Essay

The Turn Against Law: The Recoil Against Expanding Accountability

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I propose to examine a remarkable shift in our legal culture that took place a generation ago. In the course of a sudden change in the legal climate, many sturdy plants took root to form part of the landscape in which we live today.

A century ago, Americans invoked the civil courts more frequently on a per capita basis than they do now.[1] But the makeup of court caseloads was quite different. There has been a shift from a predominance of cases involving market transactions (contract, debt collection, and property cases) to family and tort cases.[2] Molly Selvin and Patricia Ebener, who examined civil litigation in Los Angeles Superior Court from 1880 to 1980, described a "significant shift from a . . . debt caseload to a personal-injury dominated caseload."[3] Debt cases made up over half the civil damages caseload in the interwar years, but only about ten percent of the caseload after 1950.[4]

The period from the Great Depression through the recovery following World War II (roughly 1930 to 1960) might be described as the "trough" of American litigation.[5] Litigation declined, and the number of lawyers barely kept pace with population growth. The trough is plainly displayed in Figure 1, taken from Selvin and Ebener's study.[6] Even by 1980, litigation had not

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1. *See* MOLLY SELVIN & PATRICIA A. EBENER, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 32–34 (1984) ("The population of Los Angeles County was much more litigious in the 1920s and 1930s and in the late nineteenth century than it is today."); *see also* WAYNE V. MCINTOSH, THE APPEAL OF CIVIL LAW: A POLITICAL-ECONOMIC ANALYSIS OF LITIGATION 48–69 (1990).

2. MCINTOSH, *supra* note 1, at 48–49; Lawrence M. Friedman & Robert V. Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 266, 280–83 (1976).

3. *Id.* at 44.

4. *Id.*

5. *See* Marc Galanter, *Contract in Court; Or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577, 581–83 (describing the "trough" as the decrease in American civil litigation per capita rates of litigation that existed from 1930–1960).

6. SELVIN & EBENER, *supra* note 1, at 34.

reached the per capita rate that prevailed in the first quarter of the twentieth century.

FIGURE 1.

Civil filings in Los Angeles Superior Court per 100,000 population, 1880-1980

SOURCE.— MOLLY SELVIN & PATRICIA A. EBENER, MANAGING THE UNMANAGEABLE: A HISTORY OF CIVIL DELAY IN THE LOS ANGELES SUPERIOR COURT 32–34 (1984).

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The sense of exuberant or even menacing growth in things legal, to which we have lately become accustomed, was not present during this period.[7] As late as 1963, Dean George H. Young of the University of Wisconsin Law School contended that "law is a dwindling profession. In numbers it has remained fairly constant while everything else grows."[8] Through the clear lens of hindsight, we observe that at that very moment a great surge of legal activity was taking off in which every dimension of law, including the population of lawyers and the amount of litigation, would increase to a level that no one had anticipated.

The courts in post-World War II America lowered barriers to litigation—dismantling immunities, widening standing, and eliminating the requirement of privity in products liability cases—and enlarged remedies. There were more opportunities for successful assertion of rights by outsiders, dependents, and subordinates against society's managers and authorities. By the mid-1960s, courts, legislatures, and lawyers had transformed the legal landscape. Civil rights, enlarged tort liability, the emergence of poverty law, consumerism, and environmentalism all reflected higher expectations of institutional performance by manufacturers, doctors, and government. Government responded to and promoted rising public expectations by launching a "War on Poverty" as well as enacting a wave of civil rights, consumer, and environmental legislation.

This period was also a golden age of law in the media, the time of *To Kill a Mockingbird* and *The Defenders.* Law school enrollment swelled as students saw law as a means of fulfilling their desires to reform society. Throughout the mid-twentieth century, the number of lawyers per capita had remained roughly the same (and roughly the same as the number of physicians). But starting around 1970, the proportion of lawyers in the population increased steeply, more than doubling by the end of the century (and outstripping the number of physicians).[9]

I. The Public Justice Critique

As courts and legislatures expanded rights and remedies, critics both inside and outside the law mounted a sustained critique, targeting institutional arrangements that defeated justice and focusing especially on lawyers for neglecting their obligations and for forming self-serving alliances with the powerful. Ralph Nader attacked the "endemic malaise" of lawyers

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7. *See generally* Marc Galanter, *Law Abounding: Legalisation Around the North Atlantic*, 55 MOD. L. REV. 1 (1992) (describing the modern explosion of the legal landscape in the United States, Canada, and the United Kingdom).

8. Owen Coyle, *'Benchers' Group Aiding Needy Law School Scholars at U.W.*, CAPITAL TIMES, Oct. 28, 1963, at 1. I am indebted to Chris Richards of the University of Wisconsin Foundation for this reference.

9. THEODORE CAPLOW ET AL., THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000, at 30–31 (2001).

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for acquiescing to a maldistribution of their services that fortified powerful interests.[10] In his highly regarded 1976 history, *Unequal Justice*, Jerold Auerbach condemned the elite of the legal profession for their subservience to the powerful and privileged and for its failure to implement equal justice.[11] That year at the American Bar Association (ABA) convention, Secretary of Transportation William T. Coleman, Jr. "accused the organized bar . . . of having 'failed the American public' by turning its back on people unable to afford high-priced lawyers."[12] He further asserted, "'You need someone who can represent the general interest.'"[13] In response, Chesterfield Smith, a former ABA president, called for "a system of dues checkoff for A.B.A. members, with a portion of their dues going to public interest law; and a change in the profession's ethical canons to require at least some public interest work by each lawyer."[14] The "public-interest-law"[15] and "access-to-justice"[16] movements, which sought to give voice to unrepresentative groups and to enlarge the modalities for securing justice, called for lawyers to embrace these neglected responsibilities.[17]

The flavor of the public justice critique might be summed up by two old stories that decry the disjunction of law and justice, a condition for which lawyers and judges are responsible:

> *Defendant (in a loud voice): "Justice! Justice! I demand justice!"*
>
> *Judge: "Silence! The defendant will please remember that he is in a courtroom."*[18]

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10. Ralph Nader, *Overview* to VERDICTS ON LAWYERS, at vii–viii (Ralph Nader & Mark Green eds., 1976).

11. *See generally* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (Oxford Univ. Press 1992) (1976).

12. Lesley Oelsner, *Coleman Asserts Bar Fails Public*, N.Y. TIMES, Aug. 8, 1976, at 25 (quoting William T. Coleman, Secretary of Transportation).

13. *Id.*

14. *Id.* (reporting former ABA president Chesterfield Smith's suggestions).

