CASE CONGREGATIONS AND THEIR CAREERS

MARC GALANTER

This article explores the way that a set of cases arising from a specific event, product, or claim form a congregation of cases that displays common features and that traces a discernable career over time. Such a career is related to, but not uniquely determined by, the course of the social activity that underlies the type of case. The relation of activity and case congregation is mediated by a complex structure of disputing activity (including norms, cognitive dispositions, institutions of access, stakes and resources, social support, legal services, and more). In addition to these external influences, such litigation itself influences its future course by various effects on the underlying activity, on the organization of disputing about it, and on the legal setting. Such endogenous effects include *holistic effects* associated with the size and distribution of the congregation and *career effects* associated with the way that the congregation unfolds over time. Delineation of these various effects suggests that litigation lives "a life of its own," partly independent of underlying events in the outside world, but that the regularities in the litigation process are not reducible to a comprehensive pattern since the activity is interactive and strategic.

> [The common law forms of action] are living things. Each of them lives its own life, has its own adventures, enjoys a longer or shorter day of vigor, usefulness, and popularity, and then sinks perhaps into a decrepit and friendless old age. A few are stillborn, some are sterile, others live to see their children and children's children in high places.
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> Pollack and Maitland (1968: 2, 561)

I. THE NOTION OF CASE CONGREGATIONS

We are used to thinking of cases as the units that make up a litigation rate. We also recognize that cases are related to one another by legal doctrine—as co-instances, as precedents, extensions, duplicates. But they are also related in another way: as members

I am indebted to Stewart Macaulay, Frank Munger, and John Padgett for helpful responses to my earlier draft, to Mike Haakenson for able research assistance, and to Brenda Storandt for skillful and dedicated preparation of the manuscript. Robert Flanagan kindly granted permission to reproduce Figures 2 and 3. I am grateful to the Roscoe Pound–American Trial Lawyers Foundation for support of work on this article as part of a study of lawyer's litigation networks.

LAW & SOCIETY REVIEW, Volume 24, Number 2 (1990)

https://doi.org/10.2307/3053686 Published online by Cambridge University Press

of a congregation of cases that has a history or a career. I propose to develop some ideas about such congregations and their careers. I hope to identify some of the major contingencies in such careers and to suggest some hypotheses about the factors that influence their course.

What I mean by a *congregation* is a group of cases that are seen as a defined set that share common features, that are shaped by a common history, that are subject to shared contingencies, and that lean into a common future.[1] The shared features that define the set may differ: a set may be connected by its origin in a specific event (e.g., a disaster like the Babylift crash, the Buffalo Creek flood, or the Hyatt Skywalk collapse; a particular form contract; or a financial incident). Or a set may be related to use of a particular product (e.g., the Dalkon Shield) or a particular type of product (e.g., all-terrain vehicles [ATVs]). Or a set may represent a conjunction of a particular kind of party and doctrine (e.g., insurance bad faith) or of a particular right and a particular procedure (e.g., Title VII class actions). Since lawyers often shape practice specialties around such congregations, they may add another layer of connection.

My criteria of common fate and shared features are so loose and general that you will correctly note that they might apply to such immensely large and enduring and ordinary categories of litigation as automobile injury cases, cases involving injury on property, construction contracts, bankruptcies, divorces, and other matters that populate the courts in large numbers. I think there is a useful contrast, even if it is a relative one, between what I call congregations and these relatively long-lasting, slow-moving populations, in which the fate of case 100,002 is not likely to be strongly affected by what happens in case 100,001. These giant populations form a relatively stable (if slowly changing) background to smaller sets that are subject to considerable influence from one case to another. These latter, which I call congregations, are seen as distinct by at least some groups of regular players (lawyers, judges, court administrators, experts, insurers) and sometimes by litigants and wider public audiences. There is wide awareness of "asbestos cases" and "medical malpractice cases." Litigants know they have malpractice cases, but plaintiffs may not think of their claims as ATV cases. Of course there is always the potential for a subset

[1] Let me summarize the usage I have tried to follow as I have devised a terminology for talking about these things. The basic notion is a set of cases that have shared features and that exert influence upon one another. Obviously these are relative judgments; we are in the realm of more and less. I use the term *populations* to refer to sets that are very large and long-lasting, such as automobile injury cases, divorce cases, and collection cases. It may be that the members of such populations have less influence on one another than do the members of the more specific groupings that I call *congregations* (cf. Rheingold, 1982:3). I can also imagine a set of very closely related cases (for example, involving a single party or incident) that might be called a *family* of cases.

https://doi.org/10.2307/3053686 Published online by Cambridge University Press

within a large diffuse category to crystallize into a distinct congregation, so that a set of automobile injuries can become recognized as "Pinto cases."

