IDEOLOGY, SCHOLARSHIP, AND SOCIOLEGAL CHANGE: LESSONS FROM GALANTER AND THE "LITIGATION CRISIS"

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A prominent feature of the landscape of American sociolegal research is Marc Galanter's scholarship on the civil justice system. Galanter began his academic career in anthropological research on India, and his studies of the American legal system reflect these origins. Like an anthropologist at work in his native land, Galanter's contribution has been to illuminate the properties of the American legal system as a social whole. No other scholar has so effectively comprehended the organic character of American law—how the operation of the formal rules system depends on the strategic interplay among actors in the system, the significance of indigenous or embedded systems of normative ordering that pervasively emerge in the shadow of the formal legal system, and the relationship between the law as a system of symbols and a system of bargaining endowments. "Why the Haves Come Out Ahead" (Galanter, 1974) remains the most ambitious and comprehensive attempt to explain the relationship between the litigation system and patterns of inequality in American society. Not only did the article develop a useful set of grounded categories for social actors in the system (the famous distinction between "repeat players" and "one-shotters"), it also specified the mechanisms through which these social categories could achieve dominance in the system. In broad sweep, it suggested those strategies of legal change that would have the greatest redistributive effects on society, as well as the limitations that would confront attempts at social change through the law. Given the nature of this early accomplishment, it seemed natural when Galanter (1983b) reasserted his role as the preeminent commentator on the civil justice system with "Reading the Landscape of Disputes."

In the second article Galanter attempted to debunk the widely publicized notion of an explosion of litigation in Ameri-

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can courts and the associated condition of "hyperlexis," a malady that consists of having too many laws, lawyers, and lawsuits. His basic argument was that evidence of a litigation explosion was much weaker than the hyperlexis advocates suggested. Only a small proportion of grievances (potential disputes) resulted in the filing of a lawsuit, and only a small proportion of these went to trial. With the exception of the federal courts, which house a relatively small percentage of all cases in the United States, historical data on case filings indicated only a modest rise in litigation rates. Compared to other times and places, the contemporary American experience with litigation was not so extreme. Other societies, and our own in various historical periods, showed a greater propensity for litigiousness than the United States today. Indeed, some of the societies held up as ideals of nonlitigiousness, most notably Japan, manifested low levels of litigation and few lawyers not because of a cultural predisposition against formalized conflict, but as a result of conscious decisions by political elites to limit the institutional resources given to formal dispute resolution structures. Galanter suggested, therefore, that the "litigation crisis" was largely the social construction of a small group of legal elites whose only exposure to the system was at the top, mostly in federal courts. The image of a litigation system run amuck had been fed by speculative and unrealistic statistical projections about the future caseloads of federal courts and a small number of horror stories concerning ridiculous lawsuits that gained high visibility in the media. Galanter rejected the view that the civil litigation system was in crisis, concluding instead that the system had made rather conservative adaptations to a vast set of social, political, and technological changes in American society.

The reaction to Galanter's piece was quite remarkable. *Newsweek* (November 21, 1983: 98) picked up the story. (When was the last time a law and society scholar had their picture in a major news weekly?) Leaders of the organized bar hailed Galanter's conclusions as a vindication of the American legal profession (*American Bar Association Journal*, 1984; see also Cooley, 1984). Then Chief Justice Burger responded to the article by questioning Galanter's sense of reality, prompting Galanter to point out that the chief justice had in the very same speech quoted other scholars out of context and relied on the same misleading statistics criticized in Galanter's original article (1986a). Galanter has since become further embroiled in the debate over tort reform and has, in papers delivered after "Reading the Landscape," continued to question the necessity for changes in tort rules that would tend to limit what plaintiffs (and their lawyers) can recover (Galanter, 1986b; 1986c; *Maryland Law Review*, 1986).

