Annu. Rev. Sociol. 1989. 15:17–29

LITIGATION AND SOCIETY

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Abstract

Litigation, in ordinary speech, refers to actions contested in court; this involves a claim, a dispute or conflict, and the use of a specific institution, the court, to resolve the conflict or dispute. In the past most legal research has consisted of analysis of doctrine and theory about doctrine. But litigation is an important phenomenon in its own right and research lately has shown this. This chapter aims to sketch out a few major areas of research and theory and to add a few brief remarks about the significance of the work thus far. The topics covered include: dispute-centered and court-centered research; quantity of litigation and the so-called litigation explosion; and the impact of litigation on society.

INTRODUCTION

Only in the last decade or so has there been substantial research on litigation, or theorizing about the social meaning and impact of litigation, even among law and society scholars and those who identify themselves as sociologists of law. To be sure, legal scholarship in common law countries has always been obsessed with appellate litigation; but what jurists considered "research" consisted mostly of analysis of doctrine, and theory about doctrine, all quite formalistic and never quantitative or empirical. In other countries, legal scholars have had even less interest in conducting systematic research on litigation. For their part, social scientists have tended to neglect litigation as well. This was perhaps originally a reaction against the tendency of legal research to act as if the law was nothing but formal process. Sociology, then, took as its domain *informal* processes—law-related behavior that took place outside the courtroom setting.

But litigation is an important phenomenon in its own right, and this has become very obvious in the last two generations. The school desegregation

0360-0572/89/0815-0017$02.00

cases, and in general the activities of the United States Supreme Court under Earl Warren, suggested the potential for social change through litigation. More recently, the so-called "litigation explosion" (Galanter 1983) has led to speculation about the harmful social effects of litigation, real or imagined. The discussion is by no means confined to the United States, although the United States is usually seen as the worst offender.

In one sense, to be sure, the large literature on courts, judges, juries, litigants, and the like, in sociology, criminology, legal history, political science, psychology, economics, and anthropology, is all relevant to the problem of litigation; but I work here with a somewhat narrower and more manageable concept of the field. My aim has been to sketch out a few major headings of research and theory, and to add a few brief remarks about the significance of the work thus far. We therefore ignore many of the cognate questions and fields of research—for example, the truly vast literature on the jury, and on the dynamics of jury deliberation and decision-making (for an overview, see Hans & Vidmar 1986).

Litigation Defined

No definition of litigation commands general agreement; indeed, most of the literature on courts makes no attempt to define litigation at all. Litigation, in ordinary speech, refers to actions contested in court. The core meaning thus implies three distinct elements: first, a *claim,* that is, an active attempt to attain some valued end; second, a *dispute* or conflict, in other words, resistance to the claim; and third, the use of a specific institution, the *court,* to resolve the conflict or dispute.

This definition may seem banal, but there are subtle choices implicit in the formulation. The phrase "action contested in court" implies that the *contest* takes place inside the courtroom. But courts have other functions besides litigation. In the life cycle of many disputes, the final act of the drama, or its (apparent) resolution, takes place inside the courtroom; and yet the court stage is (arguably) not true litigation.

For example, only a court can grant a divorce; and parties to a divorce are often in serious dispute over the division of property rights, support payments, or custody of children. But the *courtroom* phase may range all the way from bitter and protracted battles to perfunctory and routine paper-shuffling. Indeed, in the *typical* case, the problems are worked out, usually with the help of lawyers, long before any of the actors appears before the judge. What is presented to her honor is a package of agreements already settled; she merely rubber-stamps these prior agreements. Under our definition, divorces of this type, though judicial statistics report them as "cases," are not litigation, because they are not contested *in* court. Since the case-loads of many trial courts are dominated, quantitatively, by completely uncontested divorces, to

consider such cases "litigation" would seriously distort the figures on litigation rates. These cases, in the aggregate, may demand time and effort; but they do not seriously overburden the system as the more complex cases do, which are actually tried.

