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A RE-EXAMINATION OF LITIGATION TRENDS IN THE UNITED STATES: GALANTER RECONSIDERED

KENYON D. BUNCH* AND RICHARD J. HARDY**

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I. INTRODUCTION

The general commentary on recent litigation patterns in the United States depicts a worrisome, and occasionally panicked, scenario often called the "litigation explosion." The commentaries characteristically direct attention to a supposed "epidemic of hair-trigger suing" burying the courts under an "avalanche" of civil actions. Moreover, judicial scholars proffer a myriad of purported explanations for the alleged prodigious growth in the number of civil lawsuits. The common theme throughout these explanations is that changes or disruptions in our social, economic, political-legal environments have caused Americans to become a contentious and overly-litigious people.

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2. See Pike, supra note 1, at 50.

3. See, e.g., Auerbach, A Plague of Lawyers, HARPER'S, Oct. 1976, at 37,
Most recently, Marc Galanter, law professor at the University of Wisconsin and head of the Law and Society Association, has castigated these purveyors of the litigation explosion theme for propogating a "myth." Galanter cites evidence, particularly litigation patterns of courts in past historical eras, which he believes demonstrates that the litigation explosion is the fictional product of an "information base [which is] thin and spotty". While Galanter views the recent pattern of litigation as a response to "a set of changing conditions" in our society, he disputes the position that litigation stems from disruptions which have eroded America's sense of community and created an unhealthy assertiveness.

Is the so-called litigation explosion fact or fiction? Moreover, how much do we know about what causes American society to resort to the judiciary to process disputes? The clashing positions sketched above concerning these questions suggests that these are matters which require closer scrutiny, despite Galanter's and other's arguments to the contrary. This article will address these two broad questions. The litigation explosion theme, and Galanter's critique of the literature endorsing it, is examined first. In this vein, the findings indicate, as Galanter observes, that some of the commentary has not exercised an enviable standard of scholarship. Indeed, Galanter is to be commended for calling to our attention the need for more cautious commentary regarding the evolution of litigation patterns in the United States. However, in the second portion of the discussion it is argued that the general thrust of Galanter's remarks and his interpretation of specific data are as misleading as the commentaries of those whom he so uncharitably reproves. The article concludes with an examination of what we know—and do not know — about the extent and the causes of increased rates of civil litigation in American courts.

II. The "LITIGATION EXPLOSION" Theme

The fundamental premise of the litigation explosion literature is that the American public is taking too many disputes to the courts. This premise

37-44; Barton, supra note 1, at 567-84; Burger, supra note 1, at 275; Footlick, supra note 1 at 43-45; Manning, supra note 1, at 770-74; Gest, Solorzano, Shapiro & Dean, "See You in Court," Our Suing Society, U.S. News & World Rep., Dec. 20, 1982, at 58, 58-62 (hereinafter "Gest"); Pike, supra note 1, at 50; Tribe, supra note 1, at 238-41.
5. Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. Rev. 4, 71 (1983-84).
6. Id. at 69.
7. Galanter calls the explosion "folklore." See Galanter, supra note 5, at 64. For commentary presuming an explosion of litigation, see Manning, supra note 1.
encompasses two concerns. First, many contend that the caseloads of our courts are quantitatively excessive. And second, some argue that the courts are not the appropriate forum for deciding many of the issues which are increasingly part of their work. However, the increasing quantity of civil suits, as Professor James Willard Hurst of the University of Wisconsin School of Law observes, has been the predominate focus of concern in much of the professional commentary on courts in recent years. And, it is concern about the number of civil cases in our courts which is at the center of the polemic between Galanter and those who have disseminated the litigation explosion theme.

Nevertheless, the evidence marshalled to support the assertion that our courts are being inundated with an excessive number of cases is both quantitative and qualitative. The commentary emphasizing our litigiousness, as one would anticipate, almost invariably cites caseload statistics. Former Supreme Court Chief Justice Warren Burger points out that the “litigation explosion during this generation is suggested by a few figures. From 1940 to 1981 annual federal district court civil case filings increased from about 35,000 to 180,000 . . . . From 1950 to 1981 annual court of appeals filings climbed from over 2,800 to more than 26,000.” In a more sensational style, a recent article reports, “state courts cases are coming in so fast that officials can’t provide an up-to-date total. [In] 1977 . . . more than 12 million cases were filed.”

Other quantitative evidence is allegedly related to our affinity for litigation. We are repeatedly reminded that we have a surfeit of lawyers, laws and administrative regulations. A.E. Dick Howard, Professor of Law at the University of Virginia, and Laurence H. Tribe, Professor of Law at Harvard University, remind their audience that the United States has more lawyers per capita than any other nation — “three times as many lawyers per capita as England and twenty times as many as Japan.” Further, America’s passion for the law leads us to “pass 150,000 new [statutes] every year and [issue an inestimable] number of administrative regulations.” All of these factors in turn, it is said, spawn lawsuits.