These congregations are cultural categories, part of the culture of the regulars, created by an act of labeling, that in turn intensifies interaction and mutual influence. Labels may be shared by litigants, court officials, insurers, the legal press, academics, and the popular press; they may be institutionalized in lawyers' networks, in publishers' newsletters or continuing legal education seminars; sometimes official record keepers will adopt such categories. Thus the Administrative Office of the United States Courts has from time to time incorporated in its annual reports new categories such as product liability and asbestos cases as part of its effort to identify major movements of caseload.[2]

I start with the notion that each population and congregation of cases has its own career. There is no uniform or general movement in which every type of litigation increases or decreases; different kinds of cases increase and decrease at different rates. Yet there is an order over time in the occurrence of a particular kind of case. There is movement and change, but we do not find a thousand cases one year, twelve the next, and two thousand the year after that. Although there are abrupt changes, there are few discontinuities of the sort that suggest that one year's cases are unrelated to those of the previous and following years. I believe that examination of these case congregations and their careers will reveal something about the internal dynamics of litigation as an institution and will assist us in constructing a more refined picture of the relation between litigation and society.

The present effort is eclectic and exploratory. I have indulged myself in making up grand labels for what may turn out to be clouds of steam. At this point, I could enter many caveats to prove that I am aware of various difficulties. But readers would no doubt find still others, so I dispense with them.

II. LITIGATION AS A REFLECTION OF SOCIAL ACTIVITY

I begin with what might be called the "underlying activity" hypothesis. By this I refer to the intuitively plausible notion that there is

> a positive relationship between the volume of an activity—crime, or highway accidents, or retail sales, or marriages, or whatever—and the number of cases arising out of that

[2] Product liability cases have been counted separately in the *Annual Reports* since 1974; asbestos cases have been counted separately since 1984. See United States Administrative Office of the United States Courts, *Annual Reports of the Director* for various years, Table C-2. Conversely, waning congregations may cease being of interest and cease to be counted separately—e.g., the Administrative Office's *Annual Report* stopped counting selective service cases after 1978, as displayed in Figure 1 below.

https://doi.org/10.2307/3053686 Published online by Cambridge University Press

> activity. Other things being equal—a very important qualification—an increase over time in the volume of an activity should give rise to an increase in the number of legal disputes, including the number of those disputes that are litigated arising from the activity. (Casper and Posner, 1974: 346)

Thus we can expect litigation patterns to follow the ups and downs in the quantity of the underlying activity. As the quotation indicates, there is some ambiguity about the layer of activity that we should regard as relevant: is it the *untroubled* level of miles driven or retail sales or marriages? Or is it the *disturbance* level of highway accidents? Or is it the full-blown socially defined *trouble* of crime? Why is the appropriate denominator highway accidents rather than miles driven on the one hand or injuries and damage on the other? But for all the problems with identifying the proper cut of underlying activity, we can identify some litigation that seems to follow activity pretty closely. One example would be air disaster litigation, which spurts and ebbs in tandem with airplane crashes. Another example is selective service cases in the federal courts, whose rapid decline in the early 1970s is traced in Figure 1.[3]