Dispute-Centered and Court-Centered Research

There are at least two distinct approaches to the study of litigation. Some scholars are primarily interested in *disputes* themselves, as a social phenomenon—their causes and cures. For them, litigation is only of interest as a phase in the life-cycle of disputes. Other scholars are primarily interested in courts as institutions. They are thus not directly concerned with conflicts and disputes that never reach the courts, except insofar as court decisions have an impact on such disputes, for example, by influencing the terms of settlements (see Ross 1970).

Research on *disputes* suffers from the difficulties of defining and measuring disputes. Court statistics are, on the whole, quite poor; statistics on the population of disputes are worse, or non-existent. Although it is not easy to count defamation cases, for example, it is thoroughly impossible to measure the population of insults, or the population of disputes in society that arise out of insults. Sometimes there is data on the number of *potential* disputes—for example, data on serious railroad or automobile accidents—which give a kind of base-line for measuring possible lawsuits (see Friedman 1987, Munger 1987). *Victim* studies in recent years have provided base-line data for measuring the relationship between criminal acts and the number of arrests, charges, and cases (see Hindelang et al 1976). But these are exceptions.

In recent years, a start has been made in studying the life-cycle of disputes, from their beginnings in the social field, to the point where a few of them "ripen" into lawsuits. The most ambitious attempt has been the Civil Litigation Research Project (CLRP) at the University of Wisconsin. CLRP used the dispute as its unit of analysis (Trubek 1980–1981), in order to link the work of courts with the social context out of which disputes arise. The researchers did not confine themselves to disputes that ended up in court. They also drew a random sample of households and organizations to identify disputes that never got as far as court (Kritzer 1980–1981).

Dispute-centered research asks why some situations produce disputes, and what happens to these disputes. What are the switching devices (so to speak) that shunt some disputes onto a court track, while others disappear or are diverted into alternative modes of resolution? Logically prior to the study of litigation, then, is study of the "transformation" of "injurious experiences" into legal claims. Felstiner et al (1980–1981; see also Fitzgerald & Dickins 1980–1981) describe a three-stage process of transformation. First, in-

dividuals perceive themselves as undergoing an "injurious experience" (they call this "naming"); next, the experience becomes a grievance ("blaming"); the third stage is "claiming," that is, the process of turning to the responsible party and asserting a demand for remedial action. At this point, a *dispute* has emerged, which, if not settled or arranged beforehand, may end up as actual litigation.

One theoretical and empirical issue is why such "transformations" occur or do no occur. Clusters of factors can be isolated. One cluster is substantive (based on "rules of law" or "doctrines"). In Paraguay, the law does not allow absolute divorce; this is a *substantive* barrier, which keeps many kinds of marital dispute out of court. Other factors are *institutional* or *procedural:* the expense of lawsuits, or the steps that make litigation simple or difficult, whether courts are accessible or not, formal or informal, and so on.

These various structural and procedural factors are often quite obvious. It is more difficult to demonstrate or assess *cultural* factors. It is, however, commonly assumed that culture (and personality) factors are critical in explaining why (for example) the Japanese seem to litigate very little, and Americans a great deal. That is, "litigiousness" is posited as a specific cultural trait, a matter of custom, tradition, and way of life; the Japanese (it is said) prefer compromise and interpersonal arrangements; Americans are individualists—battlers and sticklers for rights. Needless to say, there is very little hard research on such issues. In fact, it is not clear whether cultural factors best explain varying rates of litigation, or whether structural and substantive barriers should be invoked (see Upham 1987, Fitzgerald 1983). Most probably, litigation rates are the product of multiple factors—including the sheer difficulty and expense of litigation. Doctrinal and structural barriers, after all, are not generated out of thin air, but are durable or permanent patterns formed out of "softer" cultural phenomena.

In one sense it is misleading to talk about "barriers" to litigation; this assumes that it is normal or natural for a dispute to end up in litigation. In fact, most people do not pursue their grievances at all. Claims-consciousness is related to class—better educated, more articulate people are more apt to insist on their rights (Caplovitz 1963, Best & Andreasen 1977). Even when grievances mature into "disputes," they do not necessarily become lawsuits. Most disputes disappear or are settled long before the trial stage, and this has apparently been true for at least a century (see Daniels 1985, Friedman & Percival 1976). From one theoretical standpoint, indeed, every trial is a mistake in calculation. It is almost always in the interests of the parties to settle; trials are socially disruptive, and people in continuing or community relationships tend to avoid them (Macaulay 1963, Engel 1984, Ellickson 1986). Moreover, trials are costly affairs, and in civil disputes, there is usually a zone of settlement or range of values at which both parties are better

off if they settle (see Ross 1970). Trials result when parties seriously misjudge the likely outcome of a trial or insist on litigation in order to establish some principle.

