra* note 58, at 61-62.

n102. H. Owen, *The Role of Trial Courts in the Local Political System: A Comparison of two Georgia Counties* 68, 142 (1971) (unpublished dissertations, University of Georgia).

n103. Hurst, *The Functions of Courts in The United States, 1950-1980*, 15 LAW & SOC'Y REV. 401, 422 (1980-1981). In other settings, the use of courts has been found to be more frequent among marginal than central actors or among lower status rather than higher status actors. *See* Todd, *Litigious Marginals: Character and Disputing in a Bavarian Village*, in THE DISPUTING PROCESS -- LAW IN TEN SOCIETIES (L. Nader & H. Todd eds. 1978) (marginal vs. central actors); D. Black & M. Baumgartner, *supra* note 63 (lower status vs. higher status actors). This comports with the observation that courts, because the limiting forms of adjudication exclude the deployment of many political resources, are particularly attractive forums for those who cannot prevail in more political forums. K. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS: STATE COURT POLICY IMPACT AND FUNCTIONS IN A LOCAL POLITICAL SYSTEM* 63 (1967); Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339, 345 (1969).

n104. Best & Andreasen, *supra* note 49, at 723. *Cf.* L. HILL, *THE MODEL OMBUDSMAN: INSTITUTIONALIZING NEW ZEALAND'S DEMOCRATIC EXPERIMENT* 121-23 (1976) (on the greatly disproportionate rate of complaints by professionals to the New Zealand Ombudsman).

n105. T. BARTSCH, F. BADDY, B. KING & P. THOMPSON, *A CLASS-ACTION SUIT THAT WORKED: THE CONSUMER REFUND IN THE ANTIBIOTIC ANTITRUST LITIGATION* 57-100 (1978).

n106. Merry, *supra* note 64, at 913.

n107. Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 346, 350-51 (table 1) (1975).

n108. Wanner, *The Public Ordering of Private Relations* (pts. 1 & 2), 8 *LAW & SOC'Y REV.* 421, 424, 431 (1974), 9 *LAW & SOC'Y REV.* 293 (1975).

n109. H. Owen, *supra* note 102. See Galanter, *supra* note 107, at 352 (tables 3 & 4). There is reason to think that this pattern is not distinctively American. Analysis of 489 civil cases in the Amtsgericht (lower civil court) Freiburg shows a remarkable resemblance to American data. See Blankenburg, Blankenburg & Morasch, *Der lange Weg in die Berufung*, in TATSACHEN FORSCHUNG IN DER JUSTIZ (R. Bender ed. 1972). Some fragmentary British data also reveal a similar pattern. See Galanter, *supra* note 107, at 350-51 (table 1).

n110. Yngvesson & Hennessey, *Small Claims, Complex Disputes: A Review of the Small Claims Literature*, 9 *LAW & SOC'Y REV.* 219, 235-43 (1975); Galanter, *supra* note 107, at 349, 354-55 (tables 6-8).

n111. V. FLANGO, R. ROPER & M. ELSNER, THE BUSINESS OF STATE TRIAL COURTS 90 (1983). In 1978, 26% of filings in the civil courts of 15 states and the District of Columbia were small claims cases. Comparable breakdowns were not available for other states.

n112. But if this is the modal criminal case, we must recognize that the character of either "claimant" or defendant, or both, may vary. Among defendants we would, of course, distinguish such repeat players as the professional criminal, the persistent corporate violator, etc. On the claimant side, too, we should distinguish those cases in which the moving party is really a one-shot complaining witness from that in which the case is managed by the prosecutor for whom the complaining witness is just one more resource to be managed.

n113. ARTHUR YOUNG & CO. & PUBLIC SECTOR RESEARCH, INC., AN EMPIRICAL STUDY OF THE JUDICIAL ROLE IN FAMILY AND COMMERCIAL DISPUTES (1981) [hereinafter cited as ARTHUR YOUNG & CO.].

n114. *Id.*

n115. W. McIntosh, A Long-Range View of Litigators and Their Demands (Sept. 2-5, 1982) (paper prepared for delivery at the 1982 Annual meeting of the American Political Science Association) (on file with author).

n116. See Merry, *supra* note 64, at 895; Sarat, *Alternatives in Dispute Processing: Litigation in a Small Claims Court*, 10 *LAW & SOC'Y REV.* 339 (1976).

n117. Concerning the incompatibility of litigation with on-going relations between parties, consider the case of the lawyer employed by a brokerage house who brought suit against his employer in order to challenge New York State's law requiring finger-printing of employees in the securities industry.

They told me, "Don, you've done a serious thing: you've sued your employer." They knew I had sue them. Without the making employer a defendant, it's absolutely impossible to get a determination in court. It was not a matter of my suing them for being bad guys or anything like that and they knew it.

. . . [T]he biggest stumbling block is that I'm virtually blacklisted to Wall Street. . . .

N.Y. Times, Mar. 2, 1970, at 55, col. 7. His application for unemployment compensation was rejected on the ground that he had quit his employment without good cause, having provoked his dismissal by refusing to be fingerprinted. N.Y. Times, Mar. 2, 1970, at 55, col. 3. It appears that, in

the American setting at any rate, litigation is not only incompatible with the maintenance of continuing relationships, but also with their subsequent restoration. On the rarity of successful reinstatement of employees ordered reinstated by the NLRB, see L. Aspin, *A Study of Reinstatement Under the National Labor Relations Act* (1966) (unpublished dissertation, Massachusetts Institute of Technology, Department of Economics). Bonn finds this pattern even among users of arbitration, which is supposedly less lethal to continuing relations than litigation. He found that out of 78 cases of arbitration in textiles, "business relations were resumed in only fourteen." Bonn, *Arbitration: An Alternative System for Handling Contract Related Disputes*, 17 AD. SCI. Q. 254, 262 (1972).

n118. Yeazell describes 17th century English class actions among parson and parishioners, lord and tenants who were so securely tied to one another that the litigation did not threaten severance. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 881-82 (1977). Perhaps this accounts for the immense amount of litigation among trading partners in the Soviet Union, where is reported that there were over one million *arbitrazh* cases annually. See Loeber, *Plan and Contract Performance in Soviet Law*, in LAW IN THE SOVIET SOCIETY 128 (W. LaFave ed. 1965).