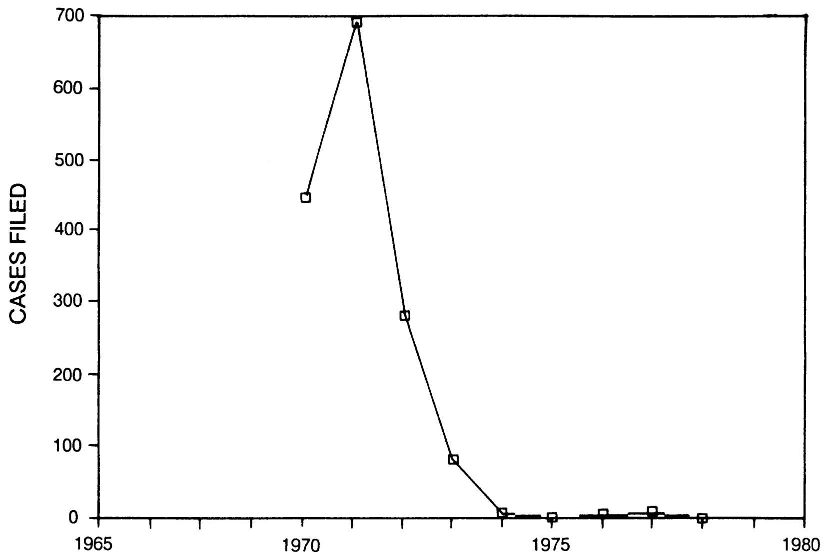

Figure 1. Selective Service (civil) cases filed in U.S. district courts

But there are notable departures from the underlying activity pattern. Perhaps best known is Toharia's (1976) demonstration

[3] This and some other categories of federal litigation have the special virtue of providing a comprehensive count of all cases of a particular type. The example suggests that the explanatory power of the underlying activity hypothesis may be most clearly displayed when there is a sudden and dramatic decline in a type of activity.

https://doi.org/10.2307/3053686 Published online by Cambridge University Press

that litigation in Spain, which increased along with the greater number of economic transactions accompanying industrialization, leveled off as the number of transactions continued to increase. The so-called curvilinear model, which generalizes from this, is a qualification of the underlying activity hypothesis.[4] This model predicts that as societies industrialize, the number of legally relevant transactions continues to increase, but recourse to the more specialized, technical, and expensive judicial machinery occurs less frequently, and dispute settlement takes place elsewhere (Friedman 1976).

A stunning example of this attrition of litigation rates is found in Robert Kagan's demonstration that in the post–World War II era debt litigation in United States courts has not kept pace with the underlying activity, defined either in terms of the amount of debt or the amount of default (Kagan 1984: 328–31). He rejects the notion that this can be attributed to legal stabilization, for there has been an increase rather than a decrease in contestable issues. He suggests that of the

> factor[s] forestalling debt collection litigation . . . undoubtedly the most significant . . . has been a trend toward systematic stabilization—the development of methods of loss-spreading, diversification, insurance, and economic stabilization that prevent financial panics, blunt the edges of individual disputes and encourage consensual refinancing or absorption of losses rather than protracted litigation. (Kagan 1984: 365)

Thus great increases in the underlying activity are not accompanied by increases in litigation.

The underlying activity hypothesis may predict too little litigation as well as too much. A dramatic example is provided by Robert Flanagan's (1987) recent study of unfair labor practice complaints in the United States. He found that the number of unfair labor practice complaints to the National Labor Relations Board [NLRB] "filed by unions, employers, and workers has doubled every decade since the mid-1950s, while the volume of labor relations activities subject to regulation—largely union representation elections and collective bargaining negotiations—has remained stable" (*ibid.*, p. 1). A similar rise in filings and lack of connection to labor relations activity is found in Ontario. These are depicted in his figures, which I have reproduced as Figures 2 and 3.

This dissociation of litigation from the volume of activity should come as no surprise to the beneficiaries of twenty years of research on the dispute process. That body of research has established that between litigation and the underlying activity lies a complex structure of disputing activity in which grievances are perceived, disputes constructed and transformed, resources organ-

[4] Munger (1988) and McIntosh (1983) elaborate and test this curvilinear model, which is found in the work of Friedman (1976) and others.