8. See, e.g., H. Friendly, supra note 1, at 3; Barton, supra note 1, at 567; Burger, supra note 1, at 275; Pike, supra note 1, at 50; Tribe, supra note 1, at 25.
12. Gest, supra note 3, at 58.
13. Howard, A LITIGATION SOCIETY, THE WILSON Q., 98, 98 (Summer 1981); Tribe, supra note 1, at 25; see also Auerbach, supra note 3, at 37.
14. Footlick, supra note 1, at 43; see also Tribe, supra note 1, at 25.
15. See, e.g., Footlick, supra note 1, at 43; Howard, supra note 13, at 98-100; Pike, supra note 1, at 50-51; Gest, supra note 3, at 58.
The “glut” of civil actions, according to much of the litigation explosion literature is also the product of a qualitative change in the disputes taken to court. Jerrold Footlick, legal columnist for Newsweek magazine, notes that there is an “ever-increasing willingness, even eagerness, on the part of elected officials and private citizens to let the courts settle matters that were once settled by legislatures, executives, parents, teachers—or chance.” A parade of outlandish, or at least unusual cases are cited to support this position: “A former student is seeking $853,000 in damages from the University of Michigan, in part for the mental anguish he says he suffered after being given a ‘D’ grade rather than the ‘A’ he expected in an advanced German course;” “A postmaster in North Carolina is sued by a postal employee for assault and battery for puffing on a cigar while a postal employee is lodging a complaint about excessive smoking;” “A 41-year old man, upset at being stood up on a date . . . sued his would-be companion [in small claims court] for $38 to compensate him for sprucing up and driving 40 miles for nothing.”

III. Galanter’s Criticism

In Galanter’s judgment, the “litigation explosion” view was born of myopic and careless scholarship among the elite in the legal profession and is perpetuated by a continued display of lax scholarship in the legal profession and by other commentators. Galanter supports his general deprecation of the litigation explosion literature by pointing to specific weaknesses in the evidence which is typically proffered to confirm the explosion view.

For purposes of discussion, Galanter’s criticisms can be grouped into two broad classifications. First, the inferences drawn by the explosion literature are too casual and too sweeping, and are made from an inadequate base of quantitative information. And second, the literature has presented the value judgment that we have too many lawsuits as being objective fact.

According to Galanter, “The only systematic empirical base that played a role in” fabricating the myth of a general upsurge in civil actions filed was data on the growth of caseloads in the federal courts. It was inaccurately assumed that dramatic increases in the number of civil cases filed in federal courts permitted an inference that this increase was a near-universal phenomenon in American courts. He believes this unwitting assumption stems

17. Pike, supra note 1, at 50.
19. Pike, supra note 1, at 50.
20. Galanter, supra note 5, at 61-64, 71.
21. Id. at 10-11, 62.
22. Id. at 11, 64-65.
23. Id. at 62.
24. Id.
from the relatively greater attention paid to the federal courts by the elite of the legal profession.\textsuperscript{25}

Certainly, the foregoing assessment is true to the extent that most commentary has tended to emphasize the number of case filings in federal courts.\textsuperscript{26} However, increases in state court civil filings are also cited as proof of the litigation explosion. While one may object that the state caseload data cited are not systematic, this is not attributable solely to the “biases” of the elite in the practice of law. Rather, it may reflect, in part, the difficulties of acquiring systematic caseload data for state courts.

Galanter also contends, “Typically, only gross figures on filings” have been cited.\textsuperscript{27} Gross figures can be misleading. Professor of American History and Law at Wellesley College, Jerold Auerbach notes that “four times as many suits are filed in the state courts of California alone as in the entire federal system.”\textsuperscript{28} Yet, after a moment of reflection, one is uncertain as to why these figures should be unsettling or serve as an indication of an “explosion” of litigation.

It should be clarified that many commentators, including those who might be labeled the elite of the judiciary and legal academia, have not confined themselves to merely citing gross figures as evidence of an upsurge in litigation. For example, Chief Justice Burger, after citing the gross number of lawsuits noted above, states that “the real meaning of these figures emerges when we see that federal civil cases in the district courts increased almost six times as fast as our population . . . . [For the federal circuit courts of appeals, caseload] growth was sixteen times as much as the increase in population.”\textsuperscript{29} Similarly, Auerbach correlates the increase of the caseload in the federal courts with the growth in population.\textsuperscript{30}

Galanter seems to disagree with the idea that growth in the size of the legal profession is evidence of an explosion of litigation.\textsuperscript{31} Yet, he also makes statements suggesting that the size of the legal profession may affect the amount of litigation. For example, he argues that “[t]he real check on Japanese litigation is the deliberate limitation of institutional capacity: the number of courts and lawyers is kept small.”\textsuperscript{32} In fact, as discussed at length in Part V., there is only scant published empirical evidence supporting the belief that legal/political phenomena (e.g., increasing numbers of lawyers or an increasing number of administrative regulations) cause more lawsuits.