15. *See generally* BURTON A. WEISBROD ET AL., PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS (1978) (providing an economic and institutional analysis of the public interest movement); COUNCIL FOR PUB. INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA (1976) (discussing potential approaches to funding public interest law).

16. *See generally* ACCESS TO JUSTICE (Mauro Cappelletti ed., 1978); ACCESS TO JUSTICE AND THE WELFARE SYSTEM (Mauro Cappelletti ed., 1981).

17. For additional examples of this public justice critique, see Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 638–43 (1994).

18. *Cf.* BILL JOHNSTON'S JOY BOOK 237 (William T. Johnston ed., 1922); EVAN ESAR, ESAR'S JOKE DICTIONARY 106–07 (1945); PETER V. MACDONALD, RETURN OF THE COURT JESTERS: BACK TO THE BAR FOR MORE OF THE FUNNIEST STORIES FROM CANADA'S COURTS 6 (1990) (containing a version of the story as an anecdote about a 1976 U.S. criminal case). A related and much-repeated story depicts Justice Oliver Wendell Holmes rejecting a well-wisher's urging to "do justice" by saying that that is not his job or, alternatively, admonishing a young lawyer: "Young man . . . never forget that this is not a court of justice, it is a court of law."

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> *A businessman has to leave town before a lawsuit brought against him by a competitor was ended. So he told his lawyer to wire him the outcome as soon as it was over. Several days later he received a telegram: "Justice has triumphed." He hastened to wire back immediately: "Appeal at once!"*[19]

Two events can serve as high water marks of the public justice critique. In 1979, President Jimmy Carter took the occasion of the One Hundredth Anniversary Dinner of the Los Angeles Bar Association to deliver a withering critique of the legal system.[20] He declared that legal services were, more than any resource in our society, "wastefully [and] unfairly distributed."[21] Lawyers were particularly to blame for failing to make justice "blind to rank, power and position."[22] He deplored that "lawyers of great influence and prestige led the fight against civil rights and economic justice."[23] Devoted to the service of dominant groups, lawyers failed to discharge their "heavy obligation to serve the ends of true justice."[24] He called upon them to release "the enormous potential for good within an aroused legal profession."[25] In short, lawyers had fallen woefully short of their calling to be votaries of justice in an imperfect world. He called on them to embrace the theme of "Access to Justice," which was the official theme of the American Bar Association for 1978.[26] Although the tones were critical, the song was one of optimism and hope: rededication to lawyers' high calling combined with institutional redesign could vindicate the promise of connecting law to the pursuit of a just society.[27] Needless to say, the

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19. ESAR, *supra* note 18, at 253. This story, which is known throughout the English-speaking world, has been in circulation since the early years of the twentieth century.

20. President James E. Carter, Address at the 100th Anniversary Dinner of the Los Angeles Bar Association (May 4, 1978), *in President Carter's Attack on Lawyers, President Spann's Response, and Chief Justice Burger's Remarks*, 64 A.B.A. J. 840 (1978) [hereinafter *Carter's Speech Against Lawyers*]. Additional details on the Carter speech and the response to it may be found in Galanter, *supra* note 17, at 638–40.

21. *Carter's Speech Against Lawyers*, *supra* note 20, at 842.

22. *Id.* at 843.

23. *Id.* at 842.

24. *Id.*

25. *Id.*

26. *Id.* at 844.

27. *Id.* at 846. Carter's address is the direct descendant of an unheralded Law Day speech at the University of Georgia School of Law, delivered four years earlier, when he was Governor of Georgia. In that speech, he traced his understanding about justice and "what's right and wrong in this society" to reading Reinhold Neibuhr and listening to the songs of Bob Dylan. Governor James E. Carter, Address at the University of Georgia School of Law (May 4, 1974), *in* ADDRESSES OF JIMMY CARTER (JAMES EARL CARTER), GOVERNOR OF GEORGIA, 1971–1975, at 261 (Ben W. Fortson, Jr. ed., 1975). Cataloging the injustices of the legal system, he chastised lawyers for tolerating injustice, lacking fire to improve the system of which they were a part, avoiding the obligation to "restore equity and justice and to preserve or enhance it," and being distracted from the pursuit of justice into self-serving concern for their own well-being and authority. *Id.* He closed with the reflection, echoed four years later, that the state could be transformed if the body of attorneys were deeply committed to abolishing the system's inequities. *Id.* Apparently the speech

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President's observations did not get a warm reception from the bar.[28] Likewise, the general press was quite unfavorable.[29] Nonetheless, the President's criticism of the bar met with general public approval.[30]

A second culminating event of the public justice critique was the work of the Kutak Commission, established in 1977 to revise the rules of ethical conduct for lawyers.[31] The major themes of the new model rules proposed by the Commission were enlargement of the public duties of lawyers and limitation of their license for adversary combat.[32] The Commission sought to accentuate the duties of lawyers that transcended their responsibilities to clients—for example, by limiting confidentiality to enable lawyers to blow the whistle on client wrongdoing, imposing a duty of fairness in negotiations by requiring disclosure of material facts, and requiring lawyers to devote a portion of their time to *pro bono publico* work.[33] The Commission's proposals aroused fierce opposition from various sectors of the bar and were vitiated at a series of ABA meetings in 1982 and 1983.[34]

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was from notes, so there is no original text available. The version that appears in his book of addresses was apparently reconstructed from a tape recording.

28. Tom Goldstein, *Carter's Attack on Lawyers*, N.Y. TIMES, May 6, 1978, at 11 ("[L]eading lawyers around the country reacted with anger, bitterness, frustration and sadness yesterday to President Carter's assertion that the legal profession has been an impediment to social justice."). On behalf of the American Bar Association, its president, William B. Spann, responded that "we disagree sharply with the implications of the president's remarks" and accused him of "tak[ing] the popular course of attacking the professions" to distract attention from foreign problems, inflation, and his political vulnerability. *Carter's Speech Against Lawyers*, *supra* note 20, at 841. In Spann's view, Carter's speech was a simplistic distraction from the ceaseless and constructive efforts of lawyers to solve the problems of the justice system. *Id. See also* 124 CONG. REC. 13,939 (1978) (statement of Rep. Kastenmeier) (characterizing the President's remarks, in part, as harsh and inaccurate).

29. *See, e.g.*, *The Law's Delay*, WALL ST. J., May 10, 1978, at 24 (noting that since "Washington itself has become the fountainhead of unnecessary laws and litigation," the President should spend "less time lashing out at lawyers in general and more time asking the government's lawyers just what it is they are trying to do"); *Mr. Carter's Class Struggle*, WASH. POST, May 7, 1978, at C6 (dismissing the President's remarks as "unfocused resentment").