The dispute that ends up in court has been transformed in another way, too. It has been, necessarily, translated from raw, lay norms and descriptions, into legal categories; it has been encoded and reworked to fit the traditions and the habits of internal legal culture (on this concept, see Friedman 1975:223). In the process, the dispute itself has been subtly or not so subtly altered. Lawyers, then, who do the translation in this and most modern societies, exercise control over disputes and their outcomes by virtue of their command of the language and the traditions which the legal system legitimates and to which it assigns a privileged place. There has been, unfortunately, very little systematic work on this process of translation and transformation (but see Mather & Yngvesson 1980–1981). It is clear, however, that the practice can be more or less "participatory" or autocratic; and that the style of lawyering makes a difference to the outcome of cases (see Rosenthal 1974).

Whether disputes end up in court also depends on the definition of a court (see Shapiro 1981). Institutions called "courts" in this society perform tasks other than dispute-settlement. They have administrative responsibilities, for example—probating estates, or formalizing name changes. On the other hand, many institutions imitate the courts, or use courtlike processes, without the name or the official status.

To begin with, in some societies there are "tribunals" which exist apart from the formal court system. In many societies, too, *arbitration* is a common process, substituting for "regular" judicial progress. Arbitration differs from "litigation" chiefly in that the arbitrator is only a temporary judge—usually selected by the parties—rather than a state official. The spread of "due-process" within institutions, government agencies, and other large organizations, in addition, has meant that internal dispute-settling or grievance procedures exist throughout society, institutionally very much like courts; in some instances, the parties may even use lawyers to help them prepare or argue their "case" (Macaulay 1987).

The court system in the United States, and in most modern nations, is exceedingly complex. There are civil and criminal courts, sometimes run as separate institutions; petty courts, trial courts, and intermediate appellate courts (in most states), and state supreme courts (see Kagan et al 1978); there is also the three-tier system of federal courts (see, for example, Howard 1981). Each level can be a separate object of study. There are also specialized courts—in Europe, labor courts and administrative courts are quite prominent; and there are supra-national courts, in the European Economic Community, for example. In each society, courts occupy a specific position in the structure of government and have a distinct role in and impact on society. There is also

a great deal of interest in "alternative dispute resolution"—modes of dealing with conflict and dispute that avoid the formal (state-run) courts. Arbitration has already been mentioned. "ADR" was not only a field of research; in the 1970s it became something of a social movement—a reaction against the formal court system, in the interests of efficiency and greater access to justice, especially for the poor (see Abel 1982).

Court Centered Research: The Quantity of Litigation and the So-Called Litigation Explosion

It is commonly assumed that the United States is a highly litigious society and that litigation rates have been rising rapidly in recent periods. This rough hypothesis appears in popular literature, in the press, and in the speeches of judges and politicians. It is also assumed that the effect of the explosion of lawsuits, especially tort lawsuits, is harmful to the economy, if not to the very make-up of society (Rabin 1988). Fear of litigation stifles innovation, and leads to conservative, "defensive" strategies in business and medicine; municipal liability has led to the closing of playgrounds, the cancelling of programs, and even to urban bankauptcy. But these effects are difficult to demonstrate empirically (see below).