\textsuperscript{25} Id.
\textsuperscript{26} See, e.g., Barton, supra note 1, at 567, Burger, supra note 1, at 275; Carruth, The “Legal Explosion” Has Left Business Shell-Shocked, 87 FORTUNE, April 1973, at 65.
\textsuperscript{27} Galanter, supra note 5, at 62. See, e.g., Gest, supra note 3, 58; Pike, supra note 1, at 50.
\textsuperscript{28} Auerbach, supra note 3, at 37.
\textsuperscript{29} Burger, supra note 1, at 275.
\textsuperscript{30} Auerbach, supra note 3, at 37.
\textsuperscript{31} Galanter, supra note 5, at 10.
\textsuperscript{32} Id. at 59.
The view that we have too much litigation implies that we are able to determine, to use Galanter's words, "how much is too much." The litigation explosion literature issues warnings such as, "Clearly, something is awry. For too long we have reflexively relied on law to right every wrong;" "[L]itigation has become the nation's secular religion;" and "Our colonial forebears would be struck dumb by the [recent] explosion of law and litigation." The authoritative tone of these warnings suggests that they are objective factual assessments.

Yet, how much litigation is "too much" is, necessarily, a value-laden determination. While these assessments presuppose, as Galanter explains, that the purported upsurge in litigation is a dysfunctional departure from a more preferred past, this judgment needs to be substantiated with more systematic empirical evidence than is typically offered. Galanter describes most of the evidence in this regard as: "[a]trocity stories"—stories of cases that seem unusually frivolous or extravagant; "[w]ar stories"—cases that have an extraordinarily negative effect on the lives of people and institutions; and "monster cases"—civil actions which have resulted in the expenditure of an inordinate amount of resources. These descriptions, while suggesting the extremes of civil actions, are not evidence which supports the conclusion that most Americans are ready to take any and every dispute to court.

In sum, Galanter finds the evidence of a litigation explosion unpersuasive. This article, in the discussion which follows, will assert the following regarding Galanter's arguments: Galanter is correct in criticizing the commentators who have disseminated the "explosion" theme for too often having not presented systematic evidence of this purported phenomenon and for having been careless about distinguishing between value judgments and objective facts; but, Galanter has failed to prove that there is not a litigation explosion.

A. Galanter's First Argument Reconsidered

According to Galanter, the "explosion" myth is the product of "elite folklore." He believes a more realistic characterization of modern litigation

33. Id. at 10.
34. Tribe, supra note 1, at 25.
36. Howard, supra note 13, at 98.
37. Galanter, supra note 5, at 11.
38. Id. at 10.
39. Id. at 11.
40. Id. at 10.
41. See, e.g., Pike supra note 1, at 50. For an example of the commentary expressing the opinion that most Americans will sue about anything see Auerbach, supra note 3, at 42.
42. Galanter, supra note 5, at 64.
patterns in the United States should emphasize points other than those of the "explosion" theme. Two of these points are discussed below. First, current rates of litigation are not dramatically different than the rates of litigation in our past.\textsuperscript{43} Second, modern civil suits rarely involve full-blown adjudication.\textsuperscript{44} The discussion, with respect to each of these points, demonstrate that Galanter's evidence is weak and does not confirm his conclusion that the litigation explosion is a myth.

To support his first point, that current rates of litigation have not increased dramatically from the past, Galanter draws on research on litigation patterns done by other students of the courts. Specifically, he refers to studies of changing litigation rates (suits filed per thousand population) over time in a few state courts and a study of the federal district courts.\textsuperscript{45} These studies sampled litigation rates at widely separated intervals in the 19th and 20th centuries. (See Table 1 and Table 2). Galanter concludes that "these rates are not marked by abrupt and extreme departures from past patterns."\textsuperscript{46}

Galanter also draws support from two studies of colonial courts:

In Accomack County, Virginia in 1639 the litigation rate... was more than four times that in any contemporary American county... In Salem County, Massachusetts, about 11 percent 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.'\textsuperscript{47}

Should the litigation explosion theme be dismissed, then, as an exaggeration spawned by slovenly scholarship? This would be premature because Galanter's evidence concerning past rates of litigation suffers from several critical weaknesses.

First, the data for many of these courts may be atypical. The time-series data on state courts are drawn from only a very few counties. Is it safe to use these data as a basis for generalizations about litigation rates in state courts of general jurisdiction as a whole? Note that Galanter has rebuked the proponents of the litigation explosion for making generalizations about litigation rates in state courts on the basis of changes in the rates of civil filings in federal courts. Moreover, while reasonably systematic and comprehensive data for litigation rates in state courts which is available show, to use Galanter's description, "a pronounced recent acceleration of litigiousness," Galanter consigns this information to a footnote and dismisses it because the increase was not uniform across all jurisdictions.\textsuperscript{48}

Surely, it is incongruous to insist that reasonably comprehensive data, which show civil filings over a four year period in state courts increased 23 percent while the population increased 4 percent, cannot be taken as an indication of "a gen-

\textsuperscript{43} Id. at 40-41.
\textsuperscript{44} Id. at 43, 62.
\textsuperscript{45} Id. at 38-40.
\textsuperscript{46} Id. at 41.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 40-41 n. 174.
eralized disposition” to go to court because of non-uniform increase, and then direct attention to a handful of local state courts with the implication that we should consider their rates of filings as an indication of how litigation rates of the past compare with the present in state courts generally.