Despite the widespread attention given to Galanter's article, "Reading the Landscape," the critics of the civil litigation system have recently scored impressive political victories for their vision of a system in crisis. Several states have enacted legislation that significantly limits various aspects of tort liability, and similar legislation is pending at the federal level.* The political success of the crisis interpretation in the face of a telling critique by a prominent sociolegal scholar raises an interesting question. Why has Galanter's reading of the landscape of disputes failed to take hold, even though it presumably enjoys the political support of the organized bar, a group that supposedly wields considerable power in state politics (Halliday, 1987)? Is it because there are flaws in Galanter's analysis that make it unpersuasive to policy makers? Or does the debate over the litigation crisis disclose a deeper message about the relationship between ideology, sociolegal scholarship, and legal change? This essay probes these issues by critically examining the interpretations of the civil litigation system contained in Galanter's article and those offered by the proponents of the hyperlexis version.

I. INTERPRETING THE DATA: CRISIS, CONTINUITY, OR CHANGE?

The empirical question at the core of Galanter's analysis in "Reading the Landscape" is whether the United States currently has high rates of disputing and litigation compared to earlier historical periods or other societies. He does not confine himself to looking exclusively at disputes or the courts, nor does he limit himself to quantitative indicators. Instead he draws on a variety of evidence concerning the role of law in social life, including data on the number and organization of lawyers, the incidence of legal problems among the population, media coverage of legal institutions and events, and the like. The lack of boundary definition and the range of information reviewed complicate the effort to weigh the evidence for and against Galanter's interpretation. But they also make his analysis much more interesting in that it addresses broader questions about the role of law in American society.

Galanter's position on the nature of the changes that have oc-

* In 1985, 46 states enacted some kind of tort reform legislation; in 20 of these, the reforms were termed "significant" by an insurance industry reporter. In 1986, 21 of the 38 adjourned legislatures had enacted "significant" reforms (Casey, 1986: 14). We must be aware that these figures no doubt oversimplify a very complex phenomenon. The political success of the tort reform movement must be measured according to the resources devoted to it and the proportion of legislative goals achieved. An in-depth examination might reveal that the reform effort has not been as successful as it appears on the surface and that Galanter's work played a significant role in frustrating these efforts. Nonetheless, with this caveat in mind, the broad lines of the success of the tort reform campaign are clear.

curred in the civil justice system is not entirely clear, however. Consider the concluding paragraph of a section on changes in litigation over time:

> Thus litigation proliferates. It becomes more complex and refined, but at the same time most of it is truncated, decomposing into bargaining and mediation, or administration. Courts and big cases are more visible. For many in society courts occupy a larger part of the symbolic universe even when their relative position in the whole governmental complex diminishes. Cost and remoteness remove the courts as an option in almost all disputes for almost all individuals. . . . But courts are ever present as promulgators of symbols of entitlement, enlivening consciousness of rights and heightening expectations of vindication. (1983b: 52)

This hardly sounds like a rebuttal of the hyperlexis interpretation. Indeed, in this and other passages it is apparent that Galanter recognizes that there have been significant changes in the litigation complex and a dramatic increase in consciousness about the law.

At one level Galanter seems to be refuting the empirical claims of the hyperlexis writers. The narrow interpretation of his argument is that he rejects the contention that the current system is in a state of crisis because Americans have become pathologically litigious. But he has to admit that there is some merit to the hyperlexis notion, even if it is exaggerated. Thus at key points in the argument his position shifts from refuting the claim that the litigation complex has expanded to defending the expansion that has taken place. The defense is based on the claim that the growth in litigation is largely continuous with the recent past of our own society and has largely benign consequences for the social order because litigation is socially useful. From my point of view, this broader aspect of Galanter's analysis is the most important, for the issues raised are at the core of theoretical questions concerning the causes and consequences of change in the modern legal system. It is also the most problematic, however. In several ways Galanter understates the nature of change in the American legal system as well as the differences between American legal culture and the legal cultures of other societies. And, by failing to develop an explicit theory of change in the civil justice system, he may present an overly optimistic view of the changes occurring in the system.