30. Two-thirds of a national sample of registered voters polled by Yankelovich, Skelly, and White thought the President's criticism of the legal profession was fair. Roper Ctr., Public Opinion Online, *Roper Report 78-6*, *at* http://www.ropercenter.uconn.edu (1978). A Roper poll of a national sample of adults found that 52% of people thought his criticisms were justified and another 16% thought them partly justified. *Id.* The public was equally critical of doctors, whom Carter criticized in responding to questions the day after his lawyer speech. *Id.*

31. The American Bar Association's Special Commission on Evaluation of Professional Standards was known as the Kutak Commission. The impetus for a new ethics code came in part from the damage to the bar's public image occasioned by Watergate. *See* William B. Spann, Jr., *The Legal Profession Needs a New Code of Ethics*, BAR LEADER, Nov.–Dec. 1977, at 2 (relating the ABA President's charge to the Kutak Commission).

32. Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 696 (1989).

33. *Id.*

34. Gerald J. Clark, *Fear and Loathing in New Orleans: The Sorry Fate of the Kutak Commission's Rules*, 17 SUFFOLK U. L. REV. 79, 85 (1983). However, Ted Schneyer points out that, although a number of the Commission's major innovations were jettisoned, the model rules in many ways accommodated elements of the public justice critique:

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In retrospect, the Kutak Commission and the Carter speech were the valedictories of that twenty-year legal summer—of growth, experiment, dismantling of formalism, and the enlargement of remedy and accountability. By the time these two events occurred, a decisive turn was already well underway to a new and enduring critique that was soon to be dominant.

II. The Rise of the "Too-Much-Law" Critique

By 1960, there were occasional newspaper editorials grousing at the mounting number of unjustified lawsuits, the reckless generosity of juries, and the "lawsuit happy" public.[35] By 1965, insurance-defense lawyers warned of a "law explosion."[36] But the prevalent worry about law among the establishment was about inefficient, corrupt, and overloaded courts. The problem, according to a 1961 *Fortune* survey of "The Crisis in the Courts," was not innovations in the law or expansion of its scope, but the failure of the courts to organize themselves with modern efficiency.[37] Most lawyers, the author of this survey scoffed, had an approach to the courts that "if carried over into medicine, would result in considerable reverence for treatment by leech and mustard plaster.... [T]he court blight is serious and reforms are overdue."[38] The law's problems were lethargy and inefficiency, rather than overreaching or innovation. The author asserted:

> Law is the authentic idiom of the American people in the struggle for the world, carrying within its wisdom much of the morality, the

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> They... invite lawyers... to take their own values into account. They permit lawyers to refuse on moral grounds to represent would-be clients; authorize lawyers to "limit the objectives" of representation by excluding client aims they find "repugnant or imprudent"[] and in a remarkable concession to lawyers' sensibilities allow them to withdraw whenever "a client insists upon pursuing an objective the lawyer considers repugnant or imprudent"—even if the client's interest will be "adversely affected" by the withdrawal!

Schneyer, *supra* note 32, at 736 (footnotes omitted).

35. *We're Suing Ourselves to Death*, ST. PETERSBURG TIMES, Mar. 5, 1960, *reprinted in* 1 FOR THE DEFENSE 18, 19 (Int'l Ass'n of Ins. Counsel ed., 1960).

36. DEFENSE RESEARCH INSTITUTE, THE INJURY INDUSTRY AND THE LAW EXPLOSION 3 (1965). The "law explosion" was seen as a problem largely specific to tort cases and one for which "[m]uch of the responsibility... must be charged against the national organization of attorneys who represent claimants in personal injury cases and receive their remuneration from 'contingent fees.'" The organization referred to is the Association of Trial Lawyers of America (ATLA), founded as the National Association of Claimants' Compensation Attorneys in 1946. The name change occurred in 1964. The Defense Research Institute, a counterpart group of insurance defense attorneys, was founded in 1960.

37. Louis Banks, *The Crisis in the Courts*, FORTUNE, Dec. 1961, at 86. This assertion matched a concern of public justice critics about the deleterious effects of delay and inefficiency in the courts. For years, Chief Justice Warren had been regaling bar audiences with speeches expressing his distress at the shortcoming of the courts' diminishing respect for the law. For example, "[T]he delay and the choking congestion in the federal courts today have created a crucial problem for constitutional government in the United States. It is so chronically prevalent that it is compromising the quantity and quality of justice available to the individual citizen." Earl Warren, *Delay and Congestion in the Federal Courts*, 42 J. AM. JUDICATURE SOC'Y 6, 6–7 (1958).

38. Banks, *supra* note 37, at 190, 198.

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> charity, the restraint and experience in the nation's heritage—all waiting for application to specific new cases. The great task is to bend and fashion the workings of justice to fit the nation's—and the world's—newest needs.[39]

In terms not far removed from the heroic expectations of law implicit in the public justice critique, he concluded that the nation is "hungry for the leadership of law," and if the courts succeed in reforming themselves, "they can be the principal institution that gives point to American national development."[40]

The theme of institutional deficiency reappeared in the American Assembly's 1965 symposium on *The Courts, the Public, and the Law Explosion*.[41] In his introductory essay to the ensuing publication, Professor Harry Jones attributed the "tide of litigation" confronting the courts to population growth, technological change, more government regulation, recognition of new rights, and the inclusion of previously unrecognized social interests.[42] Like the *Fortune* writer of a few years earlier, Jones viewed the problem, not as inappropriate demands by the public, but as inefficient organization of a vital public service.[43]

In 1970, Justice Macklin Fleming of the California Court of Appeals described a "litigation explosion" that threatened to overwhelm existing legal institutions.[44] Like the *Fortune* author and Professor Jones, he saw this "explosion" as a call to reorganize the machinery of the courts and to rationalize their ways of doing business. That same year, the new Chief Justice of the United States, Warren Burger, instituted what became an annual "state of the judiciary" address at the American Bar Association's annual meeting. Like earlier critics, he worried about deficiencies in the machinery of justice: "In the supermarket age we are trying to operate the courts with crackerbarrel corner grocery methods and equipment—vintage 1900."[45]

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39. *Id.* at 198.

40. *Id.*

41. *See* THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION (Harry W. Jones ed., 1965) (compiling essays written by speakers at the symposium).

42. Harry W. Jones, *Introduction* to THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 1, 2 (Harry W. Jones ed., 1965).