n119. Research in other societies indicates litigation is relatively more frequent in disputes with geographically distant antagonists than with those near at hand. Engel reports that "At distances where interaction may be presumed most frequent, the rates of litigation are same as -- or even lower than -- the rates of litigation at distances where interaction is relatively rare." D. ENGEL, CODE AND CUSTOM IN A THAI PROVINCIAL COURT: THE INTERACTION OF FORMAL AND INFORMAL SYSTEMS OF JUSTICE 143 (1978). Cf. Starr & Pool, *The Impact of a Legal Revolution in Rural Turkey*, 8 LAW & SOC'Y REV. 533, 546 (1974); Witty, *Disputing Issues in Shehaam, A Multi-religious Village in Lebanon*, in THE DISPUTING PROCESS -- LAW IN TEN SOCIETIES 286, 308 (L. Nader & H. Todd eds. 1978).

n120. Cf. Mendelsohn, *The Pathology of the Indian Legal System*, 15 MOD. ASIAN STUD. 823, *passim* (1981); Starr & Yngvesson, *Scarcity and Disputing: Zeroing-in on Compromise Decisions*, 2 AM. ETHNOLOGIST 553 (1975); S. Forman, *Law and Conflict in Rural Highland Ecuador* (1972) (unpublished dissertation, University of California, Berkeley).

n121. See Cavanagh & Sarat, *Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y REV. 371, 388-90 (1980); Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 284-86 (1976).

n122. ARTHUR YOUNG & CO., *supra* note 113; F. LAURENT, THE BUSINESS OF A TRIAL COURT (1959); W. McIntosh, *supra* note 115, at table 4 (uncontested judgments accounted for approximately 20-40% of all judgments).

n123. See Merry, *supra* note 64, at 902.

n124. See Mather, *Some Determinants of the Method of Case Disposition: Decision-making by Public Defenders in Los Angeles*, 8 LAW & SOC'Y REV. 187, 190 (1974).

n125. See Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearms Statute*, 13 LAW & SOC'Y REV. 393, 426 (1979).

n126. See McIntyre & Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 *A.B.A.J.* 1154 (1970).

n127. McIntyre, *A Study of Judicial Dominance of the Charging Process*, 59 *J. CRIM. L., CRIMINOLOGY & POLICE SCI.* 463 (1968).

n128. Ryan & Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 *LAW & SOC'Y REV.* 479, 486 (1979).

n129. *Id.*

n130. A. CONARD, J. MORGAN, R. PRATT, C. VOLTZ & R. BOMBAUGH, *AUTOMOBILE ACCIDENT COSTS AND PAYMENTS* (1964) [hereinafter cited as *AUTOMOBILE ACCIDENT COSTS*]; H. ROSS, *SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENT* (1970); Franklin, Chanin & Mark, *Accidents, Money, and the Law: A Study of the Economics of Personal Injury Litigation*, 61 *COLUM. L. REV.* 1, 10-11 (1961).

n131. CLRP II, *supra* note 99, at II-82. See also ARTHUR YOUNG & CO., *supra* note 113; W. McIntosh, *supra* note 115.

n132. See H. ROSS, *supra* note 130, at 136-75. Cf. G. STERN, *THE BUFFALO CREEK DISASTER* 216-18 (1977).

n133. Woll, *Informal Administrative Adjudication: Summary of Findings*, 7 *UCLA L. REV.* 436 (1960). Cf. the description of the "formal informal settlement system" of the Wisconsin Department of Motor Vehicles in S. MACAULAY, *LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS* 153-56 (1966).

n134. See H. ROSS, *supra* note 130, at 220-22.

n135. See D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 72 (1966).

n136. See, e.g., H. ROSS, *supra* note 130, at 220-22.

n137. *Id.* at 218.

n138. *Id.* 220; Belli, *Pre-trial: Aid to the New Advocacy*, 43 *CORNELL L.Q.* 34 (1957). Belli states: "I have to maintain my advocacy in court on trial in order to keep up my settlement value." *Id.* at 44.

n139. See Galanter, *supra* note 72; S. MACAULAY, *supra* note 133, at 135-39; L. ROSS, *supra* note 130, at 213.

n140. See F. SORAUF, *THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE* (1976).

n141. See Galanter, *supra* note 72, at 112.

n142. Mayhew, *supra* note 83, at 413.

n143. Steele, *Fraud, Dispute and the Consumer: Responding to Consumer Complaints*, 123 *U. PA. L. REV.* 1107 (1975).

n144. *Id.* at 1140.

n145. See L. MAYHEW, LAW AND EQUAL OPPORTUNITY: A STUDY OF THE MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION (1968); FitzGerald, *The Contract Buyers League and the Courts: A Case Study of Poverty Litigation*, 9 LAW & SOC'Y REV. 165 (1975).

n146. Cf. Aubert, *Competition and dissensus: two types of conflict and of conflict resolution*, 7 J. CONFLICT RESOLUTION 26 (1963) (distinction drawn between conflicts of principle and conflicts of interest).

n147. FitzGerald, *supra* note 145. The story is told in more detail in MacNamara, *The Contract Buyer's League: A View From the Inside*, 1 YALE REV. L. & SOC. ACTION 70 (1971); McPherson, *In My Father's House There Are Many Mansions, and I'm Gonna Get Me Some: The Story of the Contract Buyer's League*, ATL. MONTHLY, Apr. 1972, at 51.

n148. FitzGerald, *supra* note 145, at 184-85.

n149. *Id.* at 184.

n150. See *Diary of a Plaintiffs' Attorneys' Team in the Thalidomide Litigation*, 8 LAW IN JAPAN 136 (1975) [hereinafter cited as *Thalidomide Diary*]; Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits*, 10 LAW & SOC'Y REV. 579 (1976).

n151. Consider the following entry from the diary of one of the plaintiffs' lawyers for the Japanese thalidomide children:

The ceremony of signing the [settlement] confirmation instrument was held at Prefectural Assembly Hall . . . . Some 100 people representing 56 families including 30 deformed children were present. The whole function was conducted by the plaintiffs themselves, as the attorneys' team watched the proceedings.