First, a significant element of Galanter's argument is based on what he refers to as the "dispute pyramid," in which he uses the findings of the Civil Litigation Research Project (CLRP) to demonstrate that only a tiny fraction of potential disputes ever result in the filing of legal claims and that most legal claims are resolved administratively or by negotiation, with very few going to trial (1983b: 12–18). Galanter's synthesis develops a terribly important social fact. It rebuts the commonplace view that Americans are "sue happy," suggesting instead that they are much more

likely to "lump it" than to file suit, and that even if they file, they are far more likely to settle than to litigate. A critical limitation of the dispute pyramid data, however, is the lack of historical comparisons. We do not know whether there have been changes in the size and steepness of the pyramid. Is there now a greater tendency for people to perceive injurious experiences as a violation of a right or entitlement? Are they now more likely to convert grievances to claims, claims to disputes, and disputes to lawsuits? In the absence of systematic historical data we can only speculate, but it seems unlikely that what Galanter refers to as the "growing symbolic presence of law" would not contribute to the increase in the rate of transition from the lowest reaches of the dispute pyramid to the higher ones involving the invocation of legal rights and formal legal process.

Moreover, since only a relatively small proportion of potential disputes currently make their way up the pyramid, it does not necessarily indicate that changes in disputing behavior have not increased the scope or magnitude of claims. If the base of the pyramid (perceived injurious experiences and grievances) is expanding, the number of actual or threatened lawsuits would dramatically increase, even if the rates of transition from grievances to higher levels of legal process remain constant or decline. Nor do we have a base line of experience with which to determine whether the quantitative dimension of the current pyramid of disputes is one we would label as "litigious." Is a litigious society one in which 5 percent of grievances lead to the filing of suits, or 6 percent, or 10 percent? The best comparison available that Galanter notes (1983b: 61–62) is Fitzgerald's replication of the CLRP study in Australia. Fitzgerald found that Australia, which is seldom thought of as a hotbed of litigiousness, displayed a remarkably similar disputing pyramid to that found in the United States. There were some significant differences, however. Australians were substantially more likely to complain about middle range grievances to other parties, but they were half as likely to take disputes to court. If (as the CLRP found) Americans take 11 percent of their disputes to court, but (as Fitzgerald found) Australians take only 5.5 percent to court, is that a significant difference? There is no clear answer, and the comparison is complicated by dissimilarities in the legal systems of the two countries, but the difference is not trivial on its face.

Second, given these difficulties in measuring the entire pyramid of disputes over time, Galanter turns to the only quantitative indicator available in the literature—litigation rates (based on the number of civil cases filed per population). His review of the literature reveals another surprise: Litigation rates in all but federal district courts have been remarkably stable over time, showing only modest increases in recent years (1983b: 37–42). While the synthesis of these findings certainly tends to rebut alarmist pro-

nouncements that litigation rates are skyrocketing, the limitations of the data for making inferences about broader patterns of disputing, much less about the role of law in structuring social behavior, must be kept in mind. Relatively constant levels of case filings in regular courts do not mean that the entire pyramid of disputes has remained constant. Historical statistics on litigation rates do not account for the changing base of cases, as particular problems exit the regular courts for alternative adjudicatory and regulatory forums. Workmen's compensation claims, for example, at one time were brought as common-law actions in the courts, but, beginning in the 1920s, primary jurisdiction over such claims was given to industrial accident commissions. As a result, only a relatively small number of cases in which there is an appeal of a commission decision now appear on the dockets of regular courts (see Friedman and Ladinsky, 1967: 69–71). Thus a potentially vast number of cases were removed from the regular courts. If one included all varieties of disputes brought to third parties for authoritative resolution (arbitrations, tax and zoning appeals, small claims court cases, dismissal and suspension hearings for employees and students, and the like), some of which may have been brought in the regular courts in earlier periods but many of which are new, we would have a much different image of the growth in the number of civil disputes. Galanter is acutely aware of these "appended" and "embedded" forums, for he comments on their significance (1983b: 17, 26–31; 1974; 1983a). The pervasiveness of alternative forums may reflect a strength of our dispute resolution complex, in that it indicates that we do not depend solely (or even primarily) on the inflexible and costly decision-making processes of regular courts. But certainly the dimensions of these systems are relevant to the role that law and formal rules systems play in the United States, as well as to the legal consciousness of the citizenry.