43. *Id.*

44. Macklin Fleming, *Court Survival in the Litigation Explosion*, 54 J. JUDICATURE 109, 109 (1970). This seems to be the first appearance in print of the term "litigation explosion." Justice Fleming reports that his article is adapted from an address delivered at the World Assembly of Judges in Bangkok on September 10, 1969, so the phrase may have been coined a bit earlier. *Id.* A host of similar expressions appeared earlier. *See* Jones, *supra* note 42, at 2 (using the term "law explosion" in 1965); Eleanore Carruth, *The "Legal Explosion" Has Left Business Shell-Shocked*, FORTUNE, Apr. 1973, at 65 (using the term "legal explosion"); Ian R. Heap, *The Liability Explosion*, J. INS., July–Aug. 1975, at 10 (using the term "liability explosion"); *Lawsuit Explosion: Where's It Heading?*, NAT'L UNDERWRITER, Sept. 15, 1978 (using the term "lawsuit explosion").

45. Warren Burger, *The State of the Judiciary—1970*, 56 A.B.A. J. 929, 929 (1970).

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But within a few years, a large section of the legal elite, including the Chief Justice, embraced a much bleaker and more ominous vision of the American legal system. Chief Justice Burger decried "legal activism" by judges and lawyers.[46] By 1973, the Chief Justice worried about a "litigation explosion."[47] That year, *Fortune* returned for another look at the law—this time at "The 'Legal Explosion' [that] Has Left Business Shell-Shocked."[48] The author of this article described a "new era in corporate law [that] began in 1966," an era in which the "big problem" is "the enormously increased legal *exposure*."[49] The arrival of "consumerism, environmentalism, and other forms of Naderism" and increasing litigiousness of Americans[50] threaten to bring about a "society in which business is endlessly besieged by legal problems."[51] The "five areas" that the author found to be "matters of serious and widespread concern" are "antitrust, securities and stockholder matters, consumer, environment, and fair employment practices."[52] Surprisingly, to one looking over this author's shoulder from thirty years later, the list does not include torts (except to the extent that that topic may be represented by consumerism, environmental, or fair-employment issues).

It was precisely tort liability that aroused and alarmed others. *Business Week* reported that "[a]lmost to a man, insurance executives think that the tort system is running amok."[53] A medical malpractice insurance crisis in 1972 through 1974 led many state legislatures to curtail remedies; a crisis in products liability insurance in 1974 through 1976 stirred wide sections of the business and insurance communities.[54] Schemes for cutting back on remedies abounded. The term "tort reform" became current in 1976.[55] Insurers sponsored full-page advertisements in national publications warning the public about the infirmities and the dangers of the law.[56]

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46. *See Top of the News: Red Light on Litigation*, TRIAL, July–Aug. 1971, at 50 (describing Justice Burger's pessimistic comments about legal activism and the future role of litigation at a New York meeting of the American Bar Association).

47. Warren Burger, *The State of the Judiciary—1972*, 58 A.B.A. J. 1049, 1049 (1970) ("At every level, the number of cases filed and the number tried and disposed of have undergone an explosive increase in the past ten years . . . . This is an unprecedented explosion of litigation.").

48. Carruth, *supra* note 44, at 65.

49. *Id.* at 66.

50. *Id.* at 65.

51. *Id.* at 157.

52. *Id.* at 68.

53. *The Overload on the Nation's Insurance System*, BUS. WK., Sept. 6, 1976, at 48.

54. The *Journal of Insurance* devoted its September–October 1978 publication to a special issue on litigation, consisting of reprints of opinion pieces from newspapers and magazines with titles like "Lawsuit Fever," "The Sue-Syndrome is Spreading," "A Surfeit of Lawsuits," "The Law Gone Crazy," and "The Mugging of American Industry." *See generally* J. INS., Sept.–Oct. 1978.

55. The earliest items turned up by a Lexis-Nexis search for the term "tort reform" are *The Overload of the Nation's Insurance System*, BUS. WK., Sept. 7, 1976, at 46, and *Generous Juries Cost You a Bundle*, CHEMICAL WK., Nov. 24, 1976, at 21.

56. The impact of these advertisements on juries is examined in Elizabeth Loftus, *Insurance Advertising and Jury Awards*, 65 A.B.A. J. 68 (1979).

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FIGURE 2.

SOURCE.—WALL ST. J., Dec. 9, 1976, at 15.

The concerns of legal and business elites took institutional form in the establishment of conservative public interest law firms (starting with the Pacific Legal Foundation in 1973) that "arrived on the scene at about the same time that 'New Right' think tanks, institutes, and foundations were

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being founded."[57] Critics accused the courts of overreaching and constituting an "imperial judiciary."[58]

In 1976, Chief Justice Burger organized a conference on "the Causes of Popular Dissatisfaction with the Administration of Justice," held on the seventieth anniversary of Roscoe Pound's celebrated address on that topic.[59] It was attended by the Attorney General and Solicitor General, prominent judges, distinguished practitioners, and influential legal academics. Speakers emphasized the burden placed on the courts, especially federal courts, by an increased caseload and ever-expanding demands for court intervention to address social problems. There was a general consensus that the courts should scale back their excursions into problem solving and that their quantitative burdens should be addressed by eliminating the diversity jurisdiction of the federal courts, by abandoning the use of the jury in civil cases, and by promoting the use of alternative dispute resolution.[60]

To appreciate the sense of surfeit experienced by the senior lawyers of the time, we should recall that the inhabitants of the legal world rarely carry clear ideas about the quantitative parameters of legal activity. They do have a baseline sense of what is normal and expectable in terms of litigation, incomes, and other dimensions of legal work. This picture is formed, I submit, in our early exposure to the law, as framed by the wisdom of our teachers and seniors. So the experience of the decades preceding our entry into active professional life tends to form a baseline from which we measure developments. Earlier cohorts of lawyers experienced the lower rate of litigation in the 1930s and 1940s against expectations acquired during their professionally formative years. Similarly, the senior lawyers of the 1970s and 1980s, who attended law school from the 1940s through the 1960s, formed expectations about the amount and scale of litigation that reflected the preceding "trough" period. Unsurprisingly, many felt engulfed in an explosion or flood of litigation.[61]

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57. NAN ARON, LIBERTY AND JUSTICE FOR ALL: PUBLIC INTEREST LAW IN THE 1980S AND BEYOND 74 (1989); Ann Southworth, Lawyer Entreprenuers and the Creation of an Infrastructure for Conservative Advocacy (May 30, 2002) (unpublished manuscript, on file with author).