The senior representative of the group, Mr. Terasaka Kanematsu, in an appeal about the pain shared by the children and parents alike, which wrenched the hearts of those present, pleaded for the defendants' fullest and most sincere execution of the provisions. No applause followed, nor any smiles. President Miyatake [of the offending manufacturer] and the Minister of Health and Welfare, both hanging their heads low, apologized before the children. The Minister pledged that like compensation would be provided for victims who had not brought suit.

*thalidomide Diary*, *supra* note 150. at 185.

n152. The account of the plaintiffs' lawyers is given in G. STERN, *supra* note 132. Plaintiffs' theories of psychic damage from destruction of community are set forth in K. ERIKSON, EVERYTHING IN ITS PATH: DESTRUCTION OF COMMUNITY IN THE BUFFALO CREEK FLOOD (1976). The effects of the litigation on the plaintiffs are reported in G. GLESER, B. GREEN & C. WINGET, PROLONGED PSYCHOSOCIAL EFFECT OF DISASTER: A STUDY OF BUFFALO CREEK (1981).

n153. Contrast Erikson's description of the "emotionally subdued" meeting of plaintiffs to announce the settlement, K. ERIKSON, *supra* note 152, at 248, with the Japanese ceremony described *supra* note 151.

n154. Compare G. STERN, *supra* note 132, at 88, with *id.* at 173.

n155. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 968 (1979).

n156. *Id.* at 968.

n157. See H. ROSS, *supra* note 130.

n158. Damaska, *A Foreign Perspective on the American Judicial System*, in *STATE COURTS: A BLUEPRINT FOR THE FUTURE* 237, 240 (T. Fetter ed. 1978).

n159. See Cavanagh & Sarat, *supra* note 121, at 405-07; Diver, *The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 *VA. L. REV.* 43 (1979).

n160. See Galanter, *Justice in Many Rooms*, 19 *J. LEGAL PLURALISM AND UNOFFICIAL LAW* 1, 6-17 and *passim* (1981).

n161. Moore, *supra* note 72, at 721.

n162. Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* (forthcoming, Russell Sage Foundation).

n163. Galanter, *supra* note 160. There is an immense profusion and variety of such indigenous forums. The existing literature includes reports, for example, on self-regulatory activity in a variety of business settings. See S. MACAULAY, *supra* note 133 (auto dealers' relations with manufacturers); Bonn, *supra* note 117, and Bonn, *The Predictability of Nonlegalistic Adjudication*, 6 *LAW & SOC'Y REV.* 563 (1972) (the textile industry); Macaulay, *supra* note 58 (heavy manufacturing); MacCollum, *Dispute Settlement in an American Supermarket*, in *LAW AND WARFARE: STUDIES IN THE ANTHROPOLOGY OF CONFLICT* 291 (P. Bohannon ed. 1967) (shopping centers); Mentschikoff, *supra* note 72 (trade associations); Moore, *supra* note 72 (the garment industry); Whitford, *Law and the Consumer Transaction: A Case Study of the Automobile Warranty*, 1968 *WIS. L. REV.* 1006 (auto dealers' relations with customers. In addition, there are reports on self-regulation in various social settings. See, e.g., P. BLAU, *THE DYNAMICS OF BUREAUCRACY: A STUDY OF INTERPERSONAL RELATIONS IN TWO GOVERNMENT AGENCIES* (1963) (workplaces); B. ZABLOCKI, *THE JOYFUL COMMUNITY: AN ACCOUNT OF THE BRUDERHOF, A COMMUNAL MOVEMENT NOW IN ITS THIRD GENERATION* (1971) (intentional communities); Akers, *The Professional Association and the Legal Regulation of Practice*, 2 *LAW & SOC'Y REV.* 463 (1968) (professional associations); Cross, *The College Athlete and the Institution*, 38 *LAW & CONTEMP. PROBS.* 151 (1973) (athletics); Doo, *Dispute Settlement in Chinese-American Communities*, 21 *AM. J. COMP. L.* 627 (1973) (ethnic communities); Note, *Rabbinical Courts: Modern Day Solomons*, 6 *COLUM. J.L. & SOC. PROBS.* 49 (1970) (religious groups).

n164. Extrapolated from data in *LAW ENFORCEMENT ASSISTANCE ADMIN., NAT'L CRIMINAL JUSTICE INFORMATION & STATISTICS SERV., U.S. DEPT' OF JUSTICE, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1975*, at 41 (1979).

n165. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 *S. CAL. L. REV.* 65 (1981).

n166. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *ANNUAL REPORT OF THE DIRECTOR* 3 (1980).

n167. Clark, *supra* note 165.

n168. *Id. at 81.*

n169. *Id. at 83, 85.*

n170. *Id. at 87-88.*

n171. Generally, the increase in criminal appeals may prove less widespread and steady than imagined by those who cite it as epitomizing the litigation explosion. Davies found that criminal appeals to the intermediate appellate courts in California remained roughly proportional to the number of felony complaints, except during the period from 1961 to 1967, when criminal appeals grew faster than other measures of appellate activity. Davies, *Gresham's Law Revisited: Expedited Processing Techniques and the Allocation of Appellate Resources*, 6 JUST. SYS. J. 372, 384 (1981); Davies, *Affirmed: A Study of Criminal Appeals and Decision-Making Norms in a California Court of Appeal*, 1982 AM. B. FOUND. RESEARCH J. 543. Rates of appeal since then have grown relative to convictions in superior court, but Davies regards this as a spurious measure since changing jurisdictional policies of transferring less serious cases out of superior court have left that court with a caseload containing more of the serious felony cases from which appeals are disproportionately drawn.

n172. Howard, *Query: Are heavy caseloads changing the nature of appellate justice?*, 66 JUDICATURE 57, 58 (1982).

n173. W. McIntosh, *Litigation and Private Dispute Settlement in the ST. Louis Circuit Court, 1820-1970: A Preliminary Analysis* (August 1978) (paper delivered at 1978 Annual Meeting of the American Political Science Association) (on file at *UCLA Law Review*).