A number of studies have tried to measure American litigation rates over fairly long timespans (often a century or more). These studies have, on the whole, failed to document the "litigation explosion." Thus McIntosh (1981) studied courts in St. Louis, Missouri, between 1820 and 1977. Litigation rates dropped in the last half of the nineteenth century, then rose and fell and rose in the twentieth century, but hardly dramatically. The "litigation rate" in the 1970s was higher than it had been a century before; but 45% of McIntosh's cases were family law cases, almost all of them uncontested divorces. "Litigation" in the sense of actual contests in courts in fact was perhaps lower in proportion to population in the 1970s than in the 1850s (see also Friedman & Percival 1976, Munger 1988). On the whole, those who have studied litigation rates tend to agree that there are no signs in state courts of a *quantitative* explosion (for the literature, Galanter 1983; a dissenting note is Marvell 1987). Filings in *federal* court, however, are an exception; there is no question that the number of such cases has been increasing far faster than has population size (see Clark 1981). But the overwhelming majority of cases filed—over 90%—are filed in state courts. It is the state courts that handle almost all cases of family law, personal injury, and criminal justice, and the overwhelming bulk of ordinary commercial matters. No increase on the federal scale can be documented for state courts. Gifford & Nye (1987), examining recent data, found evidence that litigation rates in Florida were rising more rapidly than population rates. The Florida data, however, thus far seem exceptional.

The federal data do point toward a more interesting and promising issue: changes in the *type* of case over time. The increase in federal filings is not difficult to understand, in light of the increased role of the central government in economy and society, relative to the states. It reflects the dominance of federal regulatory and welfare law; it also reflects the activism of the federal courts—and, what is often forgotten, the activism of Congress. There are thousands of civil rights cases in federal courts; 50 years ago there were virtually none. Though some of these cases invoke constitutional rights, or post-Civil War legislation, the vast bulk of them arise under the Civil Rights statutes passed by Congress in the 1960s. Unfortunately, despite the enormous literature on civil rights, empirical research on civil rights *litigation* is rare (but see Eisenberg 1982).

The federal courts, too, are the home of the preponderance of large, complex "public law" cases (Chayes 1976), which contrast so strongly with traditional private litigation. In these "public law" cases the issues go far beyond the parties, and the court frames broad remedies and maintains continuing jurisdiction. The major school desegregation cases are examples; or the long struggles to reform prison systems through litigation. There have been examples of "public law" cases in the United States since the nineteenth century; but there is no question that cases such as Chayes describes are more frequent today than before. Unfortunately, there is no agreed-on definition to mark off the boundaries of this case-type, and thus no data on the precise number of such cases. However, their importance is beyond dispute. It is also likely that they account for a good deal of the time and effort spent on litigation. The legal profession has been growing very rapidly in the United States—there were perhaps 60,000 lawyers in 1880, about 104,000 in 1900 (Friedman 1985:633), and over 650,000 in 1985 (Curran et al 1986:1); the number continues to increase steadily. Law firms have been getting very much larger as well (Nelson 1988:2); the largest firm today, Baker & MacKenzie, has over 1,000 lawyers on its staff; and a greater share of the effort of the large firms seems to be devoted to litigation (Galanter & Rogers 1988). "Public law" cases, along with a few giant private cases (antitrust, for example), account for much and perhaps most of this effort.

Longitudinal studies of state trial courts have also looked at changes in the mix of business that courts handle (see, for example, Friedman & Percival, 1976). Compared to the nineteenth century, commercial cases and ordinary property cases account for a lesser share of the caseload of the state courts. Personal injury cases. family law cases, and public law cases have increased in number and percentage. Courts have been spending less of their time on market-oriented disputes, and more on disputes that have an expressive, personal element. The only large-scale quantitative study of state appellate litigation came to a similar conclusion. This was a study of sixteen state

supreme courts between 1870 and 1970. For 1870–1900, debt, contract, and real property cases made up 55% of the case-load. More "personal" issues—tort, criminal law, and family issues—added up to less than 30%. For the period 1940–1970, these proportions were reversed; debt, contract, and property had fallen to 25.9%, but tort, crime, and family issues now aggregated 52.3%. However, there has been something of a resurgence of contract and business litigation in recent years, at least in federal court (see Galanter & Rogers 1988, Nelson 1988).

How can one make sense of these various developments? The longitudinal data, to begin with, render extremely doubtful the assumption that there is a simple, linear relationship between litigation and economic development. In a path-breaking study, Toharia (1974) analyzed the work of the Spanish courts between 1900 and 1970. He found that there was, in fact, an inverse relationship between economic development and the volume of litigation. Litigation in the formal courts actually *declined* in the period he studied; the decline was most pronounced in the most economically advanced sectors of the country. Studies in other European countries generally confirmed Toharia's findings, for the period in question (Blegvad et al 1973, Rottleuthner 1985).

