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## AUTHORITY IN THE DOCK

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### INTRODUCTION

A way of examining the current "litigation explosion" is to consider the kinds of cases and legal issues that litigation now involves and compare them with what litigation used to involve fifty or one hundred years ago. Instead of inquiring only whether there is relatively more litigation today in quantitative terms, our inquiry can address the social and political characteristics of what might be called the "new litigation." Such an inquiry can consider not only the types of conduct directly involved but also changes in substantive law that emerge from litigation, the impact of these changes in the law on behavior patterns in the community at large, the relationship between legal norms and behavior patterns, and the effects on the community's system of authority considered as a whole.

Taking this approach is a tall order when considered as a project for systematic research. Indeed, considered as such in its full scope, the inquiry will be impossible as a single project or organized series of projects. Available information relevant to these issues is fragmentary, often dispersed into inaccessible repositories and subsumed in categories too diffuse and too undifferentiated to permit direct analysis along the lines suggested. So difficult is it to get hold of the necessary information that some have debated whether there actually is a "litigation explosion."<sup>1</sup> Nevertheless, suggestive studies have already been accomplished along these suggested lines.

For ten years, the Institute for Civil Justice of the RAND Corporation, for example, has been carefully analyzing patterns of contemporary jury verdicts in litigation. Through such labors, it has been able to identify apparently significant variables that determine the number of suits brought as well as their outcomes.<sup>2</sup> Stanton Wheeler and his associates have investigated

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<sup>1</sup> Compare Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 17-28 (1986) (arguing that increases in federal litigation are concentrated in particular areas, such as social security and products liability litigation, and are a reaction to "calculated" official policy rather than a rash of low-value claims) and COUNCIL ON THE ROLE OF COURTS, *THE ROLE OF COURTS IN AMERICAN SOCIETY* (J. Lieberman ed. 1984) (recognizing a marked increase in cases filed over the past decade but declining to classify it as an explosive or similarly severe) with R. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 55-79 (1985) (explicitly finding a litigation explosion since the 1960s and employing numerous categories of statistics to analyze this dramatic increase).

<sup>2</sup> See D. HENSLER, M. VAIANA, J. KAKALIK & M. PETERSON, *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* (1987). This study classified tort

long-term patterns of appellate litigation in state courts that provide illuminating background for assessing the present "crisis."<sup>3</sup> In addition, Lawrence Friedman's comparisons of contemporary trial dockets with those of a century ago indicate, among other things, the radical increase of criminal litigation in the present day.<sup>4</sup> This finding suggests that it is a mistake to consider civil and criminal litigation in isolation from each other, although such a bifurcated perspective is conventional. But these investigations are only beginnings.

Because we do not have studies of this quality adequate to understand the character of the present-day "litigation explosion," we are necessarily relegated to fashioning hypotheses. The observations that follow are intended to be as such, with recognition that it is difficult to maintain the intellectual and social discipline involved in going further than formulating hypotheses. Persons holding positions of responsibility want answers. So do we all. In the present day, legal events generating social change swirl about us, cumulatively transforming our physical environment, our economic and political institutions, and our very sense of identity. We wish to understand what is going on. Yet we must realize that our attempts at understanding are largely conjectures, even when they appear plausible. It is particularly important to remember this when considering the possibility of grand scale changes, such as abolishing litigation or killing all the lawyers.

What is offered here, therefore, are *questions in the form of an answer*. The general inquiry might be framed as Roscoe Pound framed the problem eighty years ago in the title of his work, *The Causes of Popular Dissatisfaction with the Administration of Justice*.<sup>5</sup> It should be noted, however, as Harry Kalven once said, that what Roscoe Pound was really referring to was his *own* dissatisfaction with the administration of justice.<sup>6</sup> Putting the issue

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law in three groups and analyzed the growth of each category individually. First, routine litigation, like automobile accident cases, exhibited moderate growth over the statistical period examined. Larger growth occurred in the second category of high-stakes product liability and medical malpractice litigation. But the most explosive growth clearly occurred in the third category, that consisting of mass latent injury cases, such as asbestos litigation. These differences reflect the increasing importance of salient litigation, discussed in Part II, *infra*.

<sup>3</sup> See Wheeler, Cartwright, Kagan & Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 LAW & SOC'Y REV. 403, 437-44 (1987) and companion studies cited therein.

<sup>4</sup> L. FRIEDMAN, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910*, at 26-35 (1981).

<sup>5</sup> Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice* (paper presented to the ABA, Aug. 29, 1906), reprinted in 8 BAYLOR L. REV. 1 (1956) (originally published in 40 AM. L. REV. 729 (1906)).