Litigation rates in themselves also do not disclose changes in the social significance of the cases. If the cases filed deal with more dollars, more people, larger systems, and broader remedial issues, they have more significance for the society. Galanter discusses these changes in the system, noting the rise of public law or extended impact cases that dramatically expand the scope and duration of judicial intervention from that encountered in the typical lawsuit, the increase in class action suits that merge the claims of numerous individuals, the growth in the number of "blockbuster" federal cases (those lasting more than 20 days), the increasing complexity of pretrial and posttrial procedures, the growing number and specialization of the lawyers working on cases, and so forth (1983b: 43–53). But again he may slight their significance, for these cases do not merely reflect the increased symbolic presence of law but also a significantly greater impact on the allocation of society's resources. Indeed, the changes in the kinds of cases courts deal with also may suggest why there is increasing dissatis-

faction with their role. Public law, criminal, divorce, and tort cases, which have displaced property and commercial cases as the major business of courts (ibid., pp. 43–44), involve courts in controversial and morally ambiguous issues (see, e.g., Engel, 1980; 1984), and may contribute to a decline in their legitimacy.

Nor do litigation rates measure what Galanter (1983a) has called the "radiating effects" of court decisions or legal rules, that is, their effects on the behavior of those who are not directly involved in litigation. For example, in relatively stable areas of law, a credible assertion of a legal right may lead to a settlement without the filing of a lawsuit. Galanter (1983b: 33–35) acknowledges the significance of this function of the courts for bargaining and negotiation in the context of disputes, but the observation can be extended beyond the context of disputes. Vast numbers of transactions and relationships can be subjected to legal rationalization in the sense that they are consciously constructed and conducted in reference to an operant set of legal rules, even though the parties rarely call on the courts for enforcement, interpretation, or invalidation. Kagan's (1984) analysis of debt cases nicely illustrates this point. He uncovered the apparent paradox that, although there have been large increases in the volume of loans and delinquent debts and substantial change in federal statutory law regarding debtor-creditor transactions, there has been a sharp drop in the number of contested debt cases since the mid-1930s. A significant factor in this decline, Kagan (ibid., p. 344) suggests, was the legal rationalization of debtor-creditor relationships: "Lenders became increasingly adept at devising loan agreements and security arrangements to forestall legal conflict and at routinizing non-judicial debt collection procedures." Thus, as large bureaucratic lending institutions with the resources to retain legal specialists became dominant in the credit market, a larger proportion of credit transactions were processed through legally rationalized channels that avoided resorting to the courts to enforce debt agreements. As anyone who has recently bought a house or a car can attest, there is more "law stuff" in credit transactions today in the sense that more contracts, papers, notices, and waivers are signed, which makes legal regulation appear more prevalent and burdensome to the average consumer. But, as Kagan found, there may be less frequent resort to the courts to enforce these agreements.

Third, Galanter tends to underestimate the differences between the past and present legal culture of the United States and other societies. He cites historical research and indicates that in some colonial communities Americans went to court with far greater frequency than they do today (1983b: 42) and anthropological studies that suggest that other societies (Yugoslavia, certain societies in East Africa, and the Philippines) use the courts far more often than does contemporary America (ibid., pp. 56–58). The comparisons underscore a valid point—that frequent use of the

courts is not in itself a social evil—but can only be judged in relation to the social context. Hence "litigation" in a communal society, in which disputes are unburdened by the costs and delays that are part of American judicial processing, aired before the entire collectivity, and resolved according to the likely impact on the total set of relationships in the group (see, e.g., Gluckman, 1955), may define and strengthen the community in a variety of ways, in part because of the frequency with which it occurs. The critical issue then becomes not the frequency of litigation but the social functions it performs. In making these comparisons to other systems, Galanter is silent on whether he sees the American civil justice system as occupying the same position in American society as do the courts in Yugoslavia or East Africa.