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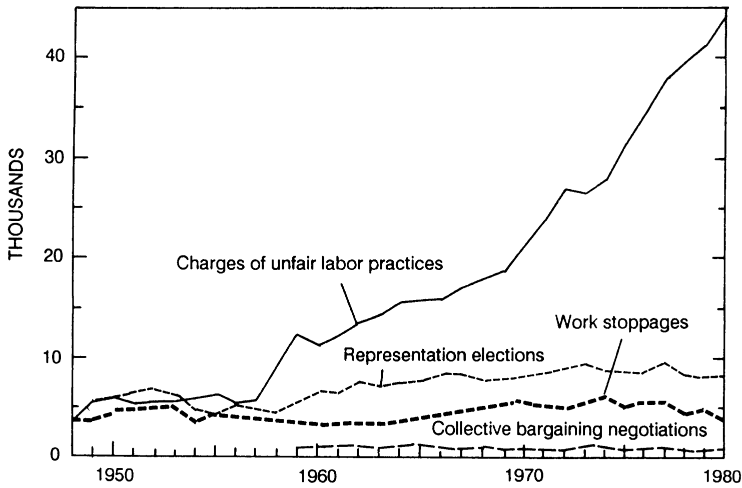

Figure 2. Charges of unfair labor practices and measures of labor relations activity, 1948–1980

SOURCE: Flanagan (1987: 17).

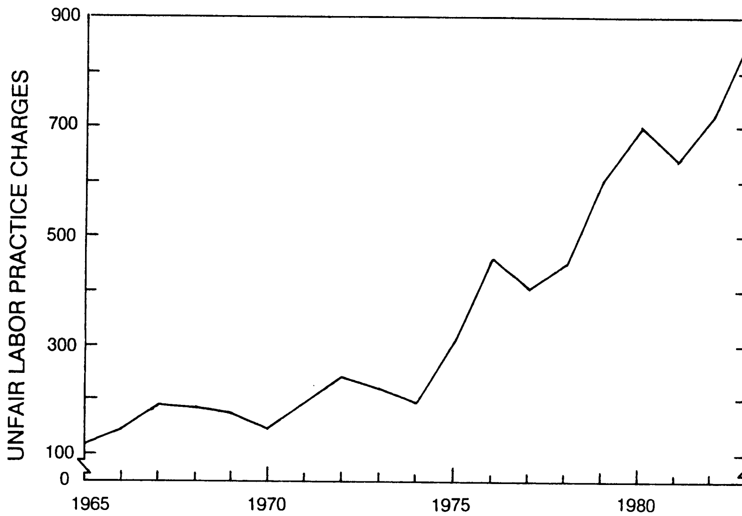

Figure 3. Charges of unfair labor practices Ontario, Canada, 1965–1983

SOURCE: Flanagan (1987: 40).

ized and rationed, and so forth.[5] This literature suggests many factors that mediate the relationship so that litigation is not a mere reflection of underlying activity. It is not my intention to review that literature here. Let me just mention a couple of large clusters of intervening factors.

[5] Some major contributions to this perspective, which is summarized in Galanter, 1986b, are Felstiner, Abel and Sarat, 1980–81; Miller and Sarat, 1980–81; Mather and Yngvesson, 1980–81.

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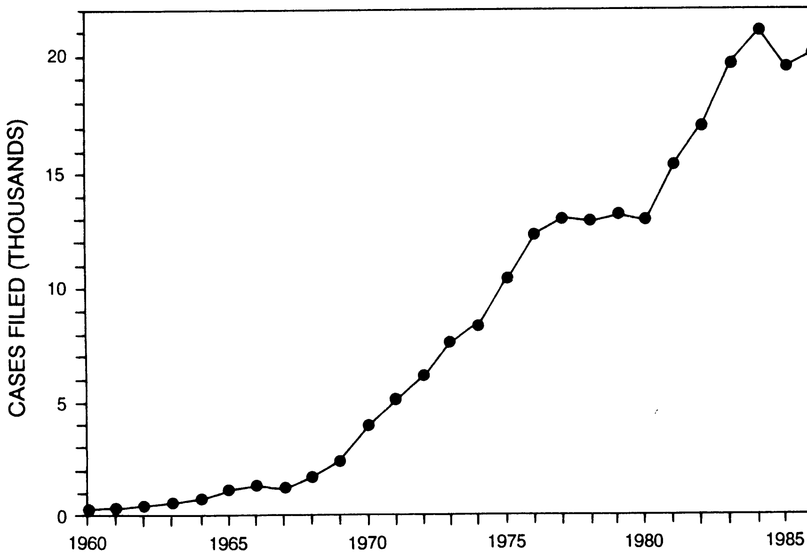