A second weakness of Galanter’s reliance on comparing rates of civil litigation for courts of past eras with the present is that we have no assurance that the filings data are comparable. The jurisdictions of courts often are redefined over time. Record collection systems are modified in various ways over time. Anyone who has tried to collect data on state courts is acutely aware of how difficult it is to get comparable data over a period of time extending very far into the past. Data for federal court filings has been collected on a more systematic basis for a longer period of time than for most state courts. One study of federal district courts, however, warns: “We recognize . . . that federal court statistics may be inaccurate, particularly for the early years of our study.” Therefore, the burden of demonstrating that filings data are commensurable across large intervals of time should rest with those making such comparisons.

What inference can one be secure in making concerning the relative litigiousness of the colonial era, compared to the present, based on figures from one county in Virginia in 1639 and one county in Massachusetts in 1683? Scrutiny of these historical studies reveals marked dissimilarities of these courts as compared to courts of general jurisdiction in the late 18th century setting. For example in Accomack County, Virginia, “one of the earliest and most popular practices before the court was the appearance of community attorneys. Usually neighbors of the plaintiff or defendant, these self-styled advocates possessed no legal training nor, in fact, did they need any.” “The justice administered in Accomack County court derived from the needs of the community and not from any one formal legal tradition.” In fact, formal jurisdictional requirements in Accomack County were regularly flouted.

In both Accomack County, Virginia and Essex County, Massachusetts (which Galanter refers to as Salem County), the generalizations and figures concerning involvement with the courts include criminal as well as civil cases. The study of Essex County devotes one chapter to an examination of witch-

49. Id.
52. Id. at 288.
53. Id. at 275.
54. Id. at 284-87; D. Konig, LAW AND SOCIETY IN PURITAN MASSACHUSETTS.
Essex County, 1629-1692 xii (1979).
craft prosecution." This perspective of these early courts counsels that extraordinary caution is appropriate regarding generalizations about significant proportions of the population having been involved with colonial courts.

The point is that we do not know how much more or less litigious our society as a whole is relative to the remote past. Galanter has acknowledged some of these limitations. Apparently he feels these limitations do not enfeeble comparisons across time regarding our relative litigiousness in "regular courts."

On this point Galanter is wrong. The information he directs our attention to is important because it provides a limited perspective of the past which should engender more circumspection in making claims about modern litigiousness relative to our past. Even if we can make valid comparisons of litigiousness of a former era in a handful of counties with present litigiousness in those same courts, this does not warrant Galanter's assertion that "we are not rushing to the courts in unprecedented numbers compared to our own [remote] past." Rather the emphasis should be on the limitations respecting what we know about litigiousness in "regular courts" as a whole in earlier periods.

B. Galanter's Second Argument Reconsidered

The second major component of Galanter's perspective of modern litigation patterns accentuates how few civil cases run the full adversarial gamut. Most cases in state trial courts, he explains, never reach trial. Rather, "the vast majority are disposed of by abandonment, withdrawal, or settlement without full-blown adjudication and often without any authoritative disposition by the court." Moreover, Galanter notes that of the cases that reached an authoritative disposition, "a large portion do not involve a contest." The work of the courts is decreasingly made of "the direct, decisive resolution of individual disputes; more of it is routine administration and supervised bargaining." Galanter emphasizes that much the same situation prevails in federal courts: "while federal court filings have risen dramatically the percentage of cases reaching trial has diminished." And, he contends "not only has the increase in [federal] judges kept up with the caseload, but there has been a massive increase in the support staff."

56. Galanter, supra note 5, at 36.
57. Id. at 37.
58. Galanter, supra note 4, at 82.
59. Galanter, supra note 4, at 82.
60. Id.
61. Id. at 44.
62. Id. at 43.
63. Id. at 37.
In sum, Galanter disparages the importance of citing increased case filings as an indicator of an "explosion" of litigation for two reasons. First, he believes that since most cases filed are settled before trial, the increasingly adversarial temperament attributed to litigants by the "explosion" literature is invalid. Second, in the federal courts, where the largest increases in filings have occurred, the adverse consequences of heavy caseload reported by the "explosion" literature are not materializing. These arguments suffer from demonstrable weaknesses.

A more persuasive portrayal of the "modern" character of judicial dispute processing is offered by Richard O. Lempert, Professor of Law at the University of Michigan, who contends that "judicial dispute settlement activity is not limited to cases that eventuate in trials." He lists several ways in which a court can contribute to dispute settlement after a case is filed without the case reaching an authoritative disposition:

(1) courts define norms that influence or control the private settlement of disputes;

(2) courts ratify private settlements, providing guarantees of compliance without which one or both parties might have been unwilling to reach a private settlement;

(3) courts enable parties to legitimately escalate the costs of disputing, thereby increasing the likelihood of private dispute settlements;

(4) courts provide devices that enable parties to learn about each other's cases, thus increasing the likelihood of private dispute settlements by decreasing mutual uncertainty;

(5) court personnel act as mediators to encourage the consensual settlement of disputes; and

(6) courts resolve certain issues in the cases, leading the parties to agree on the others.