58. Nathan Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INT. L. REP. 104 (1975); Ernest van den Haag, *The Growth of the Imperial Judiciary*, 4 POL'Y REV. 57 (1978); *cf.* Stuart Taylor, Jr., *Attorney General Outlines Campaign to Rein in Courts*, N.Y. TIMES, Oct. 30, 1981, at 1.

59. The proceedings of the conference, known as the "Pound Conference," are published at 70 F.R.D. 79 (1976). Needless to say, there was little to connect the criticisms voiced there with "popular dissatisfaction." Unlike more recent meetings by legal establishment groups that have tried to consult public opinion by surveys, focus groups, or representation of various stakeholder groups, the participants of the Pound Conference ascertained public opinion by consulting their own experience and insights.

60. A recent symposium commends the Pound Conference as the "defining event" that "shape[d] and frame[d] the ADR movement." L. Camille Hébert, *Introduction—The Impact of Mediation: 25 Years After the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 524, 524 (2002).

61. For a discussion on the arrival and development of the litigation-explosion imagery, see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think*

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On a more instrumental level than the Pound Conference, agendas of tort reform were being formulated.[62] These agendas included not only changes in rules, such as ceilings on damages and abolition of joint and several liability, but also fundamental structural changes like the abandonment of the civil jury and the replacement of adjudication with arbitration and other alternative methods of dispute resolution.[63] Although the replacement of adjudication with arbitration had been frequently proposed earlier, the notion that there was an array of modalities for addressing disputes, with varying suitability to different kinds of disputes, gained new and widespread acceptance.[64] The tort reform proponents shared with elite lawyers and judges a sense that traditional adversarial adjudication was not the exclusive, and frequently not the optimal, method to resolve many of the disputes being brought to the courts.

The recoil against enlarged accountability filtered into legal education. The rise of "law and economics" and generous funding by right wing foundations, notably the John M. Olin Foundation, encouraged an academic counterpart to the shift from "not enough justice" to "too much law."[65] Legal academics became less confident in the ability of legal reform to transform society. Influential torts casebooks tracked the rhetoric of tort reform.[66] But business spokesmen and conservative ideologues were not the only people who were dubious about the expanded reach of the law. A spate of articles by liberal academics decried excessive legalization and litigation.[67] Skeptical

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We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993) [hereinafter Galanter, *News from Nowhere*]; Galanter, *supra* note 17; and Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717 (1998) [hereinafter Galanter, *An Oil Strike in Hell*].

62. For example, by the following year, the Insurance Information Institute produced a pamphlet comparing in tabular form eleven separate tort reform proposals. INSURANCE INFORMATION INSTITUTE, THE PRODUCT LIABILITY PROBLEM: PROPOSALS FOR SOLUTIONS THROUGH TORT REFORM (1977).

63. Although several of the Pound Conference speakers used the words "alternative dispute resolution," it was not used as a fixed noun phrase until several years later.

64. One source demonstrating such acceptance was Professor Frank Sanders's very influential paper at the Pound Conference. Frank Sanders, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976). A recent account credits the Pound Conference as making "the beginning of a concerted effort to stimulate court-connected mediation programs . . . ." Dorthy J. Della Noce, *Mediation Theory and Policy: The Legacy of the Pound Conference*, 17 OHIO ST. J. ON DISP. RESOL. 545, 545 (2002).

65. On the funding of law-and-economics and conservative initiatives in the legal academy, see Michael L. Rustad & Thomas H. Koenig, Taming the Tort Monster: Ideology and Utopia in the American Civil Justice System (Mar. 6, 2002) (unpublished manuscript, on file with the Texas Law Review).

66. Walter Probert, *The Politics of Torts Casebooks: Jurisprudence Reductus*, 69 TEXAS L. REV. 1233, 1247–48 (1991).

67. *See, e.g.*, Jerold S. Auerbach, *A Plague of Lawyers*, HARPERS, Oct. 1976, at 37; Thomas Ehrlich, *Legal Pollution*, N.Y. TIMES MAG., Feb. 8, 1976, at 17. For later outcroppings, see

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social scientists suspected that courts might not be capable of meeting the enlarged responsibilities that they had taken on.[68] At the same time, others who had been passionately invested in the courts as agents of social transformation began to express doubts not only about their capacities but also about whether law provided the leverage for genuine transformation of capitalist society or was merely a mask for oppression. In the spring of 1977, just a year after Justice Burger's Pound Conference, the Conference for Critical Legal Studies held its first meeting.[69]

The misgivings of the legal elite—right, center, and left—and the complaints of insurance and defense interests were echoed in the popular media. The year 1977 opened with a *Newsweek* cover story entitled *Too Much Law?*[70] followed some months later by a *Business Week* cover story entitled *The Chilling Impact of Litigation*.[71] The discrete concerns with medical malpractice, products liability, judicial activism, and excessive litigation were increasingly seen as aspects of a single, more general problem. The chairman and president of the Fireman's Fund Insurance Companies declared, "We, the American people, are headed toward nothing less than the economic breakdown of our society" and that "a revolution is in order."[72] Laurence H. Silberman, later to become a federal judge, asked, "Will Lawyering Strangle Democratic Capitalism?"[73] He detailed how "the legal process, because of its unbridled growth, has become a cancer which threatens the vitality of our forms of capitalism and democracy"[74] and "the harmful impact of an ever expanding legal process on our society."[75] The profligate creation of new individual rights was weakening the "intermediate institutions [such as families, churches, schools, corporations, labor unions, and political parties that] are, without question, indispensable pillars of a pluralistic democracy."[76] In addition, "litigation of all kinds [was] becoming

Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767 (1977); Laurence Tribe, *Too Much Law, Too Little Justice: An Argument for Delegalizing America*, ATLANTIC MONTHLY, July 1979, at 25.

68. *See, e.g.*, DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY 298 (1977) ("It may be the limited scope of consultation, or the inability of our courts to see how their policies work out, or the difficulty of dealing with unusually fluid or broad problems in an episodic and narrow framework, that stamps the judicial process as more limited for some policy problems than other institutions are.").

69. John H. Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 396 (1984).

70. Jerrold K. Footlick, *Too Much Law?*, NEWSWEEK, Jan. 10, 1977, at 42.

71. *The Chilling Impact of Litigation*, BUS. WK., June 6, 1977, at 58.

72. Myron Du Bain, The Next American Revolution, Address at the Annual Meeting of the Western Association of Insurance Brokers (Jan. 20, 1976).