n174. A recent compilation by the National Center for State Courts seems at first glance to give credence to a pronounced recent acceleration of litigiousness. Figures from 40 states show an overall increase in the filing of civil cases on the order of 23% over the four-year period 1977-1978 to 1981-1982, a period during which the recorded population of the United States increased by only 4%. Interpretation of these figures is hampered by the absence of any breakdown showing what the new cases consisted of, so it is not clear what this increase represents. Nor are we in a position to know about changes in record-keeping practices during this period of improved court-management and agitation about rising caseloads. That the overall increase does *not* represent a rise in some generalized disposition to go to court is suggested by consideration of some pairs of contiguous jurisdictions. Thus we find that during this four-year period, filings in Massachusetts grew by an astonishing 73%, but in neighboring (and demographically similar) Rhode Island, they fell by 1% and in Connecticut they grew by only 2%. Similarly, in Illinois, filings increased by 4% while neighboring Indiana was a hotbed of litigation with a 40% increase. Maryland experienced a 51% increase, but the District of Columbia had a 9% drop in filings. (Are we to imagine a wave of litigiousness that bypasses Chicago and Washington?) Similar disparities are reported from the wide open spaces: Utah had a 47% rise in filings during these four years while energy-booming Wyoming, with a 19% population gain, had a 1% decrease in filings. V. FLANGO, R. ROPER & M. ELSNER, *THE BUSINESS OF STATE TRIAL COURTS* 68 (table 13) (1983).

n175. McIntosh, *supra* note 173.

n176. Curtis, *The Colonial County Court, Social Forum and Legislative Precedent, Accomack County, Virginia, 1633-1639*, 85 VA. MAG. HIST. & BIOGRAPHY 274, 287 (1977).

n177. *Id.*

n178. D. KONIG, *LAW AND SOCIETY IN PURITAN MASSACHUSETTS: ESSEX COUNTY, 1629-1692*, at xii (1979).

n179. ARTHUR YOUNG & CO., *supra* note 113, at table 10.

n180. Friedman & Percival, *supra* note 121, at 281-282.

n181. *Id.* at 282-83.

n182. McIntosh, *150 Years of Litigation and Dispute Settlement: A Court Tale*, 15 *LAW & SOC'Y REV.* 823, 829 (1980-1981) (analysis of effect of socio-economic development and rising litigation costs on dispute-resolution function of a state court of general jurisdiction).

n183. ARTHUR YOUNG & CO., *supra* note 113, at table 10.

n184. Friedman & Percival, *supra* note 121, at 281-82.

n185. *Id.* at 282-83.

n186. McIntosh, *supra* note 182, at 829.

n187. ARTHUR YOUNG & CO., *supra* note 113, at table 10.

n188. Friedman & Percival, *supra* note 121, at 281-82.

n189. *Id.* at 282-83.

n190. McIntosh, *supra* note 182, at 829.

n191. Kagan, Cartwright, Friedman & Wheeler, *The Business of State Supreme Courts, 1870-1970*, 30 *STAN. L. REV.* 121, 131-52 (1977) [hereinafter cited as *State Supreme Courts*].

n192. L. Baum, S. Goldman & A. Sarat, Transformation in Appellate Activity: A Look at the Business of Three U.S. Courts of Appeal, 1895-1975 (Aug. 31-Sept. 3 1978) (paper delivered at the annual meeting of the American Political Science Association) (on file with author) [hereinafter cited as Appellate Activity paper].

n193. *See, e.g.*, Friedman & Percival, *supra* note 121; McIntosh, *supra* note 182. In an unpublished study of state civil courts of general jurisdiction in 6 cities, Craig Wanner found that the rate of completed trials or hearings per 1000 of population fell from 12.2 in 1951 to 10.2 in 1981. Wanner, *The Public Ordering of Private Relations: 30 Years of Litigation in the United States*, ch. 6, table 1 (unpublished manuscript on file with the author).

n194. *State Supreme Courts*, *supra* note 191, at 130-31 (examining incidence of opinions from state supreme courts in states with intermediate appellate courts and a courts of last resort which has case-selecting discretion).

n195. *See infra* Table 2. In his study of state courts of general jurisdiction in six cities, Wanner found that the percentage of cases with completed trials or hearings declined from 26.8% in 1951 to 22.3% in 1981. Wanner, *supra* note 193, at ch. 6, table 1.

n196. M. SHANLEY & M. PETERSON, *COMPARATIVE JUSTICE: CIVIL JURY VERDICTS IN SAN FRANCISCO AND COOK COUNTIES, 1959-1980*, at 19-20 (1983).

n197. *See* Abel, *supra* note 41. *See generally* Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 *LAW & SOC'Y REV.* 91 (1978).

n198. Cf. M. FLEMING, *THE PRICE OF PERFECT JUSTICE* (1974).

n199. J. FRANK, *supra* note 7, at 85-124.

n200. Damaska, *supra* note 158, at 240.

n201. Cf. Grady, *Trial Lawyers, Litigators and Clients' Costs*, 4 *LITIGATION* 5 (Spring 1978).

n202. Mather, *supra* note 124.

n203. McIntyre, *supra* note 127.

n204. Woll, *supra* note 133.

n205. Engel & Steele, *Civil Cases and Society: Legal Process and Order in the Civil Justice System*, 2 *AM. B. FOUND. RESEARCH J.* 295 (1979).

n206. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 *YALE L.J.* 480, 528 (1975). Cf. Feeley, *The Concept of Laws in Social Science: A Critique and Notes on an Expanded View*, 10 *LAW & SOC'Y REV.* 497, 500 (1976).

n207. Heinz & Laumann, *The Legal Profession: Client Interests, Professional Roles, and Social Hierarchies*, 76 *MICH. L. REV.* 1111, 1117 (1978).

n208. One measure of the presence of these blockbusters is given by the number of trials over 20 days in length in the United States District Courts, a figure that has been recorded since 1944. In 1944 there were 17 such trials (.00219% of a total of 7,755 trials); in 1981, there were 187 (.00893% of 20,940 trials). Compare ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR, at table 9 (1944), *with id.*, at table C-8 (1981).