It is possible to connect these results with empirical and theoretical discussions of why individuals and businesses do or do not litigate. Individuals and businesses with ongoing relationships avoid litigation, which is inherently disruptive. This is the theme of the classic article by Macaulay (1963), which studied the behavior of Wisconsin businessmen. Thus the recent upsurge of contract cases, as noted by Galanter & Rogers (1988; see Friedman 1989), suggests changes in the nature of business relations themselves—more volatility, rougher competition, and less emphasis on continuing, quasi-personal relationships among principals of firms. Study of this new phenomenon seems promising, since it supplements the research on disputes by exploring models and devising theories to explain why firms and individuals do or do not go to court.

Research on the *outcomes* of cases, oddly enough—as opposed to the quantity of litigation, or the subject matter, or the motivation—is comparatively thin, although most of the longitudinal studies present at least *some* data bearing on outcomes. One starting point for research is the well-known article by Marc Galanter, suggesting reasons why the " 'haves' come out ahead" in trial court litigation (Galanter 1974). To a certain extent, the reference to "haves" is misleading. The argument is that "repeat players"—those who use the courts constantly—tend to win out over "one-shot" litigants. "Repeat players" are usually, though not always, the richer and more powerful parties—the government, or big business; accident victims are typical "one-shotters."

Galanter's thesis is essentially structural. It is the organizational strength of

"repeat players" that accounts for their success. Ideology or simple class bias are not put forward as critical variables. Wheeler and associates have recently presented findings on winners and losers in state appellate courts, 1870–1970 (1987). There the results are also favorable to the "haves," that is, large organizations and government entities, though not overwhelmingly by any means. Recently, too, the Rand Corporation has run important studies of jury verdicts, mostly in personal injury cases. Their data suggest the need to reexamine the usual assumption that plaintiffs consistently win at trials (see, for example, Shanley & Peterson 1983; for a historical study that points in the same direction, see Friedman 1987).

The Toharia study raised questions about the much discussed issue of the "autonomy" of the legal system, specifically, the autonomy of courts and litigation rates. Toharia did not suggest that the legal system was, as a whole, "autonomous" in the sense of unconnected and independent of social forces in society; but his findings could be interpreted to mean that at least the *formal* courts of Spain were increasingly irrelevant to economic life. Presumably, these courts were locked into a tough and relatively rigid tradition, which rendered them incapable of adjusting rapidly to social change and the demands of modern business litigants. As a consequence, these courts were increasingly by-passed by economic institutions and perhaps by ordinary citizens as well. These were important findings, and very fruitful in stimulating other research, much of which tended to confirm Toharia's findings. Of course, it is by no means clear that the situation described can be generalized across cultures, or to other times, places, and institutions. Certainly, the work of American courts in at least *some* areas—civil rights and civil liberties, product liability, and medical malpractice—hardly suggests rigidity; there may be parallel changes taking place in Europe as well. Certainly, the explosive growth of judicial review, in West Germany for example, suggests a more "American" model of court use (see Bryde 1982). And when Toharia returned to his subject, a decade or so after his first study had been published, he found that the workload of the Spanish courts had risen sharply since the early 1970s (Toharia 1987).

The Impact of Litigation on Society

This is largely uncharted territory, as far as systematic study is concerned. One of the "impacts" of litigation, especially in a common law system, is the creation of the basic legal norms themselves. This "impact" is so fundamental that it is often taken for granted; and in a sense most of the legal literature, and a good deal of the social science literature on particular fields of law, concerns this impact. Much less common are theoretical or empirical attempts to speak generally about the mode in which courts frame and devise rules, and the nature of the rules which they are likely to frame (but see Friedman 1967). A

few legal scholars, in the 1970s, advanced the thesis that litigation in common law courts tends to evolve in the direction of "efficient" rules (see Priest 1977); this thesis is, however, not generally accepted.