73. Laurence H. Silberman, *Will Lawyering Strangle Democratic Capitalism?*, REGULATION, Mar.–Apr. 1978, at 15.

74. *Id.*

75. *Id.* at 44.

76. *Id.* at 18.

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a major structural impediment to our economy."[77] "Our bloated lawyer population," Silberman speculated, "may confer a competitive advantage on our economic rivals in Japan and Europe."[78] These claims up the ante; they argue that the expansion of litigation is not a parochial concern of certain industries or institutions, but a shared vital general interest.[79] Such claims present lawyers as dangerous parasites in the national bloodstream. According to the executive vice president of the Insurance Counselors Association of Texas:

> [E]ach year at the beginning of June, 100,000 law school graduates with visions of faultily-designed football helmets dancing in their heads, descend upon American commerce and industry like a plague of locusts.
>
> [L]ike the '49ers of the California Gold Rush, lawyer upon lawyer, pick, axe, and contingency agreement in hand, is chipping away at the likes of General Motors, Exxon, and AMF. The Fortune 500 giants are in the process of being reduced to the Unfortunate 500.[80]

A decade later, the lawyers-as-parasites idea reached for academic respectability when a University of Texas finance professor proclaimed that countries with the highest lawyer populations suffered from impaired economic growth and that each American lawyer decreased the output of goods and services by one million dollars annually.[81] Weak data, peculiar

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77. *Id.* at 21.

78. *Id.* Here, Silberman anticipates an anxiety about the excessive number of lawyers in the United States that blossomed over the following decade and came to fruition in Dan Quayle's 1991 polemical question about why the United States had 70% of the world's lawyers. For an analysis of this legend, see Galanter, *News from Nowhere*, *supra* note 61, at 77–81.

79. This litigation-as-social-pathology theme came to full flower in the second products liability insurance crisis in 1985–1986, which was followed by the appearance of the canonical antilitigation texts—PETER W. HUBER, LIABILITY (1988), and WALTER K. OLSON, THE LITIGATION EXPLOSION (1991)—both funded by the Manhattan Institute. Along the way, this theme animated tendentious reports from the Department of Justice. *See* TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 1–2 (1986) (describing "in detail the significant problems many businesses, professionals and municipalities are having obtaining liability insurance" and asserting that "developments in tort law are a major cause for the sharp premium increases"). For the report from the first President Bush's Council on Competitiveness, see PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991).

80. Steven G. Hacker, *An Abundance of Lawyers*, NAT'L UNDERWRITER, Jan. 20, 1978, at 37. Unsurprisingly, this is another example of lawyers' innumeracy. Less than forty thousand new lawyers were admitted to the bar in 1978. ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1994, at 67 (Rick L. Morgan ed., 1994).

81. STEPHEN P. MAGEE ET AL., BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM 111–21 (1989). McGee's methods and findings are critiqued by Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEXAS L. REV. 645 (1992), and Charles R. Epp, *Do Lawyers Impair Economic Growth?*, 17

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research design, and absence of controls for other influence on economic growth led to the rapid demolition of this theory, but not before it had been adopted as part of the campaign to diminish the civil justice system.

One manifestation of the recasting of lawyers as enemies of order and prosperity is the arrival after 1980 of a swarm of nasty jokes about lawyers. One that was prominently attached to lawyers in the 1980s gives the flavor of the animus that accompanies the too-much-law critique:

> *A doctor, a lawyer, and an architect were arguing about who had the smartest dog. They decided to settle the issue by getting all the dogs together and seeing whose could perform the most impressive feat. "Okay, Sliderule," ordered the architect, and the dog trotted over to a table covered with toothpicks and in four minutes constructed a complete scale model of the Cathedral at Chartres. The architect slipped Sliderule a cookie, and everyone agreed that it was a pretty impressive performance. "Hit it, Sawbones," commanded the doctor. Sawbones spotted a pregnant cow, tipped it over, and quickly performed an emergency Caesarian. Three minutes later the proud mother of a healthy little heifer was all sewed up and doing fine. Not bad, conceded the onlookers, and Sawbones got a cookie from the doctor. "Your turn, Loophole," said the lawyer. Over went Loophole, smashed the cathedral, mauled the calf, screwed the other two dogs, took their cookies, and went out to lunch.*[82]

Mirroring their masters, the other dogs are constructive and helpful; the lawyer's dog is destructive and predatory. He not only contributes nothing but also appropriates the others' deserved rewards and violates them "personally." The dog joke captures the intense indignation of professionals and business people who feel attacked, hemmed in, and overcharged by lawyers. It reflects resentment of the emergence of medical malpractice, products liability, civil rights, wrongful discharge, and other sorts of litigation that expose America's managers and authorities to unwanted and unwarranted accountability. The dog joke paints the lawyer's predation on a wider canvas: it is not just a matter of victimizing individual clients or opponents but also of destroying social assets and unraveling the social fabric.

III. The Information Deficit

When the too-much-law critique gained the ascendancy in the late 1970s, what courts, litigants, and lawyers were actually doing was only

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LAW & SOC. INQUIRY 585 (1992). For an account of the political use of Magee's theory and a summary of the critique, see Galanter, *News from Nowhere*, *supra* note 61, at 81–83.

82. Adapted from BLANCHE KNOTT, TRULY TASTELESS LAWYER JOKES 4–5 (1990). A detailed account of this joke may be found in MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (forthcoming 2003).

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dimly known. There was no data at all about litigation in state courts until the early 1980s, so unsurprisingly, available federal court figures were overinterpreted as well as underanalyzed.[83] In this low-information environment, misinformation flourished. For example, from the late 1960s, when concern about growing products liability exposure agitated defendants and insurers, people started estimating the number of products liability cases being filed. The numbers kept escalating, so that by the time of the products liability-insurance crisis of the mid-1970s, it was "known" that the number of products liability cases had risen from fifty thousand in 1963 to one million in 1975.[84] In fact, there were probably not much more than one million products liability suits in the entire history of the United States prior to 1975 and probably fewer than twenty thousand filed in that year.[85]

Only in the early 1980s did sizable bodies of reliable information about litigation patterns become available. The first of the RAND Institute for Civil Justice studies of jury verdicts was published in 1982,[86] and findings from the University of Wisconsin Civil Litigation Research Project became available at about the same time.[87] The National Center for State Courts published the first reliable figures on litigation in the state courts in 1986.[88]

The flow of quantitative information on litigation patterns was part of a wider opening of information about the legal world. The demise of the

83. The tendentious reading of federal court statistics is traced in Marc Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921.