Figure 4. Civil rights cases filed in U.S. district courts, 1960–1986

One cluster is the presence of rights, standards, doctrine, and norms that promise some success to the litigant (Casper and Posner 1974: 348). Presumably the greater the scope of vindicable rights and the greater the probability of winning a claim, the more litigation. Hence, we would expect that changes in the scope of rights or the winnability of claims would produce changes in level of litigation. The dramatic rise of civil rights cases in the federal courts, depicted in Figure 4, would seem to exemplify the increase of litigation as a response to the enlargement of rights by statutory enactment and favorable judicial interpretation.[6]

Another cluster of intervening factors—perception of the grievance, knowledge of available remedies, having resources to use them, the presence of social support, and many more—can be summed up under the heading of access. The absence of these things constrains litigation, so it is plausible that an increase in their presence will lead to more litigation. Thus, for example, the rise of asbestos litigation seems to reflect an increase in perception of a connection between asbestos exposure and disease.

One crucially important subcategory of the access cluster is the availability of legal services. The absence of lawyers, their unapproachability (physical or cultural), their lack of experience or expertise with claims of a particular sort, the high cost of re-

[6] This example points back to the ambiguities of the underlying activity hypothesis. I think it would be generally agreed that this was a period of decreasing discrimination in some general sense. As segregation declined there may have been more occasions for individuals to experience discrimination practiced against them personally by identifiable individuals; certainly there were more occasions to experience discrimination that was perceived as legally remediable.

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taining them, and incentive structures that discourage lawyers from particular kind of cases (e.g., veterans claims)[7] are readily understood as obstacles to litigation. Presumably more lawyers, more approachability, more experience, lower cost, and incentive structures that encourage lawyers to undertake particular kinds of cases might be expected to increase litigation.

Underlying activity, rights, access, and lawyers are not the only factors that account for changes in the level of litigation. In the labor situation examined by Flanagan (1987), where litigation moved independently of underlying activity, there seems to be little change in rights, access, or lawyering. Flanagan found that increased litigation could not be traced to changes in legal doctrine or to changes in jurisdiction.[8]

Looking further afield outside the litigation system, he found that litigation not only bore no relationship to the volume of labor relations activity, but it was not explained by the regional and industrial distribution of that activity, or by unemployment and inflation (*ibid.*, p. 48). But one factor in the wider environment furnishes a key for Flanagan: the growing disparity in compensation of union and nonunion labor provided greater incentives for employers to violate the provisions of the statute, and greater incentives for unions and workers to challenge this noncompliance by filing unfair labor practice charges. Hence his explanation is that the level of litigation is driven by changes in the "stakes." In this view, the driving force of changes in the amount of litigation lies outside the system of litigation itself. But as we shall see, the "stakes" argument leads us back to the characteristics of litigation.

III. ENDOGENOUS CHANGE WITHIN THE LITIGATION SYSTEM

In all these examples litigation has figured as the dependent variable, reflecting the influence of something external: the level of underlying activity, the presence of rights, the availability of lawyers and resources, or changing stakes. But these things, in turn, are sometimes influenced by litigation. For example, litigation can lead to the expansion or contraction of rights; it can lead

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[7] A statute (34 U.S.C. sec. 3404) passed just after the Civil War provides that fees for attorneys' services in claims under laws administered by the Veterans Administration "shall not exceed $10 with respect to any one claim." This has conferred on the VA a unique immunity from having its benefit determinations challenged in the courts. This limit, the Supreme Court has recently held, does not violate due process of First Amendment Rights (*Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 87 L. Ed. 2d 220, 150 S. Ct. 3180 (1985)).

[8] The presence of a similar pattern in Ontario suggests to Flanagan (1987: 41) that the solution to the puzzle "is not related to the idiosyncratic aspects of the administration of the NLRA [National Labor Relations Act] but may instead be rooted in behavioral response to the particular approach to regulation of labor relations adopted in both countries."

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to the raising or lowering of stakes;[9] or it can change the market for legal services.