There are also studies of how litigation in particular courts affects the community in which the court sits; this is a theme, for example, of much of the literature in legal anthropology. Courts in many societies serve the function of restoring harmony and balance; they are concerned less with "law" and "rights" than with repairing ruptures in ongoing relationships (see Nader 1969). This is not necessarily the outcome in Western societies. Merry (1979) studied the efficacy of a lower court in an American urban neighborhood, for example, and concluded that the court was not an effective institution of dispute-settlement. Rather, the court was used in this community "as a sanction, a way of harassing an enemy," as a "weapon marshalled by disputants to enhance their power and influence," rather than "as a mode of airing and resolving disputes" (Merry 1979:919). Thus, the court does not repair broken ties; it may even exacerbate a tense situation. Tactical use of law to hurt an enemy may be particularly characteristic of colonial situations, where the law is an alien intrusion (Cohn 1965).

There is a considerable literature, too, made up of so-called "impact" studies (Wasby 1970, Johnson & Canon 1984)—studies of the consequences of particular court decisions, for example, the Supreme Court decisions banning prayers from public schools (Muir, 1967) or on abortion (Hansen, 1980), or state decisions extending tort liability (see Givelber et al 1984). These studies focus on whether officials obey such decisions, and why, or whether the decisions have an influence on behavior among various affected publics. Such studies raise conceptual and methodological difficulties (see Rabin 1979); and, in any event, data about the *aggregate* or cumulative impact of courts and litigation is not easy to come by. Litigation has both direct and indirect effects; and the indirect effects can be subtle and difficult to measure. Fears of losing or hopes of winning influence the course of out-of-court-bargaining, as we have noted. Judicial actions have what Galanter has called "radiating effects" (Galanter 1987:215)—they ripple outward into the larger society.

There is, to be sure, a popular literature of invective about the evil results of the "litigation explosion." Litigation itself is undoubtedly expensive. It is possible to gather rough figures to show how much businesses and individuals spend on litigation each year. It is not clear how one would go about measuring the more remote and consequential costs. How is one to know whether litigation is, or is not, stifling "innovation?" It is commonly stated that medical malpractice suits have led to an increase in wasteful, "defensive" medicine. No doubt, there have been *some* effects, but the studies do not agree on how much (Zuckerman et al 1986; 107–10; Tancredi & Barondess 1978). Thus no one can be sure whether (say) excessive tests and lab work

offset the possible gains from more cautious doctoring. With regard to other alleged costly consequences of litigation, there are serious problems of cause and effect. Even assuming that one can make concrete so vague a notion as "decline of trust," it is possible that "decline of trust" is the *cause* of certain forms of litigation, rather than the effect (see, in general, Friedman 1985).

Moreover, it is striking that popular opinion and scholarly critiques alike put so much emphasis on hidden costs and side-effects, and show so little concern for hidden benefits. The benefits, to be sure, are often quite intangible and immeasurable: social justice; expanded opportunities for women and minorities, expansion of civil liberties, fair procedures within institutions, limits on government (see Galanter 1986:28–37). Who would deny that these are significant gains? Whether they are worth the costs is a question that models and equations cannot answer.

The determinants of litigation are complex. Perhaps the key fact is that "litigation" is not a unitary phenomenon, and thus it would be vain to try to relate litigation as a process to any *general* sociological theory; or even to general theory in the sociology of law. There is no reason why the same theoretical apparatus would explain quantitative and qualitative aspects of the various types of litigation: "ordinary" litigation—boundary disputes between landowners, squabbles over custody, breaches of sales contracts—as well as giant public-law cases, mass tort cases (for example, the literally thousands of asbestos suits, or the "Agent Orange" cases; see Schuck 1986), civil rights test cases, huge private anti-trust cases; not to mention, at the other extreme, routine eviction and repossession cases, and neighborhood disputes, in small claims or neighborhood courts. It is by no means clear that all of the giant "modern" lawsuits constitute a single phenomenon in themselves.

Judicial statistics are poorly kept, and the compilation of data sets for state (Kagan et al 1977) and federal cases (Carp & Rowland 1983) has only recently begun. But perhaps what is needed most of all is intensive, small-scale study of lawsuits in different courts, at different stages of the life-cycle of disputes. Out of this might emerge a *typology* of disputes and litigious occasions; and at that point meaningful hypotheses might be framed about the many forms and shapes of litigation.

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