84. For example, one article posited that "[p]roducts liability cases [have] leaped tenfold in the [decade prior to publication] to an estimated million lawsuits this year." *Who Pays?*, FORBES, Aug. 1, 1976, at 57. Another stated, "There are a million and a half [products liability] suits filed each year now. In 1965 the number was around 50,000, and 20 years ago they were rare indeed." *The Urge to Sue*, ST. PAUL PIONEER PRESS, Aug. 18, 1976, *reprinted in Impact on Product Liability: Hearing Before the Select Comm. on Small Bus.*, 94th Cong. 12 (1976).

85. The Administrative Office of the U.S. Courts counted 2886 products liability filings in (fiscal) 1975. ADMIN. SERV. OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 218–20 tbl.31 (1975). This may be a slight undercount, since it was only the second year in which this category was counted. There is no comprehensive record of products liability filings in state courts, but observers concur that somewhere from one-quarter to one-third of all products liability cases are filed in federal court. *See, e.g.*, Theodore Eisenberg et al., *Litigation Outcomes in State and Federal Courts: A Statistical Portrait*, 19 SEATTLE U. L. REV. 433, 441 (1996) (showing that federal cases accounted for approximately 25.4% of the total estimated number of products liability jury trials in 1991–92). With every allowance, it seems highly unlikely that there were as many as 20,000 products liability cases filed in 1975.

86. MARK A. PETERSON & GEORGE L. PRIEST, THE CIVIL JURY: TRENDS IN TRIALS AND VERDICTS, COOK COUNTY, ILLINOIS, 1960–1979. The same year saw the appearance of the first balanced (but nonquantitative) account of what was going on in the area of products liability. JETHRO K. LIEBERMAN, THE LITIGIOUS SOCIETY (1981).

87. INST. FOR LEGAL STUDIES, UNIV. OF WISCONSIN-MADISON SCHOOL OF LAW, CIVIL LITIGATION RESEARCH PROJECT, FINAL REPORT (1983); *see also Special Issues on Dispute Processing and Civil Litigation*, 15 LAW & SOC'Y REV. 396 (1980–1981).

88. NAT'L CTR. FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: 1984 ANNUAL REPORT (1986) (presenting data for 1984 and comparing with available data from 1978 and 1981).

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norms forbidding lawyers to talk to reporters in 1977[89] led to the rapid growth of a new kind of legal journalism, embodied in a new generation of trade journals (i.e., *The National Law Journal*, *The American Lawyer*, and various local counterparts) and more constant and intrusive attention from *The New York Times*, *Wall Street Journal*, and other newspapers. Old norms of reticence fell by the wayside. Soon we knew much more about lawyers and their clients, their strategies, and their incomes. We also knew somewhat more about patterns of litigation.

The increased visibility of the legal world reinforced the emerging too-much-law view. The news media portrayed a world of ubiquitous litigation, outlandish claims, and excessive awards. Through the eyes of the press, individual plaintiffs consistently won huge amounts from beleaguered corporate defendants. For example, Steven Garber studied newspaper coverage of verdicts in products liability cases against automobile manufacturers decided from 1985 to 1996.[90] He found that almost three-quarters of those verdicts were in favor of the defendant; and that while newspapers reported just three percent of the defense verdicts, they reported forty-one percent of verdicts for plaintiffs.[91] In other words, a verdict for the plaintiff was twelve times more likely to be reported than a defense verdict. Consequently, in the reports that a conscientious and omnivorous newspaper reader would encounter, some four-fifths would have been of verdicts for plaintiffs—roughly the opposite of the true percentage. Other studies have shown that the amounts won by plaintiffs in newspaper and magazine reports are ten to twenty times as large as the typical run of awards.[92] Notwithstanding occasional efforts to debunk some of the legends about the "litigation explosion," the regular consumer of media reports would be badly misinformed about the number of products liability and medical malpractice cases, the size of jury awards, the incidence of punitive damages, and the regularity with which corporate defendants succeed in defeating individual claimants. Whatever the cause of the skewed coverage, the audience received the reassuring message that David generally manages to best

89. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

90. Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237.

91. *See id.* at 277.

92. Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763 (1995), compared newspaper coverage of personal injury awards in New York with actual awards and discovered even larger discrepancies. In this study, Chase compared stories of jury awards to plaintiffs in two metropolitan dailies, *The New York Times* and *Newsday*, with awards to plaintiffs recorded in the *New York Jury Verdict Reporter* for the six-year period from 1986 through 1992. *Id.* at 772 n.32. Donald S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419, 421–27 (1996), studied coverage of tort issues in five national magazines from 1980 to 1990; the five magazines were *Time*, *Newsweek*, *Fortune*, *Forbes*, and *Business Week*.

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Goliath and the disturbing corollary that undeserving or spurious Davids are thick on the ground.[93]

Lawyers are not immune to the too-much-law lore carried and reinforced by the media. Generally, lawyers' aggregate perceptions about litigation and liability are wide of the mark.[94] In a study comparing South Carolina lawyers', doctors', and legislators' assessments of tort litigation patterns, lawyers overestimated the portion of awards for plaintiffs, and their estimates about the size of awards were only marginally more accurate than other elite respondents.[95] After publication of accurate information about the level of litigation and size of awards, lawyers' responses (along with those of doctors and legislators) did not become appreciably more accurate.[96] An aborted survey by Kritzer and Zemans suggests that many or most attorneys lack systematic information even about their own clients.[97]

IV. The Legacy of the Seventies

The too-much-law critique was in the ascendant before Jimmy Carter and the Kutak Commission unfurled their public justice banners. With the election of Ronald Reagan, "too much law" became the established view in the media and in politics if not in the academy.[98] The recoil against the

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93. *See* Galanter, *An Oil Strike in Hell*, *supra* note 61. On the reporting of the "McDonald's coffee case," see Judith Acks, William Haltom & Michael McCann, Media Coverage of Personal Injury Lawsuits and the Production of Legal Knowledge (unpublished manuscript presented at the Annual Meeting of the Law & Soc'y Ass'n, St. Louis, Mo., May 29–June 1, 1997) (on file with author). They found that their sample included "43 distinct reports of specific jury awards, with a mean of $5,861,097 and a median of $1,750,000, about four and five times the size of the largest mean and median court estimates, respectively, and 14 and 34 times the size of the smallest estimates." *Id.* at 426.