We began with the notion that cases of a particular type are not randomly distributed over time but occur in sequences. We have discussed ways in which this temporal ordering may reflect various external influences. But if litigation can in turn influence these influences, then the incidence of cases of a particular kind and what happens to them may be affected by earlier (and anticipated) cases of that kind. (What such various actors as lawyers, judges, parties, and insurers mean by "that kind" is part of the story.)

What are these "endogenous" changes that originate within the case congregation? Case congregations seem to have homeostatic or self-limiting properties. No case congregation seems to increase forever.

Preventive Effects

One cluster of these homeostatic effects might be described as preventive. That is, litigation sends signals to those engaged in the underlying activity about which aspects of that activity are normatively approved, which are likely to be formally sanctioned, and which are likely to engender costs to defend.[10] Through a complex set of channels of moral suasion and calculation of benefits, these considerations of morality or cost influence that activity.[11] Products may be redesigned or withdrawn (e.g., asbestos, Dalkon Shield); hazards repaired or guarded, disclaimers made, or permissions sought. Although the extent of these preventive effects is the subject of great controversy, it seems clear that it is of major significance. A majority of CEOs of manufacturing companies who

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[9] Rules regulating fee shifting and triple damages which clearly affect stakes are usually enacted by legislatures but are interpreted and applied by courts. Other features of litigation also affect stakes. For example, in Flanagan's unfair labor practice complaints, the low level of formal sanctions imposed on an employer for a violation never puts that employer in a worse position than if he had complied initially (Flanagan 1987: 82). Flanagan wonders why there is any compliance at all. Part of the answer must be in the transaction costs of the proceedings and in the sanctions that workers and unions can apply (slowdown, low morale, turnover, sabotage, strike). Litigation frequency can be so responsive to the stakes in the underlying transaction precisely because the litigation itself does not attach new stakes to offset the perverse incentives that he describes.

[10] Of course, these messages do not neatly segregate information on substantive rights and obligations from information about diffuse costs and risks. Thus businesses may engage in various defensive maneuvers designed to reduce exposure to suit. See, e.g., Lindsey (1985) ("defensive architecture," restaurant identification of intoxicated customers, elimination of home counselling visits by ministers, etc.); Johnson (1985) (reluctance to provide references for former employees); Purnick (1985) (delay of construction to permit archaeological dig: "What we're doing is to prevent a lawsuit. . .").

[11] These preventive effects are often lumped under the heading of deterrence. I have followed Gibbs (1975) in trying to separate out a number of distinct effects. See Galanter (1983b).

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responded to a Conference Board survey reported that product liability litigation had a major impact on their firms and industries. Impacts included discontinuation of product lines, withholding of new products, and discontinuation of product research as well as improvement of the product safety and warnings (McGuire, 1988: v, 18–20).[12] A study of product design in major corporations concludes that "[o]f all the various external social pressures, product liability has the greatest influence on product design decisions" (Eads and Reuter, 1983:vii–viii).

A nice example of these preventive effects is provided by the case of *Tarasoff v. Regents of the University of California*, (13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974), withdrawn and replaced by 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976)), in which the Supreme Court of California addressed the question of therapists' duties to potential victims of violence threatened by their patients. Eighteen months after its highly publicized original ruling that a therapist has a duty to warn the potential victim, the court, upon reconsideration, nullified its earlier opinion and modified the duty to one of exercising reasonable care to protect potential victims. A survey of therapists in eighteen locations nationwide five years later (Givelber *et al.*, 1984) found that the case was widely known by therapists throughout the nation, that observation of its ruling was felt to be obligatory by most even though technically it bound only those in California (*ibid.*, p. 474), and that "by and large, the case appears to be misunderstood as involving and requiring the warning of potential victims" (*ibid.*, p. 466) (i.e., in accord with the withdrawn original opinion). The decision appeared to have influenced therapist responses to threatening behavior in the direction of giving more warnings, initiating more involuntary hospitalizations and taking more notes (*ibid.*, pp. 481–82.) These responses are not readily subsumed upon the notion of deterrence. The therapists' response is more than a calculating reestimation of costs and benefits. Indeed a majority of respondents had translated the obligation to threatened third parties into a requirement of professional ethics (*ibid.*, p. 475).[13]

Preventive effects flow not only from the delineation of rights in decided cases but also from the process itself and from anticipations of its unfolding patterns. Thus the general counsel of a pharmaceutical company is reported to have said:

[12] An earlier Conference Board survey of the risk managers of major United States corporations reported that product liability and the related crisis of insurance availability "have left a relatively minor dent on the economics and organization of individual large firms" (Weber, 1987: 2).