<sup>6</sup> Kalven, *The Quest for the Middle Range: Empirical Inquiry and Legal Policy*, in LAW IN CHANGING AMERICA 56, 60-61 (G. Hazard ed. 1968) (arguing that Pound did little research to support his sweeping assertions of dissatisfaction with legal administration).

that way reminds us that there are no obvious criteria for determining whether just causes for dissatisfaction with the administration of justice exist.

Many people think the problem with litigation today is that it is not explosive enough. They think litigation should be more intensive and intrusive in certain areas of social controversy such as racial discrimination, protection of the environment, accountability of corporate officials, student rights, children's rights, pension rights, international human rights, tax equity, land use control, historic preservation, and other matters on the social agenda. Yet even for those who hold that litigation should play a greater rather than lesser part in the political processes of American society, questions still remain as to the role that litigation should play in the governance of the community as well as the extent of such litigation's social, political, and economic effects.

### I. ROUTINE AND SALIENT LITIGATION

It is becoming conventional to distinguish between "routine" litigation and litigation that might be called abnormal, high-profile, or "salient." Certainly, this distinction offers some insights. Routine litigation refers to the kind of run-of-the-mill cases that plod through the courts year-in and year-out.<sup>7</sup> On the civil side, this kind of litigation includes automobile accident cases, divorce cases, landlord-tenant litigation, and, recently, bankruptcy proceedings. On the criminal side, we have come to accept as routine the deadening numbers of prosecutions for muggings, break-ins, intra-family assaults, and dealings in drugs.

These categories of litigation arise out of patterns of conduct by ordinary citizens that are high in volume and more or less stereotypical in form and yet involve systematically conflicting expectations between the people involved—divorcing spouses, the insolvent and the creditors, the mugger and the victim, and so on. These conflicting expectations generate uncontrolled behavior, recriminations over responsibility, and, eventually, litigation. We might call them everyday legal troubles, or the legal troubles of everyday life.

In contrast, salient litigation involves what someone perceives as unusual or aberrant legal conflicts, ones generating litigation that is somehow inappropriate or surprising or threatening to the order of the community. Thus, damage suits that put companies such as Johns Manville or A. H. Robins in bankruptcy are perceived to be abnormal. Medical malpractice litigation has achieved the status of abnormal litigation now that it has reached such a

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<sup>7</sup> See generally Trubek, Sarat, Felstiner, Kritzer & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72 (1983) (treating litigation as an investment and comparing the range of potential costs a party might accrue against the range of recovery certain ordinary cases are likely to yield).

volume and weight that some doctors have decided to "go bare" or to leave practice altogether. Similarly, cases involving "employment at will" are considered part of this abnormal litigation explosion, while grievances handled under collective bargaining procedures, even though large in volume and practical significance, are perceived as normal litigation.

Yet this distinction may well be illusory and misleading. Effective political sentiment can, when it translates into legislation, preempt even fundamental legal conflicts by rechanneling original behavior patterns through positive incentives or stringent legal prohibitions. Routine litigation, therefore, might simply refer to legal conflicts that effective political sentiment regards as too unimportant to control or preempt, or to conflicts for which this sentiment cannot concur upon preemptive measures. Automobile accident litigation exemplifies this type of conflict: if an effective political consensus favored cutting down on automobile accident litigation, we could build better road systems, tighten driver licensing requirements, and seriously enforce operating rules, thereby beginning to rechannel the behavior patterns of drivers. Another example is divorce litigation: if we wanted to minimize divorce litigation, we could simply prohibit divorce, as formerly in Italy and Spain. Alternatively, we could require all couples to enter into antenuptial agreements that specify—with the same particularity as a testamentary disposition—what is to be done with the money and children if a split later occurs. Or, we could restrict marriage by requiring parental consent, a practice that used to prevail in many social groups. On the criminal side, we could achieve dramatic effects on court calendars by removing the criminal prohibitions on most dangerous drugs, such as cocaine, a proposal that is beginning to come out of the political closet.

This is to say that even routine litigation can be considered from a political and constitutional viewpoint. A pattern of high volume stereotypical litigation indicates antecedent behavioral patterns that are in some sense abnormal or avoidable. Litigation, by definition, involves disputes over application of legal standards of conduct and by its nature involves expense and social aggression. When there is general acceptance of legal standards of behavior in various kinds of social interaction, litigation is an unnecessary mechanism of social adjustment. Correlatively, a high volume of litigation generally is a manifestation of pervasive disagreement as to behavioral standards in transactions that are part of the community's way of life.