Therefore, in Lempert's judgment "a court should be treated as filling a dispute settlement function whenever a case is brought to it." Other studies reach similar conclusions. Galanter is aware of these arguments. Indeed, he cites some of these sources and clarifies that "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 . . . ." Nevertheless, he insists that "the very
high rates of settlement in all civil litigation” suggest that Americans are not “rights-minded” or excessively contentious.  

Galanter’s assertion is misleading; it shifts attention away from the frame of mind which often accompanies the act of filing a lawsuit. As Jethro Lieberman, author of the Litigious Society cogently puts it, “A lawsuit is a signal that something has gone wrong.” Sheldon Goldman and Austin Sarat express the same judgment in a perspicuous comment: “When disputants have to seek out third parties, the significance of their declaration of trouble is magnified both in their minds and in the minds of others. Reactive procedures [of courts] force the troubled party to come forward in a visible way, to step out of the normal trend of the troubled relationship.” From the perspective of gauging the degree of contentiousness in a dispute, the importance of filing a lawsuit is reflected in the willingness to invoke the authority of the courts. This authority can have an important influence on the outcome of the dispute whether or not the case goes to trial. Indeed, as Lempert points out, “[c]onsiderable strife may lie behind a judgment that is eventually uncontested, and a judge or others attached to the court may devote considerable effort to bringing about the agreement that is necessary for an uncontested judgment to be entered.” Consequently, Galanter’s position that we can infer from a high rate of pre-trial settlements and uncontested dispositions that Americans are not particularly contentious cannot be accepted.

Galanter points to other evidence allegedly showing that Americans are not contentious. He interprets the most comprehensive survey of the occurrence of “middle range” disputes (problems of $1,000 of more) in America as indicating a strong tendency among the public to negotiate a resolution to such differences. Yet, one of the conclusions of this survey was stated as follows: “Our data indicate the existence of a widespread readiness to seek redress of substantial injuries. Contrary to what some believe, Americans are assertive when the stakes are substantial — able and willing to seek redress from wrongdoers.” This survey was part of a larger project, the findings of which one participant summarizes as having led to no “hard and fast diagnoses” of disputing. In fact, we have almost no systematic empirical evidence that permits an evaluation of whether Americans are becoming more or less contentious over time other than civil suit filings data—and this data, for courts generally, has become available only in recent years.

71. Id. at 30.
73. S. Goldman & A. Sarat, American Court Systems 19 (1978).
74. Lempert, supra note 67, at 103.
75. Galanter, supra note 5, at 16.
Galanter’s position that the explosion literature is unduly anxious about the impact of dramatic growth of the federal caseload on the quality of justice in federal courts is also vulnerable. He claims that “the increase in judges kept up with the caseload.” In 1978 Congress did in fact respond to the swelling caseload in the federal courts by increasing the number of judges on the circuit court of appeals from 97 to 132 and the number of federal district judges from 398 to 516.8 However, a glance at Tables 3 and 4 reveals that the addition of judges had a short-lived impact in reducing average civil caseload per judge in both levels of the federal judiciary.

One response might be that most of these cases were settled without trial. However, as has been observed, the ways in which courts contribute to pre-trial settlements often require expenditure of judicial resources. James Willard Hurst reaches a conclusion corroborating this: “Even nonadversary or relatively routine dispositions made drafts on court facilities, so that there was some measure of significantly increased volume of business when the ratio of filings rose relative to population.”9

Galanter also directs attention to “a massive increase in the support staff” for federal judges.80 But, rather than expediting access to “justice,” this is seen by many as aggravating the problem of bureaucratized “justice” in the federal courts. Circuit Judge Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit reports that federal district judges (as well as judges at the federal appeals level) require so much staff help and, in particular, have become so dependent on their law clerks to deal with the caseload that “we are approaching a kind of institutional judging.”81 Or, as Supreme Court Justice Lewis Powell characterizes it, reliance upon support staff results in “the rule of law, reduced to wholesale justice.”82

This examination of the points emphasized in Galanter’s characterization of the litigation landscape discloses that he has overstated the substantiality of the evidence supporting his position. If the evidence of changed rates of litigation is reevaluated can the “explosion” view be confirmed?

IV. LITIGATION IN THE FEDERAL COURTS

The current rate of civil filings in the federal district courts is unprecedented by a wide margin. In the early 1930’s civil filings in these courts reached a rate of 44.4 cases per 100,000 population. The rate of filing per 100,000 in 1982 was 89.2, or about double the earlier record rate. (See Figure

79. Hurst, supra note 10, at 411.
80. Galanter, supra note 5, at 37.
82. Powell, supra note 9, at 1372.
1. Moreover, the upsurge in the rate of civil filings through the 1920's and early 1930's can be explained by the passage of the Eighteenth Amendment to the Constitution and the arrival of the Prohibition era. The recent upsurge in the rate of filings in the federal circuit courts of appeal has been more striking than the increase in the district courts. (See Figure 2).