[13] Cf. a 1987 survey of psychologists, in which only 1 percent responded that it was not ethical to break confidentiality if a client was homicidal (Goleman, 1987).

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> Even if we win almost every case against us, the few verdicts we lose engender more suits, and make all the other suits more expensive and more difficult to settle. . . . There has to come a point with a particular product, even a good product, where you say, that's enough, and you get out of the market. (Lewin, 1985)

Sometimes the avoidance consists of segmenting the market in terms of disputing propensities, as in the practices of doctors refusing to treat people they believe have previously brought malpractice suits and landlords using screening services to avoid troublesome tenants (Abromowitz, 1982; Davis, 1985; Galanter, 1985a; Belluck, 1985).

In addition to (or instead of) inducing preventive effects on the level of the underlying activity, litigation may suppress further litigation by discouraging resistance to claims, so that potential defendants seek to resolve claims before filing of a lawsuit. Thus H. Laurence Ross (1970: 127) reports that in automobile injuries, "the principal pressure felt by the [insurance] adjuster on a day-to-day basis is to close files," avoiding the filing of suit. To this end, "[a] great deal of the adjuster's work is directed to maintaining the claimant's unrepresented status, closing the claim without the intercession of an attorney. This is called keeping the claim under control" (*ibid.*, p. 70). This same thrust to forestall filings by early and cheap settlement is evident in the aftermath of air crashes, where insurers engage in aggressive efforts to induce victims' kin to avoid lawyers and settle directly (Harris, 1980; Jackson, 1983; Tarr, 1985; Bean, 1986).

And, of course, earlier instances of use of the litigation process may inhibit plaintiffs as well as defendants from invoking it. Increases in litigation may lengthen the waiting period and drive up costs, making litigation less attractive to plaintiffs (Casper and Posner, 1974: 348).

Regime Change

Litigation may be self-liquidating on a larger scale by convincing policymakers that the problem it addresses should be dealt with some other way—or not at all—as the following examples attest.

New forum/new rules. The outstanding instance of substitution of a nonjudicial forum is workers' on-the-job injuries, where dissatisfaction with frequent, unpredictable, but low-yield litigation led to all the major parties agreeing to a regime of workers' compensation with its new tribunals, elimination of fault, and fixed schedules of payments.[14]

The zero forum. In the early 1930s, suits by disappointed inti-

[14] Friedman and Ladinsky (1967). Cf. Stookey's (1986: 299) depiction of the introduction of workers' compensation as the decline to zero of the ratio of tort cases to mining accidents.

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mates for alienation of affections, breach of contract to marry, seduction, and criminal conversation came to be viewed as a "heart balm racket." A surge of reproach of "gold diggers" who used such suits to extort settlements from wealthy defendants led to the legislative abolition of these actions in more than a dozen states.[15]

Recordkeeping

Litigation may also affect the production of information and knowledge that links litigation with the underlying activity. For example, recordkeeping may be enhanced to provide information to demonstrate the occurrence of due care. Thus therapists responded to *Tarasoff* by increased notetaking with potentially dangerous patients (Givelber *et al.*, 1984: 478). On the other hand, recordkeeping may be altered to conceal the details of care. An account of then general counsel Elmer W. Johnson of the General Motors Corporation reports:

> He has also campaigned to keep employees from putting potentially damaging criticisms on paper, where they could be used against the company in litigation. As an example, he explained, an engineer might suggest that a component should be designed a certain way to maximize safety. But if the financial people rejected the suggestion as too costly, the frustrated engineer might dash off an angry memorandum detailing how many people would die as a result of the cheaper design.
>
> Such engineers' notes have become the smoking guns that clinch a products liability case for plaintiffs' lawyers. "We have started an effort," Mr. Johnson said, "on how engineers can communicate with each other and avoid setting the foundation for this costly litigation." (Greenhouse, 1986: 7)

Corporations hire professional records-management consultants to advise them on storage programs that will minimize litigational risks.[16] "As important as teaching companies which documents to destroy . . . is teaching them which ones never to create in the first place" (Allen 1987: 1).