Another way of considering this point is to recognize that all types of what we currently call routine litigation were once abnormal and that some types of what used to be routine litigation have largely disappeared. Automobile accident litigation was relatively infrequent in 1920 and was nonexistent in 1880. Similar observations hold for divorce litigation, though of course for different reasons. On the other hand, one hundred years ago, litigation over land titles and property boundary disputes appears to have been much more voluminous than it is now. But litigation over land title and boundary disputes has not subsided in the present era because there is less land development than there used to be or less potential for disagreement over

land use rights. Quite the contrary, with the exponential expansion—one could say explosion—of real estate development over the last century, the economic potential in real property litigation has also increased exponentially. The absence of such an explosion in land title litigation is explained, rather, by a rechanneling of patterns of behavior that largely preempts land title litigation. We have title companies and elaborate title information systems. We have rules designed to require rigid legal formalities when conveying land. We have a mortgage finance system in real estate transactions that assigns squinty-eyed lawyers and loan officers to assure that transaction documentation is complete and accurate. That is, we have engineered real estate transactions—technically, legally, and financially—to exclude litigation as far as is practicable.

What has come to be called routine litigation, therefore, can be viewed as categories of litigation that are the product of high volume transactions involving significant risk of misadventure for which there have not been developed alternative mechanisms for managing the underlying conflict. Please note that the alternatives being referred to are *not* some form of Alternative Dispute Resolution (“ADR”).<sup>8</sup> ADR presupposes the incidence of disputes and contemplates the continued existence of litigation procedures to resolve them. It simply seeks to provide cheaper or more pacific procedures to do so. Litigation done more quietly and cheaply may be an improvement, but it is still litigation. When ADR fails, resort to litigation will remain necessary because adequate provision would not have been made for systematically preventing the misadventures in the first place.

In this regard, it is also useful to reflect upon the political economics of choices between enduring the burdens of routine litigation and preventing the misadventures that the litigation statistics reflect. Preserving the system of routine litigation avoids the political difficulties entailed in adopting preventive measures to rechannel behavioral patterns. If society accepts frequent automobile accident litigation as routine, it does not have to provide for either tighter control of drivers or more comprehensive accident insurance, measures that involve complicated issues of political economy. If society accepts one divorce as the normal outcome of every two marriages, it does not have to undertake the daunting task of trying to control the freedom to marry that is the antecedent of a high divorce rate. If we accept criminalization of drug use as normal, even though it generates a huge volume of criminal litigation, we do not confront the moral, political, and economic implications of permitting free use of drugs. At the same time, litigation is a relatively cheap social welfare service. The parties bear most of

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<sup>8</sup> Alternative Dispute Resolution means procedures for mediating or arbitrating the consequences of misadventures that have ripened into “disputes.” See generally Brunet, *Questioning the Quality of Alternative Dispute Resolution*, 62 TUL. L. REV. 1 (1987) (defining methods of alternative dispute resolution and assessing their costs and benefits from various perspectives).

its expense, and the system apparently can be expanded almost indefinitely simply by allowing calendar delay to become longer and longer.

## II. "SALIENT" LITIGATION

Considering routine litigation in the foregoing way may give us a more useful way of thinking about salient or high-profile litigation. We might define salient litigation, then, as litigation that significantly perturbs established systems of authority and to which adjustment has not yet been made. Imbedded in this definition are three propositions. First, salient litigation disturbs some settled way of doing things through assertion of interests that had previously been legally muted. Second, the accused parties regard the intrusion of litigation as unfair or illegitimate. Third, adjustment has not yet been made by new legal initiative to absorb the challenging interests into revised patterns of conduct. There is, so to speak, a cultural lag in adjustment to the emergent legal claims involved in this type of litigation.

In the last three decades we have witnessed overlapping waves of such litigation. One wave has been litigation over desegregation of schools, housing, and access to employment and places of business. Another wave focused on procedural rights of defendants in criminal cases. Present waves include litigation over products liability, including the asbestos cases, superfund and other environmental matters, social security disability benefits, and liability of state and local governmental agencies for various kinds of operational failures.

All these types of litigation have involved relatively novel legal theories and certainly the application of legal theories in new contexts. The fulcrum of these claims is legal accountability—substantive, procedural, or both—against people or institutions in positions of authority or responsibility who previously exercised legal autonomy in carrying out their functions. Thus, school boards, police officers, corporate managers, and even judges have been called to legally account for actions they had previously taken without question. In many instances, this accounting has involved imposition of federal legal standards on activities of state and local governments as well as relationships previously governed by mechanisms of private property and contract.