Similarly, elsewhere in the article Galanter suggests that much of the dissatisfaction with current patterns of disputing and litigation stems not from the concrete actions and consequences of the system but from a more general concern with the decline of the traditional community in American life. He (1983b: 69–70) quotes extensively from research by Engel (1984) on a small Illinois community, in which Engel found that although personal injury litigation had remained exceedingly rare, having been effectively suppressed by local norms against filing such lawsuits, it was frequently and vehemently denounced by members of the community. Engel interpreted these denunciations as a symbolic attempt to preserve idealized aspects of the traditional community in the face of a broad set of economic and demographic changes. Engel's research is very significant for what it suggests about the sources of popular dissatisfaction with the law, but we should be careful not to interpret his findings as indicating that there has been no change in the function of law in the community he was studying. Indeed, many of the social and economic changes Engel describes—the increasing scale of agricultural production, the formalization of credit and commercial transactions, the penetration of local markets by distant, bureaucratically operated corporations—were marked by the legal rationalization of relationships that were previously left to the sphere of informal systems of obligation. The hostility small town residents directed at personal injury litigation may have been misguided, rooted in their hostility to newcomers and outsiders, and out of proportion to the actual incidence of such litigation. It also reflected diffuse but real changes in their situation that were associated with increasing exposure to legal forms, courts, and lawyers. The role of law in the community, like the community itself, had changed. When one moves beyond the rural community and considers the penetration of all spheres of social life by legal rules and other law-like systems associated with the increasing bureaucratization of economic organizations and social institutions, there is little doubt that a significant transformation in American legal culture has taken place. In

emphasizing the symbolic dimensions of that change, Galanter glosses over the structural shift.

Fourth, in the attempt to refute the hyperlexis position, Galanter treats the changes that have occurred in the civil justice system in recent years as largely benign, thus underplaying the imperfections of the system. In the conclusion of the article he (1983b: 71) suggests that more and more visible litigation is not inherently inconsistent with urbanized community life, for litigation can signify not just conflict but also "a reaching out for communal help and affirmation," "an instrument for testing the quality of the present consensus," and "a forum for moving issues from the realm of unilateral power into a realm of public accountability." One need not adopt the hyperlexis perspective to find fault with this optimistic view of the civil justice system. As Galanter's earlier work (1974) so elegantly suggests, despite the broad claims of the law to control the distribution of scarce resources in a just and objective fashion, the social organization of the legal system gives the "haves" enormous advantages in legal contests. The same problems of cost, delay, institutional passivity, imbalances in representational resources, and the like, would appear to frustrate the fair and efficient functioning of the civil justice system as much or more today than when Galanter wrote his seminal piece.

Galanter's optimistic gloss on changes in the litigation complex might be explained as a defense against conservative critiques that have the transparent policy objective of limiting access to the courts and confining the remedial power of judges and juries. It also may reflect an unwillingness to confront theoretical questions about the source of the changes taking place in the legal system and the implications of such patterns for both the law and the social system. From a broader theoretical perspective, we might arrive at a very different interpretation of the developments Galanter reviews. For example, I would suggest that the last decade, with its dramatic changes in the number and organization of lawyers and in styles of lawyering, has revealed ever more clearly the tendency of the American legal system to combine an entrepreneurial responsiveness to changing business and social conditions with massively unequal access to legal representation. The commercialization of legal practice in both the corporate and personal hemispheres of the profession has accentuated the instrumental character of law. The trend is not toward a legal system that fosters a stronger sense of community, but toward one that is increasingly called upon to enforce formal rules or arbitrate conflicts between large corporate actors. Most individuals confront the litigation system as a bureaucratic complex that, as their lawyers explain, must be understood in terms of economic incentives and bargaining counters. As Galanter himself notes (1983b: 25–26), litigation usually does irreparable harm to relationships. Indeed, there are some suggestions in the literature that contact with the

legal system is more often than not an alienating, dissatisfying experience (Sarat, 1977: 437; Sarat and Felstiner, 1986; but see Tyler, 1984, 1987). Thus as the law has expanded to perform new functions on a larger scale, it has become an increasingly technical apparatus.

Do these problems with Galanter's interpretation imply that the hyperlexis critics are more correct in arguing that there is now too much litigation and that the law should be changed to restrict it? No. Galanter may have minimized the degree of change in the civil justice system. If accepted uncritically, his interpretation might lead to a misunderstanding of the nature of legal change. But his critics have not offered a more persuasive theory of how the system operates or how it can be improved. The leading alternative conception of the tort system as a system in crisis is well represented in government reports and private writings in support of the current campaign for tort reform.