Galanter does not dispute that litigation rates have increased dramatically in the federal courts. Regardless, he argues that the increase can be explained by certain socio-political events and does not reflect a generalized upsurge in litigiousness. Specifically, he asserts that in the district courts the increase can be accounted for by the stiffened attitude of the federal government toward collection of benefit overpayments and student loans and by those trying to reclaim social benefits cut off by "conservative" presidential administrations. Consequently, he believes much of the concern about caseload in the bottom tier of the federal courts, and the concern about the portent of this caseload for the upper levels of the federal courts, is grounded on an erroneous perception of the causes of this phenomenon.

Galanter's understanding of the sources of caseload growth in the federal trial courts contrasts sharply with the position and evidence offered in a study edited by Keith O. Boyum and Samuel Krislov. The study states, "The present period of growth, becoming dramatic at the end of the 1960s, is attributable not to actions taken by the U.S. government, but to cases filed by individuals, 'private civil actions'. . . There is no easily identified particular cause for those filing increases (such as prohibition or price control), and, consequently, substantial decline is not anticipated."

Which of these contradictory assessments are we to believe? The specific types of civil actions Galanter names have increased most rapidly in the most recent years. But, much remains to be explained. (See Figure 3). If United States civil actions (civil suits to which the United States government is a party) are eliminated entirely, the rate of private civil actions filed leaped from 33.4 to 56.2 per 100,000 population in only 10 years. Certainly, then, the causes of this increase in litigation warrants more than a perfunctory appraisal.

Yet the only systematic quantitative analysis of the causes of increased litigation in the federal district courts has been done by Joel Grossman and Austin Sarat. These authors have tested two broadly defined hypotheses. Specifically, they examined whether level of socio-economic development and

83. Galanter, supra note 4, at 82.
84. For a discussion of the impact the federal district court's caseload has on the circuit courts of appeals, see Goldman, Federal District Courts and the Appellate Crisis, 57 Judicature 211 (1973); Powell, supra note 9, at 1371.
type of political culture are cogent explanations of the rate of civil litigation. Neither of these hypotheses were confirmed. This is a valuable study even though much could be done to improve this aggregate analysis. Our comments will be confined to noting that the study examines the period of 1902 to 1972. Most of the "explosive" increase in civil litigation in the federal courts has taken place since their study was concluded.

Various commentators, including Galanter, argue that specific political/legal actions—especially decisions by the courts and congressional enactments—account for most of the upsurge in the number of federal civil actions.\textsuperscript{87} Yet, while this would seem to invite a systematic quantitative analysis of disaggregated caseload data, there are no studies of this type for the federal district or federal circuit courts of appeals.

V. Litigation in State Trial Courts

Galanter, as discussed earlier, criticizes the litigation explosion literature for not examining caseload data for state trial courts, where the vast majority of cases begin and end. What do we know about changes in the caseloads of these courts? The first effort to collect data for state courts on a systematic basis began in the middle 1970's by the National Center for State Courts. Their most accurate estimate of total civil caseload in state trial courts is issued in their \textit{Annual Reports}.\textsuperscript{88} These reports show that the caseload in these courts grew from 12,150,000 cases in 1976\textsuperscript{89} to 14,600,000 cases in 1980,\textsuperscript{90} a caseload increase of approximately 20 percent in 4 years. During that same period the population grew a little less than 4 percent.

A recent study conducted by the National Center for State Courts has received widespread attention as evidence that the litigation explosion is a myth.\textsuperscript{91} According to this study, the number of civil filings in state trial courts peaked in 1981, and then declined slightly during the period 1981-1984.\textsuperscript{92}

While this study purports to describe a trend, it does not prove that claims of a litigation explosion in state trial courts in recent years are bogus.

\textsuperscript{87} See, \textit{e.g.}, Friendly, \textit{supra} note 1, and Hurst, \textit{supra} note 10, at 411.

\textsuperscript{88} The National Center for State Courts makes a concerted effort to define civil cases such that they are commensurable among states and to overcome other difficulties in gathering caseload data from state trial courts. The Center nevertheless cautions that the figures in the \textit{Annual Reports} should be "viewed only as gross, 'ballpark' estimates, and not as representing the exact volume of cases." \textit{STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1980 54} (1980).

\textsuperscript{89} \textit{Id}. at 60.

\textsuperscript{90} \textit{Id}. at 55.

\textsuperscript{91} Roper, \textit{A Preliminary Examination of Available Civil and Criminal Trend Data in State Trial Courts for 1978, 1981, and 1984}, \textit{NATIONAL CENTER FOR STATE COURTS} (Apr. 1986). For an illustration of how the media and other observers have interpreted this data, see \textit{Litigation Explosion Called Myth}, St. Louis Post-Dispatch, Apr. 21, 1986, at 6B, col. 6.