These new waves of litigation involve new "rights." Correlatively, they involve new limitations upon previously constituted authority. Put simply, components of the litigation explosion are salient, and therefore politically controversial, when they involve charges of legal wrongdoing against people exercising authority who still consider that their conduct has been right, proper, or at least socially necessary. In short, it is litigation that puts authority in the dock.

Whether newly emergent litigation of one kind or another is a net social good is a matter of fundamental political debate. What seems beyond debate is that if such litigation is regarded as "good," it is because its result enlarges

someone's legally protected position vis-à-vis another's. But that enlargement simultaneously entails limitation of that other's autonomy by increasing his legal answerability. This is not to suggest that the enlargement of the legal interests of one part of the community, such as those of racial minorities or of people interested in protecting the environment, necessarily results in a corresponding loss to some other part of the community. Up to a point, enlargement of the civic franchise of any number of the community promotes respect for others as a virtue in itself. Nevertheless, the process of claiming rights and asserting them involves social costs, both direct and indirect.

Consider an example that may have particular weight with academicians, the problem of evaluating student achievement. It may be taken as given that a student has a right to a fair and objective evaluation of her performance. On this premise, it can be argued that a student has a right to an evaluation whose objectivity can be externally validated and reviewed. If this premise is accepted, it might then be argued that the only evaluation that could meet such a requirement is a standardized multiple choice test. Hence, it could well be held—God forbid—that multiple choice examinations are a due process requirement. If so, however, one would also have to recognize that evaluating student achievement exclusively by standardized multiple-choice tests would eventually transform the educational process itself, leading to “teaching to the tests” and hence artificial—and mindless—pedagogy.

This kind of interaction between legal right, legal process, and behavioral pattern has long since manifested itself in civil service examinations, workplace regulation, government contracting processes, and myriad other instances. Indeed, the transformation of complex substance into oversimplified form is an inevitable concomitant of the process of legal control. As such, it is a social cost.

Of course, this kind of cost can be absorbed, at least within wide limits. If it is accepted that employment in government service has to be governed to a large extent by civil service procedures, then civil service procedures will be used despite their limitations. If it is accepted that marketing of corporate securities must be preceded by elaborate “due diligence” procedures, as it now is, then due diligence procedures will be standardized in securities transactions, as they now are. Similarly, policemen are presently required to advise suspects of their legal rights; members of Congress are currently required to report campaign contributions.

All such behavioral modifications represent adjustment to emergent legal standards imposed on the exercise of various forms of authority. Adjusting to these modifications itself involves significant social costs. Legal coercion, for that is what is involved, generates pervasive individual distress and generates political conflict. People who have thought they were doing what was right, or what was expected of them, do not like encroachment upon their previous autonomy. Even less do they like being found “guilty,” for an element of guilt is inevitably involved. There is thus an element of moral outrage immanent in the reaction to this part of the litigation explosion.

As members of the legal profession and the judiciary, and thus as people accustomed to the mutability of laws and of the legal order itself, lawyers are probably insensitive to the depth of this feeling. Yet, the judiciary and the law itself depend for their effectiveness primarily upon persuasion rather than coercion. That, in turn, requires that legal innovation be morally persuasive, a requirement that is difficult to meet if legal coercion is overused. This requirement underlies that call for greater judicial restraint not only concerning such social issues as equal protection in matters of race and gender but also in such economic issues as products liability, professional malpractice, and matters of public administration in state and local government.

As the limits of consensus based on persuasion are approached, resistance to legal innovation manifests itself. Inexpedient standards may be repealed, as in the famous case of the "no start" mechanism for automobile seatbelts. They may simply be subverted, as is the case with certain aspects of environmental regulation. Obstructive litigation tactics become the norm. People may "vote with their feet," as illustrated in the white exodus from the central city to the suburbs over the last three decades. There can be fundamental political change, as former President Reagan sought to accomplish.

Whatever the pattern of eventual outcomes, however, salient litigation manifests unresolved controversy over community standards. The difference between routine litigation and politically salient litigation is not in the relationship between legal conflict and social controversy but in the subject matter of the conflict and in the parties involved in it. These days, we seem to have a large agenda of unresolved controversies over community standards. The highest constitutional authorities in the legislature and the executive appear unable or unwilling to resolve these controversies, preferring to pursue their own self-protective political agendas. Litigation, therefore, remains the expedient alternative. But the expedient is pursued at some detriment to the concept of authority, including the authority of law itself. At some point, the expedient may become self-defeating.