n209. Chayes, *The Role of the Judge in Public Law Litigation*, 89 *HARV. L. REV.* 1281 (1976). For example, Chayes points to the shift from bi-polar parties to contending interest groups. *Id.* at 1291. Again, decrees, may "seek to adjust future behavior instead of compensate for past wrong." *Id.* at 1298. See also Eisenberg & Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 *HARV. L. REV.* 465 (1980) (arguing that institutional litigation procedure and remedies "are not unprecedented but have analogues in older judicial traditions").

n210. See D. HOROWITZ, *THE COURTS AND SOCIAL POLICY* 1-21 (1977); Chayes, *supra* note 209; Fiss, *The Supreme Court 1978 Term -- Foreword: The Forms of Justice*, 93 *HARV. L. REV.* 1 (1979). As Chayes points out, a complex, on-going remedy "prolongs and deepens rather than terminates, the court's involvement with the dispute." Chayes, *supra* note 209, at 1298. In such litigation "the judge is not passive, his function limited to analysis and statement of governing legal rules; he is active, with responsibility not only for credible fact evaluation, but for organizing and shaping the litigation to ensure a just and visible outcome." *Id.* at 1302.

n211. See Galanter, *supra* note 160, at 14-15 and *passim*.

n212. Friedman, *The Six Million Dollar Man: Litigation and Rights Consciousness in Modern America*, 39 *MD. L. REV.* 661, 664-65 (1980). A study of the outcome of jury trials in San Francisco and Cook counties from 1959 to 1980 found that by the late 1970's most awards were no greater (measured in constant dollars) than during the early 1960's, but there was a striking increase in the number and size of very large awards. Shanley and Peterson, *supra* note 196, at 26-30.

n213. Hurst, *The Functions of Courts in the United States: 1950-1980*, 15 *LAW & SOC'Y REV.* 401, 449 (1980-1981).

n214. Cf. Reich, *The New Property*, 73 *YALE L.J.* 733 (1964).

n215. Cf. M. FLEMING, *supra* note 198, at 135-37.

n216. Haller, *Historical Roots of Police Behavior: Chicago, 1890-1925*, 10 *LAW & SOC'Y REV.* 303 (1976).

n217. Kirp, *Proceduralism and Bureaucracy: Due Process in the School Setting*, 28 *STAN. L. REV.* 841, 842 (1976).

n218. O'Neil, *Of Justice Delayed and Justice Denied: The Welfare Prior Hearing Cases*, 1970 *SUP. CT. REV.* 161.

n219. Avichai, *Trends in the Incidence of Legal Problems and in the Use of Lawyers*, 1978 *AM. B. FOUND. RESEARCH J.* 289 (analyzes changes over time in occurrence of legal problems and utilization of lawyers).

n220. Clark, *supra* note 165, at 94.

n221. *Id.* at 95-96.

n222. U.S. BUREAU OF THE CENSUS, *STATISTICAL ABSTRACT OF THE UNITED STATES*, 1979, at 442. This does not include governmental expenditures for legal services, nor the cost of operating legal institutions. The share contributed by private legal services to national income peaked in 1975 at .96%. Increased expenditures on legal services are also reflected in the number of hours worked by legal service employees in the private sector. In 1967, hours worked in legal service concerns amounted to 201 million or .2% of all hours worked in the economy. (This measure does not include the hours of partners and sole proprietors.) U.S. DEPT OF COMMERCE *SURVEY OF CURRENT BUSINESS*, JULY-DEC. 1968, at 41 (1968). By 1977, legal services work had risen to 678 million hours -- .4% of the total. U.S. DEPT OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, JULY-DEC. 1978, at 55 (1978).

n223. *A Businessman's View of Lawyers*, 33 *BUS. LAW.* 817, 839 (1978) (program presented as the Annual Section Program by the Section of Corporation, Banking and Business Law on Aug. 9, 1977, at the American Bar Association Annual Meeting in Chicago, Illinois).

n224. *The NLJ 250: A Special 5-Year Report on the Dramatic Growth of the Nation's Largest Law Firms*, *Nat'l L.J.*, Sept. 19, 1983 (Special Anniversary Section).

n225. This baseline is itself the outcome of a period of growth. Smigel reports that the number of partners in the 20 large firms in New York that were the subject of his early 1960's study increased by 16% from 1957 to 1962. Seventeen comparable large firms outside New York grew by 37% from 1951 to 1961. E. SMIGEL, *THE WALL STREET LAWYER: PROFESSIONAL ORGANIZATION MAN?* 351 (1969).

n226. *Why Law is a Growth Industry*, *BUS. WK.*, Jan. 13, 1968, at 79.

n227. U.S. BUREAU OF THE CENSUS, *COUNTY BUSINESS PATTERNS* 1956, pt. 1 at 3 (1958); U.S. BUREAU OF THE CENSUS, *COUNTY BUSINESS PATTERNS* 1966, pt. 1 at 19 (1967); U.S. BUREAU OF THE CENSUS, *COUNTY BUSINESS PATTERNS* 1973, pt. 1 at 27

(1974). These figures are for employees, so they include salaried lawyers as well as other employees.

n228. See Cantor, *Trends in Legal Organization Affirm Increased Competition*, 13 TRIAL 26, 26 (1977).

n229. The market share of firms with gross receipts of more than \$ 1 million increased from 14% in 1967 to 20% in 1972, to 35% in 1977, while the number of such firms increased from 400 to 928 to 2164. U.S. BUREAU OF THE CENSUS, LEGAL SERVICES REPORT, SC 67-S-4, 1967 CENSUS OF SELECTED SERVICE INDUSTRIES 5-5 (1967); U.S. BUREAU OF THE CENSUS, LEGAL SERVICES REPORT, SC 72-S-4, 1972 CENSUS OF SELECTED SERVICE INDUSTRIES 4-4 (1972); U.S. BUREAU OF THE CENSUS, LEGAL SERVICES REPORT, SC 77-S-4, 1977 CENSUS OF SELECTED SERVICE INDUSTRIES, 5-30 (1981).