\textsuperscript{92} Roper, \textit{supra} note 91.
When the study’s findings are closely scrutinized and placed in perspective it is apparent that these figures do not establish a trend. Contrary to the way the report has been interpreted, its conclusions are not supported by several years of data. The study compared data for three years—1978, 1981, and 1984—with only the 1984 data showing a slight decline in the rate of civil filings. That data is not an adequate basis for establishing a downward trend. The report’s description of the trend of the annual number of civil suits filed is especially unconvincing given the existence of potentially contradicting evidence. For example, a study entitled “Case Filings in State Courts, 1983” found that civil filings reported by state trial courts in 1983 were, as a whole, 20 percent greater than the rate of filings reported in 1978.93 A more adequate perspective of the trend in the annual number of civil filings in state trial courts should emphasize that, for the period for which comprehensive data exists, there have been increases substantially exceeding the growth of the American population for at least six, and possibly eight, years.94

What explains this upsurge, some might say “explosion”, of caseloads in these state courts? There is no paucity of literature addressing this question. Much of this literature is found in popular periodicals and legal journals. Yet, while the relevant articles are often pregnant with speculation as to why we are experiencing an upsurge in litigation, they typically do not offer a rigorous analysis of the potential causes hypothesized.95 Generally, the discussions of the litigation explosion in legal journals deal only tangentially with causes of this phenomenon.96 They too lack rigorous analytical treatment focused on the causes of increased litigation. Thus, these sources are most useful only as a catalog of plausible explanations for the increase.

The catalog of causes of increased litigation include the changes in conditions noted earlier—social, economic, legal and political. Galanter’s explanations for increased litigation are encompassed by these broad categories.97 He points to changes in the socio-economic environment causing more in-

95. See, e.g., Footlick, supra note 1, at 42-46; Pike, supra note 1, at 50-54; Gest, supra note 3, at 58-62.
96. See, e.g., Burger, supra note 1; Powell, supra note 9.
97. Galanter points to changes in the socio-economic environment causing more injuries, increased public awareness of litigation as an avenue of redress for injuries, increased government regulation, and changes in the legal profession. See Galanter, supra note 5, at 69.
juries, increased public awareness of litigation as a means of redress for injuries, increased government regulation and changes in the legal profession. Galanter states, with an air of authority, that relative to these causes for the increase in litigation—any increase in litigation rates has been conservative. But, in fact, there is very little empirical evidence allowing the relationship of these purported explanations to increased litigation to be gauged—whether for state or federal courts. Hurst's evaluation of empirical studies between 1950 and 1980 confirms the foregoing generalization for state courts: "the literature on state trial courts established little assured correlation of dockets to particular social trends, such as the growth of cities or of industry."

Since 1980 two quantitative studies focused explicitly on explaining the causes of civil litigation in state courts have been published — Stephen Daniels' study entitled "Civil Litigation in Illinois Trial Courts: An Exploration of Rural-Urban Differences" and Wayne McIntosh's examination of the determinants of civil litigation rates in the state general jurisdiction trial court of St. Louis, Missouri.

Daniels' study found that socio-economic factors were more significant than political culture for explaining litigation in the county courts he examined in Illinois. However, the statistical relationship between measures of socio-economic development and litigation rates were not particularly strong. Most of the differences in rates between counties remained unexplained.

McIntosh, in his analysis, investigated the relevance of three broadly defined "environmental conditions" as explanations of rates of civil litigation. He interprets his findings as indicating (1) "That political milieu affects [civil litigation rates] . . . and, in particular, that litigation can be an alternative to traditional forms of political participation; (2) . . . court resource limitations are perceived and acted upon by the clientele population; and (3) . . . [that] the relationship between socio-economic development and the rate of litigation . . . is perhaps cyclical.

The limitations of these studies are evident, despite their excellent value. First, many of the most popular conjectured explanations for increased litigation, for example the atomization of American communities and in-

98. Galanter, supra note 5, at 70.
99. Hurst, supra note 10, at 410.
100. Daniels, Civil Litigation in Illinois Trial Courts: An Exploration of Rural-Urban Differences, 4 LAW & POL' Y Q. 190 (1982).
102. Daniels, supra note 100, at 190.
103. Id. at 209.
104. McIntosh, supra note 101, at 1005.
105. Id. at 991.
106. See, e.g., Burger, supra note 1, at 275; Howard, supra note 13, at 101; Lieberman, supra note 16, at 186.
creased government regulatory activity,107 have not been examined. Second, the results may be peculiar to the particular courts examined. In sum, we know very little about what causes increased litigation in courts generally.

VI. CONCLUSIONS

Three firm conclusions can be made from this re-examination of the litigation explosion. First, we do not know how litigious Americans are presently as compared to remote past eras. Second, there has been a "dramatic" increase in the rates of civil litigation in the most recent years—since about 1970 in the federal district courts and in most recent years, since at least the middle 1970's, in state trial courts. Therefore, the litigation explosion, defined in terms of quantity of filings, is not a myth. Third, our knowledge of what explains these increases in rates of civil litigation is regrettably limited.