II. A CRISIS VIEW: THE CAMPAIGN FOR TORT REFORM

Current efforts to reform the tort system are based on self-confident assertions that the system operates unfairly and inefficiently to the detriment not only of defendants but also to the consumers of defendants' products and services, who must ultimately bear the cost of excessive judgments and litigation expenses. But many of the proposed changes in tort laws are based on value judgments about what is just rather than behavioral data on how differences in rules of liability affect filings, verdicts, and settlements. For example, commenting on Galanter's research in a symposium published in the *Maryland Law Review* (1986), Benjamin Civiletti (1986), the former attorney general of the United States, argued that the tort system has become distended due to the expansion of doctrines that favor plaintiffs, such as strict liability, joint and several liability, and comparative negligence. His assertion was made without reference to data over time or across jurisdictions that would allow one to test for the effect of changes in doctrine on filings, success rates, or the size of damage awards. Thus it is not clear how the changes Civiletti proposes would affect the operation of the system. Nor is there consensus that the proposed limitations are in the best interests of the society at large. Although there may be costs associated with doctrines expanding liability for defendants, there may be gains as well in terms of risk reduction and distribution. However, such potential benefits are not discussed (see also Phillips, 1986).

The report of the Attorney General's Tort Policy Working Group on the *Current Crisis in Insurance Availability and Affordability* (U.S. Department of Justice, 1986), is subject to the same criticisms. Based on the view that the insurance industry is competitive and that insurance rates are thus set by market

processes, the report places the blame for the insurance crisis on the tort system. It criticizes doctrinal developments expanding strict liability and leading to new theories of causation, argues that there has been an explosive growth in damage awards, and suggests that transaction costs in the system are too high. It concludes that the tort system has become too inefficient, too costly for industry, and too unpredictable, thus forcing insurance companies to limit the coverages offered or charge dramatically higher premiums. Its chief recommendations for dealing with these problems are to limit doctrines of strict liability, causation, and joint and several liability; set caps on noneconomic damages and contingency fees; and experiment with alternative dispute resolution procedures, coupled with the threat of shifting the cost of the litigation to plaintiffs who win judgments in amounts less than that offered in settlement negotiations.

The report is based on a highly tendentious reading of current doctrinal debates and the available data on the tort system. It consistently advocates a pro-defendant position on doctrinal issues, assuming perforce that doctrinal developments that have expanded liability are unjust or unwise. Higher damage awards (particularly those that include noneconomic damages) are seen as inherently bad or irrational, with no discussion of the merits or circumstances of the underlying cases or of positive social consequences that might flow from such awards. Although the report is loaded with charts and tables, giving an appearance of scientific authority, it is fraught with questionable interpretations of data (see the critique in the National Association of Attorneys General, 1986). For example, in rejecting the argument that the rise in insurance premiums has economic causes independent of changes in tort damage claims, the report (U.S. Department of Justice, 1986: 17) cites the massive underwriting losses the property/casualty industry has experienced in recent years. It fails to indicate that underwriting results present an extremely negative financial picture because they do not reflect investment revenues, capital gains, tax credits, and reserves against future premiums, but do include the voluntary payment of dividends to policyholders. The report does note the paradoxical findings that the insurance industry had a substantial net profit in 1985 and that insurance stocks posted above average gains in a rising stock market, yet minimizes their importance by suggesting that the rate of return for the industry was lower than the average for Fortune 500 companies and lower than the industry's average in the preceding decade. The validity of these comparisons is questionable as well, however. The Fortune 500 may not be an appropriate comparison for an entire industry consisting of companies of greatly varying size and profitability. Moreover, without presenting a longer time series on the profitability of the industry, we do not know whether the recent drop in profitability

reflects a regression to the historic mean or a decline below the historic average.

The report (ibid., p. 42) also cites the increasing number of product liability cases in federal courts from 1974 to 1985 (which grew by 758%) as indicative of the increase in such claims at the state level. Statistics from the National Center for State Courts (1986), however, reveal that the number of tort claims filed in state trial courts grew some 9 percent between 1978 and 1984, implying that the experience in federal courts is very different from that in the much larger state court system. The report (U.S. Department of Justice, 1986: 35–43) likewise presents statistics from various studies that purport to demonstrate explosive growth in damage awards. Again the analysis is misleading. Even though many of the statistics pertain to a small number of cases, only mean verdicts, which are subject to inflation due to a few large judgments, are reported. Very large verdicts (especially those involving punitive damages) are often reduced by the trial judge on appeal or through negotiation after trial (Landes and Posner, 1985: 565; Shanley and Peterson, 1987). The statistics the report cites, however, do not take account of these reductions.