n230. Goldstein, *Business and the Law: Demystifying the Profession*, N.Y. Times, June 1, 1979, at D3, col. 1 and col. 3.

n231. Cheney, *How Lawyers Can Polish Their Public Image by Knowing How to Deal with the Press, Media*, Nat'l L.J., Feb. 18, 1980, at 1, 29.

n232. See Brand, *The Avoidance of the Traditional Machinery of Adjudication: A World-Wide Trend?*, 38 SOC. RESEARCH 268 (1971); Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 366 (1978); Toharia, *Judicial Independence in an Authoritarian Regime: The Case of Contemporary Spain*, 9 LAW & SOC'Y REV. 475, 486-96 (1975).

n233. For example, any reference to the dramatic contrast in the number of judges has to be qualified by noting the problem of determining who are judges and what are courts. Similar bodies may be deemed courts in one place and administrative tribunals in another. Are zoning boards and licensing bodies courts? Are federal court magistrates judges? And what of all the counterpart institutions in the private sector -- grievance committees, review boards, arbitrators, etc.? Similarly, the definition of "lawyer" may include all the legally trained, all those admitted to practice, only those in private practice, etc.

n234. NAT'L CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 41 (1979).

n235. See ARTHUR YOUNG & CO., *supra* note 113; Friedman & Percival, *supra* note 121, McIntosh, *supra* note 182; S. Daniels, *The Civil Business of State Trial Courts: A Rural-Urban Comparison 1870-1960* (June 3-6, 1982) (paper delivered at 1982 meetings of the Law and Society Association); W. McIntosh, *supra* note 115.

n236. S. SILBEY, WHAT THE LOWER COURTS DO: THE WORK AND ROLE OF COURTS OF LIMITED JURISDICTION, at table 26 (1976).

n237. LAW ENFORCEMENT ASSISTANCE ADMIN., NAT'L CRIMINAL JUSTICE INFORMATION AND STATISTICS SERV., U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS -- 1976, at 613 (1979).

n238. *Spite Feuds Fill Yugoslavia's Courts*, N.Y. Times, Oct., 16, 1966.

n239. Kesic & Babic, *Sukobi u Nedostatku Dogovora [Disputes in the Absence of an Agreement]*, Borba, May 26, 1983, at 4 (Beograd ed.). A comparable total is derivable from M.

PEROVIC, PRAVOSUDI SISTEM JUGOSLAVIJE [JUDICIAL SYSTEM OF YUGOSLAVIA] 137-39 (1980).

n240. Consider, too, Frake's account of the prominence of litigation among the Lipay of the Philippines:

A large share, if not the majority, of legal cases deal with offenses so minor that only the fertile imagination of a Subanum legal authority can magnify them into a serious threat to some person or to society in general. . . . A festivity without litigation is almost as unthinkable as one without drink. If no subject for prosecution immediately presents itself, sooner or later, as the brew relaxes the tongues and actions, someone will make a slip.

In some respects a Lipay trial is more comparable to an American poker game than to our legal proceedings. It is a contest of skill, in this case of verbal skill, accompanied by social merry-making, in which the loser pays a forfeit. He pays for much the same reason we pay a poker debt: so he can play the game again. Even if he does not have the legal authority's ability to deal a verbalized "hand," he can participate as a defendant, plaintiff, kibitzer, singer, and drinker. No one is left out of the range of activities associated with litigation.

Litigation nevertheless has far greater significance in Lipay than this poker-game analogy implies. For it is more than recreation. Litigation, together with the rights and duties it generates, so pervades Lipay life that one could not consistently refuse to pay fines and remain a functioning member of society. Along with drinking, feasting, and ceremonializing, litigation provides patterned means of interaction linking the independent nuclear families of Lipay into a social unit, even though there are not formal group ties of comparable extent.

Nader, *The Anthropological Study of Law*, in THE ETHNOGRAPHY OF LAW 3, 21 (L. Nader ed. 1965) (quoting Frake, *Litigation in Lipay: A Study in Subanum Law*, in THE PROCEEDINGS OF THE NINTH PACIFIC SCIENCE CONGRESS 217, 221 (1957)).

n241. L. FALLERS, LAW WITHOUT PRECEDENT: LEGAL IDEAS IN ACTION IN THE COURTS OF COLONIAL BUSOGA 22 (1969).

n242. F. DuBow, Explaining Litigation Rates in Rural and Urban Tanzania (June 2-5, 1983) (paper presented at the Annual Meeting of the Law and Society Association) (on file with author).

n243. *See supra* notes 176-78 and accompanying text.

n244. The relative absence of lawyers in Japan is noted with commendation by many observers. *See* Burger, *Agenda for 2000 A.D. -- A Need for Systematic Anticipation*, 70 *F.R.D.* 83, 94 (1976); Tribe, *supra* note 4, at 25. *See also* Chapman, *Japan: The Land of Few Lawyers*, *Washington Post*, Apr. 19, 1981, at C5, col. 1; Lohr, *Tokyo Air Crash: Why Japanese Do Not Sue*, *N.Y. Times*, Mar. 10, 1982, at 1, col. 1; Taylor, *On the Evidence, Americans Would Rather Sue than Settle*, *N.Y. Times*, July 5, 1981, § 4, at 8E, col. 1. Silberman suggests that "perhaps some measure of the competitive advantage that Japan and some European nations seem to enjoy vis-a-vis the United States is attributable to their much less intrusive use of lawyers." Silberman, *supra* note 4, at 21. A recent newspaper story reports that the lack of litigiousness in Japan is often cited as an economic advantage. Lohr, *supra*, at D5, col. 3.

n245. *See supra* table 3.

n246. See Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* 42 (A. von Mehren ed. 1963).

n247. Cultural ideals are not invariably reflected in popular behavior. Populations which embrace ideals of harmony and conciliation may use courts at high rates while disparaging litigation. See Kidder, *Courts and Conflict in an Indian City: A Study in Legal Impact*, 11 *J. OF COMMONWEALTH POL. STUD.* 121 (1973); Morrison, *Clerks and Clients: Paraprofessional Roles and Cultural Identities in Indian Litigation*, 9 *LAW & SOC'Y REV.* 39 (1974).