94. *See* Donald R. Songer, *Tort Reform in South Carolina: The Effect of Empirical Research on Elite Perceptions Concerning Jury Verdicts*, 39 S.C. L. REV. 585, 597 (1988) (stating that, according to a recent study in South Carolina, lawyers incorrectly believed that civil litigation had dramatically increased). For a discussion of the deficiencies of lawyer knowledge about jury awards, see Marc Galanter, *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 61, 80–86 (Robert E. Litan ed., 1993). *Cf.* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1262–66 (1997) (noting the credulous acceptance by eminent lawyers, among others, of the legend that three-quarters of EPA rules are challenged in court).

95. Songer, *supra* note 94, at 597.

96. *Id.* at 600.

97. *See* Herbert M. Kritzer & Frances Kahn Zemans, *The Shadow of Punitives: An Unsuccessful Effort to Bring it Into View*, 1998 WIS. L. REV. 157, 164–66.

98. The struggle between the public justice and too-much-law critiques played out in a curious arena called the Council on the Role of Courts, which lasted from 1979 to 1983. The Council was formed as an offshoot of the Carter Administration's Department of Justice, but after the Democrats lost the presidency in 1980, the Council continued with private funding. Its report, COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY: THE FINAL REPORT OF THE COUNCIL ON THE ROLE OF COURTS (Jethro K. Lieberman ed., 1984), depicts the tension between "traditionalists" (who viewed courts as overextended and a scarce resource that must be preserved for those matters that were distinctively amenable to judicial resolution) and "adaptationists" (who thought courts were flexible institutions that could and should adapt to new roles).

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expansion of accountability and remedy flourished on several levels. The managers and authorities of society who found such enlarged accountability onerous and unwonted promoted tort reform and curtailment of remedies and also scorned lawyers. Legal elites who found the system overextended and vulnerable supported constricting intake, managerial judging, and diversion to other forums. These streams converged into a broad consensus that we had "too much law"—not to mention too many lawyers. This view of lawyers and litigation was a part of broader currents of disparagement of government, regulation, taxes, and public goods and an embrace of deregulation and privatization.[99]

Several of the too-much-law themes that took root in the 1970s were subsequently elaborated and have become institutionalized. Among these themes is "litigation as a pathology," which decries litigation as a deadweight loss that endangers social cohesion and economic performance. Another is the "demonization of lawyers," evidenced by a precipitous drop in public esteem and a dramatic change in the amount and tenor of joking about lawyers.[100] Both the amount of litigation and the number of lawyers are overestimated, and lawyers' social contribution is underestimated. A striking feature of these too-much-law accounts is that there is hardly a word about the role of law in providing predictability, protection, and remedy for social and business activity. Law is viewed as entirely negative. Only in the aftermath of the collapse of the Soviet Union has law's positive function in creating the framework for the functioning of market economies and democratic governments become visible.

As law was denigrated, "alternatives" were exalted as entirely beneficent.[101] As a result, ADR is flourishing, not as an enlargement of access to remedy for ordinary people, but as a corporate tactic to manage and confine disputes.[102] Whatever the eventual fate of the current ADR boom,

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99. The too-much-law critique coalesced at the same time as the demise of the rehabilitative ideal in criminal law and the turn to draconian imposition of imprisonment. Prison populations escalated dramatically after 1976, multiplying six times over by the end of the century. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PRISONERS IN STATE AND FEDERAL INSTITUTIONS ON DEC. 31, 1984, at 50 (1987); U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS (2001), *at* http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm (last visited Oct. 21, 2002).

100. The change in joking is examined in my forthcoming book, MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE (forthcoming 2003). While the image of lawyers declined in the news media and in jokes, other spheres of popular culture such as TV drama, movies, and popular novels present law and lawyers more favorably.

101. In his search for a less adversarial "better way," Chief Justice Burger even commended Chinese mediation as "wise and practical." *U.S. Chief Justice Visits Shanghai*, XINHUA GEN. OVERSEAS NEWS SERVICE, Sept. 9, 1981, LEXIS, News & Business Library, Xinhua General Overseas News Service File, Item No. 090825. For a discussion of the coercive character of this mediation, see generally STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 40–70, 217–41 (1999).

102. Lauren B. Edelman & Mark C. Suchman, *When the "Haves" Hold Court: Speculations on the Organizational Internalization of Law*, 33 LAW & SOC'Y REV. 941, 963–64 (1999).

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the acceptance of "process pluralism"—the notion that there are multiple ways to address disputes—seems to have become an enduring feature of the legal landscape.[103]

With filings falling, fewer trials, deregulation and privatization abounding, and a more conservative federal judiciary in place, we might anticipate the triumph of the too-much-law view.[104] But I think that is far too pessimistic. The great flush of corporate misbehavior made public in the wake of the Enron collapse and the perceived abuses of HMOs (leading to sustained insistence on a patients' bill of rights) bring into view the virtue and benefits of law, regulation, and even of litigation. Similarly, the "war against terrorism" has increased reliance on, and confidence in, government and has induced a new appreciation of public goods.

If fortune allows us to pick up the unfinished business that was put on hold by the recoil against law, will it make a difference that we know so much more about how law works? Systematic and cumulative social inquiry into the working of the legal system has been institutionalized. Although the available fund of information is spotty and uneven, there is every indication that the growth of knowledge will accelerate. Of course, we should never underestimate the powers of myth and self-deception to keep pace. A story is told of the distinguished barrister, F. E. Smith, First Lord Birkenhead

> *who, in a very complex matter, when the judge appeared puzzled by his argument, clearly and carefully reviewed its elements in great detail, to which the judge replied, "Counsel, having listened to your account at such great length, I find I am none the wiser." "Quite possible M' Lord," replied counsel, "but surely better informed."*[105]

103. For a definition of process pluralism, see John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 HARV. NEGOT. L. REV. 137, 148–49 (2000).

104. For example, from 1990 to 2000, filings of diversity cases in the federal district courts fell from 57,183 to 48,626, a decrease of 15%. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, at tbl.C-2 (2000).

Available data from state courts suggest a similar decrease there. In the 30 states that counted torts filings separately, there was a 10% drop from 1991 to 2000. In the 23 states that counted contracts filings separately, there was an 8% drop over that period. BRIAN J. OSTRAM ET AL., EXAMINING THE WORK OF THE STATE COURTS 2001, at 26, 31 (2001).

From 1990 to 2000, civil trials in the federal district courts fell from 9263 to 5780, a decrease of 37%. OFFICE OF THE U.S. COURTS, *supra*, at tbl.C-4.

105. This story has been printed in many versions. The earliest known to me is KENNETH EDWARDS, I WISH I'D SAID THAT! 23 (1976).

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