The data cited in the report, as well as in other sources (see, e.g., Danzon, 1986), do indicate a growth in the number and size of legal claims in particular fields (most notably medical malpractice and products liability) and locales. Yet no definitive data on increases in the total amount paid out for tort claims are presented. The lack of adequate information does not prompt the Working Group to recommend the systematic collection of data from insurance companies that would more comprehensively address this question. Nor does it dampen the report's ardor for suggesting sweeping changes that would affect the entire tort system, not just those areas that have been most problematic in recent years.

The quality of the discourse in the Working Group's report suggests that it is primarily an ideological document tailored to the interests of the insurance industry and defendants in the tort system. Neither the report nor the proposals for change that have been considered or adopted by many states aim at fundamental changes in the system that would generally lower barriers of cost and delay. Even suggestions for the use of alternative dispute resolution procedures are wedded to the threat that plaintiffs may face higher costs for refusing settlements, while there is no parallel threat for unreasonable bargaining by defendants. Thus the proponents of tort reform do not appear committed to reforming the system, but rather to gaining greater advantages for themselves. Their activities are properly seen as a classic illustration of one of the principles from Galanter's (1974) earlier work: Repeat players in the legal system have sufficient political resources to take advantage of strategic opportunities for changing rules to their benefit.

The outcome thus far of the political debate over the litigation explosion presents a sobering example of how ideological currents and political organization can overwhelm sociolegal scholarship. Despite the doubts I have expressed about Galanter's interpretation of patterns of change in the civil justice system, at the very least he raised significant questions about the validity of perceptions of a litigation crisis and called for an appropriate response: more research. In contrast, some of the advocates of tort reform have waged an ideological battle that has included the manipulation of statistics and the dissemination of misleading and false horror stories (see Daniels and Martin, 1987). Galanter's analysis may be subject to question, but it would be folly to suggest that its political failure is due to errors of scholarship.

Perhaps it is no great surprise that in an era of conservative backlash against the expanding role of the courts, a backlash led by the Reagan administration, ideology would prove more successful in limiting judicially enforceable rights than in the past. What is more curious at first glance is that the legal profession has been relatively quiescent, or at least relatively ineffective, in the battles over tort reform. I would offer three reasons. First, as Galanter suggests (1983b: 63–65, 72), the profession's capacity for research on the civil justice system remains remarkably weak. Law schools continue to devote vastly more resources to research on doctrine than on the operation of the civil justice system. Moreover, the way research on the system is organized may tend to produce a biased product. Much of the data about the operation of the system and a large proportion of the resources for analyzing it are controlled by interested private parties, such as insurance companies, or by the courts and the public research organizations controlled by the judiciary. Thus research in the area tends to be directed at the "problems" with the system as they are perceived by these constituencies. Second, the profession's ability to mobilize opposition to tort reform may have been weakened by internal divisions along client lines (Heinz and Laumann, 1982: 232–273). Although associations of trial lawyers may have had sufficient consensus to organize campaigns against the proposals, larger associations with substantial numbers of defense lawyers may have lacked the unanimity to take a strong stand. Third, the legitimacy of the profession in the eyes of the public and other business and community elites has probably suffered in recent years, whether justifiably or not. As the number and earnings of lawyers have grown rapidly, as the marketization of legal services has become more prevalent and visible, and as the courts have become increasingly involved in morally ambiguous areas of social life, the profession's claim that it serves the public interest has become less credible. The outpouring of hyperlexis rhetoric is itself one manifestation of professional desacralization.