<table>
<thead>
<tr>
<th>TABLE 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>CIVIL CASES FILED IN COURTS OF GENERAL JURISDICTION OF VARIOUS UNITED STATES JURISDICTIONS (PER THOUSAND POPULATION)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Alameda Cty., California</th>
<th>San Benito Cty., California</th>
<th>Menard Cty., Illinois</th>
<th>Five Counties</th>
<th>Federal District Cts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1870</td>
<td></td>
<td></td>
<td></td>
<td>16.4</td>
<td></td>
</tr>
<tr>
<td>1890</td>
<td>7.6</td>
<td>4.8</td>
<td></td>
<td>5.5</td>
<td></td>
</tr>
<tr>
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<td>1903-04</td>
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<td></td>
<td></td>
<td></td>
<td>36.8</td>
</tr>
<tr>
<td>1910</td>
<td>13.5</td>
<td>3.6</td>
<td></td>
<td>6.3</td>
<td></td>
</tr>
<tr>
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<td></td>
<td></td>
<td></td>
<td>0.158</td>
</tr>
<tr>
<td>1918-19</td>
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<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>1922</td>
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<td></td>
<td></td>
<td></td>
<td>0.265</td>
</tr>
<tr>
<td>1930</td>
<td>0.8</td>
<td>8.9</td>
<td></td>
<td>8.5</td>
<td></td>
</tr>
<tr>
<td>1932</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.444</td>
</tr>
<tr>
<td>1933-34</td>
<td></td>
<td></td>
<td></td>
<td>36.9</td>
<td></td>
</tr>
<tr>
<td>1942</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.223</td>
</tr>
</tbody>
</table>

(Continued)

107. See, e.g., Footlick, supra note 1, at 43; Galanter, supra note 5, at 69; Howard supra note 13, at 98-99.
### TABLE 1

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

<table>
<thead>
<tr>
<th>Year</th>
<th>Alameda Cty., California</th>
<th>San Benito Cty., California</th>
<th>Menard Cty., Illinois</th>
<th>Five Counties</th>
<th>Federal District Cts.</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948-49</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>36.7</td>
</tr>
<tr>
<td>1950</td>
<td>9.5</td>
<td>10.4</td>
<td>3.9</td>
<td></td>
<td>0.309</td>
</tr>
<tr>
<td>1952</td>
<td></td>
<td></td>
<td></td>
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<td>0.291</td>
</tr>
<tr>
<td>1962</td>
<td></td>
<td></td>
<td></td>
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</tr>
<tr>
<td>1963-64</td>
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<td></td>
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<td>0.439</td>
</tr>
<tr>
<td>1970</td>
<td>11.0</td>
<td>10.2</td>
<td></td>
<td></td>
<td>55.2</td>
</tr>
<tr>
<td>1972</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1976-77</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Source: Galanter, *supra* note 5, at 40.

### TABLE 2

AVERAGE CIVIL LITIGATION RATE IN THE ST. LOUIS CIRCUIT COURT FOR EACH DECADE BETWEEN 1820 AND 1977

<table>
<thead>
<tr>
<th>Decade</th>
<th>Average Litigation Rate</th>
<th>Decade</th>
<th>Average Litigation Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1820-29</td>
<td>31.3</td>
<td>1900-09</td>
<td>7.7</td>
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<tr>
<td>1830-39</td>
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<td>1840-49</td>
<td>35.9</td>
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<td>1850-59</td>
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</tr>
<tr>
<td>1860-69</td>
<td>10.5</td>
<td>1940-49</td>
<td>12.4</td>
</tr>
<tr>
<td>1870-79</td>
<td>10.5</td>
<td>1950-59</td>
<td>12.8</td>
</tr>
<tr>
<td>1880-89</td>
<td>7.3</td>
<td>1960-69</td>
<td>16.0</td>
</tr>
<tr>
<td>1890-99</td>
<td>6.9</td>
<td>1970-77</td>
<td>16.9</td>
</tr>
</tbody>
</table>

Source: Galanter, *supra* note 5, at 39. (We have rounded the average litigation rate to the nearest tenth of a percent.)
### TABLE 3

**U.S. DISTRICT COURTS**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Authorized Judgeships</th>
<th>Average Civil Cases Filed per Judgeship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>400</td>
<td>293</td>
</tr>
<tr>
<td>1976</td>
<td>399</td>
<td>327</td>
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<tr>
<td>1977</td>
<td>398</td>
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<td>1979</td>
<td>516</td>
<td>300</td>
</tr>
<tr>
<td>1980</td>
<td>516</td>
<td>327</td>
</tr>
<tr>
<td>1981</td>
<td>516</td>
<td>350</td>
</tr>
<tr>
<td>1982</td>
<td>515</td>
<td>400</td>
</tr>
<tr>
<td>1983</td>
<td>515</td>
<td>470</td>
</tr>
</tbody>
</table>


### TABLE 4

**U.S. COURTS OF APPEALS**

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Authorized Judgeships</th>
<th>Average Civil Cases Filed per Judgeship</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>97</td>
<td>172</td>
</tr>
<tr>
<td>1976</td>
<td>97</td>
<td>190</td>
</tr>
<tr>
<td>1977</td>
<td>97</td>
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<td>200</td>
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<tr>
<td>1982</td>
<td>132</td>
<td>212</td>
</tr>
<tr>
<td>1983</td>
<td>132</td>
<td>224</td>
</tr>
</tbody>
</table>

Figure 1

TOTAL CIVIL CASES FILED PER 100,000 POPULATION FROM 1902-1982

Figure 2

CIVIL CASES FILED PER 100,000 POPULATION
IN THE U.S. COURTS OF APPEALS

Figure 3

PRIVATE AND U.S. CIVIL CASES FILED PER 100,000 POPULATION FROM 1950-1982


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