n248. Haley, *supra* note 232, at 368-78.

n249. *Id.* at 371 (citing D. HENDERSON, *CONCILIATION IN JAPANESE LAW: TOKUGAWA AND MODERN* (1965) (footnotes omitted)).

n250. *Id.* at 373.

n251. *Id.*

n252. *Id.* at 391.

n253. See Meyerson, *Why There Are So Few Lawyers in Japan*, *Wall St. J.*, Feb. 9, 1981, at 16, col. 3.

n254. Haley, *supra* note 232, at 386, table 9. In part this is a matter of defining "lawyers," a problem that plagues all attempts at cross-national comparison in these matters. An American lawyer who practiced in Japan recently suggested that twelve thousand -- often cited as the number of lawyers in Japan, and the basis of the computation in table 3, *supra* -- is in actuality the number of lawyers who function as barristers and that over one hundred thousand law graduates are said to be doing legal work. Shapiro, *Letter to the Editor*, *N.Y. Times*, July 4, 1983, at 18, col.4.

n255. Haley, *supra* note 232, at 385-86.

n256. Compare FitzGerald, *Grievances, Disputes & Outcomes: A Comparison Of Australia and the United States*, 1 *LAW IN CONTEXT* 15 (1983), with Miller & Sarat, *supra* note 47.

n257. FitzGerald, *supra* note 256, at 25.

n258. *Id.* at 30.

n259. *Id.* at 30.

n260. *Id.*

n261. *Id.* at 35.

n262. *Id.* at 35.

n263. *Id.* at 28.

n264. *Id.* at 39.

n265. See, e.g., Fleming, *supra* note 4; Hufstедler, *supra* note 4; Rosenberg, *Let's Everybody Litigate?*, 50 *TEX. L. REV.* 1349 (1972).

n266. Barton, *Behind the Legal Explosion*, 27 *STAN. L. REV.* 567 (1975).

n267. Polemics on the litigation explosion are hardly unique in this respect. Philip Shuchman observes that "a persuasively stated argument by a well-known law teacher published in a

prestigious law journal, though it be based largely on anecdote, will be uncritically accepted as though it contained true statements about the effects of the legal system on society and business firms." P. SHUCHMAN, PROBLEMS OF KNOWLEDGE IN LEGAL SCHOLARSHIP A-12 (1979). This is an instance of the general weakness of legal scholarship in dealing with states of fact. Shuchman finds most law review writing displays: "uncritical acceptance as authority of what is published in the prestigious law journals . . . a priori and unfounded assumptions . . . about the effects of the doctrinal law; conjectures (sometimes stated as fact, but usually not investigated) regarding the presumed impact of changes in statutory and case law." *Id.* at 105.

n268. The lack of any cumulative development may be the result of the fact that all the contributions by accredited scholars (with the exception of Rosenberg) are one-time performances. Rosenberg, *supra* note 265 and *supra* note 8.

n269. Barton, *supra* note 266, at 567.

n270. *E.g.*, R. Aldisert, *supra* note 16, at 57; *Chilling Impact*, *supra* note 20, at 58; Note, *The California Rent-a-Judge Experiment: Constitutional and Policy Considerations of Pay-As-You-Go Courts*, 94 HARV. L. REV. 1592, 1592 (1981).

n271. The reference is to Sander who had followed a recounting and extension of Barton's projections with the caution that "one should view these dire predictions with a healthy skepticism. Litigation rates, like population rates, cannot be assumed to grow ineluctably, unaffected by a variety of social factors. Nor should it be assumed that there will be no human intervention that could dramatically affect the accuracy of Professor Barton's projections." Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 111 (1976). See also Barton, *supra* note 266. A truncated version of Barton's projection and Sander's elaboration (but without Sander's caveat) turns up in Tribe, *supra* note 4, at 25.

n272. Phillips, *The Expansion of Federal Jurisdiction and the Crisis in the Courts*, 31 VAND. L. REV. 17, 17 (1978).

n273. Burger, *supra* note 17, at 275.

n274. See *supra* section A.

n275. B. CURRAN, *supra* note 50, at 235.

n276. PUBLIC IMAGE, *supra* note 96, at 46.

n277. Compare Dingwall's discussion of the role of "atrocious stories" among professional groups. "These stories are dramatic events staged between groups of friends and acquaintances that draw on shared understandings about the way of the world." Dingwall, *"Atrocious Stories" and Professional Relationships*, 4 SOC. WORK & OCCUPATIONS 371, 375 (1977). Through the mutual affirmation of the troublesome nature of outsiders and deviants, they bind the group together and reaffirm the essential rationality and reasonableness of the shared occupation.

n278. J. BRUMVAND, THE VANISHING HITCHHIKER: AMERICAN URBAN LEGENDS AND THEIR MEANINGS (1981):

Urban legends belong to the subclass of folk narratives, legends, that -- unlike fairy tales -- are believed, or at least believable, and that -- unlike myths -- are set in the recent past and involve normal human beings rather than ancient gods or demigods. Legends are folk history, or rather

quasi-history. As with any folk legends, urban legends gain credibility from specific details of time and place or from references to source authorities.

In the world of modern urban legends there is usually no geographical or generational gap between teller and event. The story is *true*; it really occurred, and recently, and always to someone else who is quite close to the narrator, or at least "a friend of a friend." Urban legends are told both in the course of casual conversations and in such special situations as campfires, slumber parties, and college dormitory bull sessions. The legends' physical settings are often close by, real, and sometimes even locally renowned for other such happenings. Though the characters in the stories are usually nameless, they are true-to-life examples of the kind of people the narrators and their audience know firsthand.

*Id.* at 3-4.

n279. Martha Fineman presents a compelling account of the impact of reformers' "horror stories" on the shaping of divorce reform in Wisconsin:

"[H]orror stories" . . . symbolized and defined for the reformers the reform that was needed. These horror stories had as central characters a deserving but victimized wife, a villainous and selfish husband, and a legal system which closed not only the eyes, but the ears of justice in the name of property rights to leave the wife and children destitute and abandoned. . . .

. . . .