III. CONCLUSION: WHERE DO WE GO FROM HERE?

In Galanter's presidential address to the Law and Society Association shortly after the publication of the litigation explosion article, he (1985: 543) called attention to "the emergence of new knowledge about law," not only in the form of increasing amounts of law and society research, but also the expansion of legal journalism and the greater willingness of legal actors to discuss practices previously considered confidential. It led Galanter (ibid., p. 552) to suggest that the current round of crisis rhetoric about the law reflected a fundamental shift because structural changes in the law were "accompanied by a change in the social institutions of knowledge about law." He concluded with the optimistic hope that these new institutions of knowledge "might flourish in conjunction with a more responsive and more inquiring legal process." The aftermath of Galanter's article is cause for a less optimistic reading, however, of the role of sociolegal scholarship in legal change. Critical analyses that penetrate ideological characterizations of the legal system offered by legal elites and powerful interest groups will, by themselves, have little effect on general perceptions of law or on policy debates concerning legal change. The new institutions of knowledge about law, like the old, can contribute to distorted conceptions of how the legal system operates. The growing prevalence of empirical research may begin to affect the discourse of policy debates by requiring participants to justify proposals for change with empirical findings. But as the debate on tort reform implies, the increasingly frequent invocation of research results does not necessarily signify that the debate is any less ideological than before.

I do not mean to suggest that sociolegal scholars should avoid policy debates. For a variety of institutional reasons, this is impossible. (It is part of the justification for funding law and society programs, after all.) Nor is it desirable from a pragmatic political perspective. Critical commentaries like Galanter's may have some effect at the margins or in some situations. At the very least they may reveal the factual errors or the ideological dimensions of some characterizations of the legal system. But there are two strong messages in the debate over the litigation explosion for sociolegal research. The first pertains to the organization of the enterprise itself. As scholars we must be constantly sensitive to the potential impact on research results of who funds the research, who defines the questions to be investigated, and who controls access to the necessary data. In short, we must continually strive to gain more autonomy for empirical research on law.

The second lesson concerns the nature of the research practice we engage in. It is critical that we strive to create and test theory rather than to produce ideology. A major disappointment in Galanter's analysis of the civil justice system is that, in responding to

the hyperlexis notion by minimizing the degree of change that has taken place in the system, he abandoned the attempt to explain broader patterns of change in the system. He provided an important service by describing the landscape of the system and by forcing us to reconsider the conventional wisdom about patterns of disputing. But the time has come for sociolegal scholarship to move from the description of landscapes to theories of the structure of legal systems and of the structural principles that explain and predict how they will change. It is only through such a theoretical enterprise that sociolegal scholarship can hope to produce more powerful explanations of the legal system—powerful in the sense that we develop more refined notions of the kind of data and analyses necessary to test our conceptions of social institutions, that we adjust our interpretations based on our findings (and thus enhance our position to make truth claims), and that we build broader understandings of the legal system that are not captured by particular audiences. The contribution of Galanter's article to this enterprise should be properly seen as stating what we do not know, rather than as offering a definitive understanding of how the litigation system works, how it has changed, and why.

This is not a call for a crude positivism that pretends to achieve a value-free, purely behavioral science of law, such as Black (1976) extols. Constructing social theory is never a neutral process, for it entails a range of value choices concerning what is worthy of study, our conception of how society is constituted, views on how social relationships can be studied, and so forth. For many scholars this includes a critical posture toward the current structure of law and other social institutions and the attempt to develop alternative conceptions of the social order that challenge orthodox social explanations. But whatever the value orientation of law and society scholars, for sociolegal scholarship to establish itself as an influential source for the interpretation of legal phenomena, it must be more ambitious in explicating and testing theoretical paradigms of legal change.

Friedman (1986) may offer at least a limited example of such an attempt. Interpreting many of the same changes that Galanter deals with, he argues that the dramatic expansion of law, what he calls the movement toward total justice, is a response to the growing demand for social insurance and compensation that is generally characteristic of the modern welfare society. By arguing that these changes are rooted in changing social norms and reflect a broad social consensus, Friedman posits an explanation of legal change that can be tested historically and cross-nationally. Although there may be serious problems with the argument, it is in such attempts to develop and test theories of legal change that sociolegal scholarship will achieve new forms of knowledge. The danger with the alternative course is that in responding to ideology, we may become ideologues ourselves.

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