Many of the horror stories were unsubstantiated, came from only one source, occurred decades earlier, or were the results of decisions by judges in different states, but the reformers adopted them uncritically and incorporated them as the central images in the rhetoric of their reform. . . .

. . . .

[A]lone, the housewife horror stories presented an unbalanced picture. There was no explicit consideration of information on the circumstances of other groups of women, which would have allowed the reformers or their constituents to make a judgment of the overall fairness of the existing divorce procedure or to assess the range of possible reforms. There appears to have been no systematic search for additional information that would allow an evaluation of a variety of factual situations before there was a determination of what solutions would be appropriate. Even when such information was presented, it appears it was either ignored or discounted.

. . . .

[T]he horror stories had served an important function. They may have been generated as an organizing tool but, because they were so vivid and compelling, they came to substitute for a more generalized articulation of the problems.

. . . .

The stereotypical housewife horror story encouraged the reformers to argue that legal institutions were systematically biased against women in resolving the economic incidents of divorce. This may have been accurate in terms of the cases the feminists compiled to support their arguments. There is a question whether it was accurate from an historical perspective.

And, it is even less clear, however, that it was accurate in terms of all, or even most, contemporary divorce cases in Wisconsin.

Fineman, *Implementing Equality: Ideology, Contradiction and Social Change*, 1983 *WIS. L. REV.* 789, 854-65.

n280. See generally P. EHRLICH, *THE POPULATION BOMB* (1971); COUNCIL ON ENVIRONMENTAL QUALITY & THE DEP'T. OF STATE, *GLOBAL 2000 REPORT TO THE PRESIDENT* (1980); D. MEADOWS, J. RANDERS & W. BEHRENS, *THE LIMITS TO GROWTH: A REPORT FOR THE CLUB OF ROME PROJECT ON THE PREDICAMENT OF MANKIND* (1974).

n281. Cf. J. SIMON, *THE ULTIMATE RESOURCE* (1981).

n282. Of course, perceptions of increased jeopardy do not depend only on the numbers of cases. The perception of increased risk exposure by social and economic elites reflects a general broadening of areas subject to litigation. Specifically, it seems related to the increased emphasis on tort (and tort-like) claims and the trend toward higher tort recoveries. Friedman, *Courts Over Time: A Survey of Theories and Research*, in *EMPIRICAL THEORIES ABOUT COURTS* (K. Boyum & L. Mather eds. 1983). Unlike contract, with its low ceiling on damages, tort recovery is open-ended, representing an increase in stakes and risk disproportionate to the actual frequency of claims.

n283. Barton, *supra* note 266, at 573-78.

n284. Kline, *supra* note 4, at 18.

n285. Aldisert, *supra* note 16, at 60. Cf. Burger, *supra* note 17, at 275; Cavanagh & Sarat, *supra* note 121, at 413; Tribe, *supra* note 4, at 26 ("the atomization of society has triggered an explosion of law"). Aldisert has an interesting variant on the decline of institutions theory. He states that the decline leads to government intervention and corresponding development of private resistance which seeks to use courts to create and enforce limitations on government. *Id.* at 6.

n286. Cf. Bork, *supra* note 4, at 233 (increases in courts' workloads threaten to change their function from that of deliberative institutions to mere locations of administrative processing).

n287. Rifkind, *Are We Asking Too Much of Our Courts?*, 70 *F.R.D.* 96, 98 (1976).

n288. Compare Gordon's account of the intellectual discomfort engendered by Realist enlargement of the notion of the study of law. Most of the scholars affected, reports Gordon, "avoided falling into the quagmire by fashioning lifelines of limiting principles on the scope of their legal research, which kept them connected to traditional professional identities." Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 *LAW & SOC'Y REV.* 9, 33-34 (1975).

n289. D. Engle, *The Oven Bird's Song: Insiders, Outsiders and Personal Injuries in an American Community* 26, 30-31 (June 2-5, 1983) (unpublished paper presented to the annual meeting of the Law and Society Association) (on file with author).

n290. *Id.*

n291 J. GUSFIELD, *THE CULTURE OF PUBLIC PROBLEMS: DRINKING-DRIVING AND THE SYMBOLIC ORDER* 170 (1981).

n292. *Id.* at 183.

n293. *Id.* at 170.

n294. This contextual reading draws nourishment from recent writing that reacts against the hyperlexis reading of the dispute landscape, including notably J. LIEBERMAN, *THE LITIGIOUS SOCIETY* (1981); Cavanagh & Sarat, *supra* note 121; Friedman, *supra* note 212; and Hufstедler, *The Future of Civil Litigation*, 1980 *UTAH L. REV.* 753. In view of the recency of their appearance it is too early to discern the effect of this contextual view on professional and popular discussion. For a recent critical assessment that gives a differentiated portrayal of the legal scene, see Bok, *A Flawed System*, 85 *HARV. MAG.* 38 (May-June 1983).

n295. Carol Greenhouse describes a groups of Baptists in a suburb in the American south who proscribe litigation (and other overt remedial action) in case of injury. She notes that this non-use reflects not social harmony and the absence of conflict, but the cleavage between them and the larger community and the state. She concludes that:

it is possible to imagine circumstances under which rising rates of litigation would indicate the increasing integration of society, not the reverse. When law-aversion stems from a rejection of judicial institutions and the state that they represent, rising law use may signal a positive accomodation to or acceptance of the social system. . . . When law aversion stems from a negative attitude toward social groups that places them outside the cultural order, then rising litigation and law use might signal a new acceptance of groups formerly thought to be alien.

Greenhouse, *Nature is to Culture as Praying is to Suing: Legal Pluralism in an American Suburb*, 20 *J. LEGAL PLURALISM AND UNOFFICIAL LAW* 17, 31 (1982).

n296. *Cf.* M. EDELMAN, *POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE* 45 (1971).

n297. Konig, *supra* note 178, at xiii.

n298. Craven & Wellman, *The Network City*, 43 *SOC. INQUIRY* 57 (1973); Stinchcombe, *Social Structure and Organizations*, in *HANDBOOK OF ORGANIZATIONS* 142 (J. March ed. 1969).