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[15] *Virginia Law Review* (1947); *Illinois Law Review* (1936). The extensive literature generated by this legislation does not include any estimate of the amount of such litigation. But there was a general concurrence with the view of a pioneer proponent of such legislation that "90 percent of the heart balm suits . . . are blackmail suits . . . which attempt to capitalize on some one's indiscretions" (*Indianapolis News*, 1935).

[16] Fedders and Guttenplan (1980); Allen (1987: 1) observes that "[m]any of the shredding programs hinge on the premise that in the event of a lawsuit nearly any corporate document—including executives' diaries and seemingly innocent memorandums—can become dynamite in the hands of an opposing counsel."

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Promotional Effects

We have discussed the self-limiting, litigation-suppressing aspects of litigation. But in other ways litigation may lead to more rather than fewer cases. A pioneering case like *Tarasoff*, announcing a new basis for liability, broadcasts the notion that recovery is possible for this kind of victim; it tells lawyers that such cases may be won and provides a model of the needed ingredients. Thus we have *mobilizational effects* on potential claimants, who learn how to characterize their troubles, target their claims, estimate the feasibility of suit, and much more.[17] Labor unions and victim support groups may act as information networks for such mobilization.

Another agency of such mobilization is the bar. But litigation also has *educative effects* on the bar. It provides a blueprint for success. More cases enable startup costs to be spread over many cases, promise economies of scale, encourage investment, and permit specialization. When other lawyers have similar cases, there are opportunities for sharing information (e.g., on the identity of defendants, the results of discovery, and the identity of experts) that may substantially lower the cost of preparing cases.

It is testimony to the power of these educative and mobilizational effects that recurrent defendants expend considerable effort to minimize them by extracting agreements that settlements be confidential, by securing protective orders to prevent dissemination of information recorded in the case file or obtained through discovery, and by otherwise "buying out" the generalizable information component of the litigation. Two well-informed plaintiffs' lawyers, writing about "Multiple Litigation," report: "On many occasions over the years a plaintiff's counsel has agreed to take no more cases as a condition for settlement of all his pending cases."[18] They observe:

> It is natural enough for defense counsel to seek such an agreement as a condition for cashing out the plaintiff's lawyers. With his demonstrated success in disposing of all of his batch of cases, he may become the one who attracts many new cases. . . . [P]art of the defendant's reason in settling with him . . . is that it finds this particular lawyer to

[17] A nice example of educative effect of earlier cases is Brickey and Miller's (1975) description of the way that traffic court defendants whose cases are heard later in the sequence learn by observing earlier cases.

[18] I have come across several striking instances of such "buyouts" of the legal resources of a class of claimants, foreclosing or making difficult recovery by the bulk of the class. One was the agreement by plaintiffs' lawyers in the litigation arising from the Hawk's Nest Tunnel disaster to surrender all case records to the defense (Cherniack, 1986: 56, 65, 72). Similarly the earliest asbestos litigation against the Johns Manville Corporation ended in a 1933 agreement that the attorney would not participate in bringing any new suits against the company (Brodeur, 1985: 113–14, 164). According to Brodeur there was no further asbestos disease litigation against Johns Manville for more than ten years—that is, until after the immense wartime exposures that eventually brought the company to bankruptcy.

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> be preparing his cases well and digging for proof in a manner in which other lawyers are not doing. To get him out of the picture is to prevent other lawyers from profiting from his efforts.[19]

The same litigation can have effects both on the level of underlying activity and on level of disputing about that activity.[20] The same litigation can have self-liquidating and self-promoting effects. So it is impossible to know a priori what the net effect will be. For example, we can imagine that *Tarasoff* would lead to fewer of these (no warning) incidents (than there would otherwise be), but that more of them would be brought to lawyers and result in claims, but that more of these claims would be settled, perhaps before filing. The number of filings would be a product of the relative magnitude of these effects on different players and stages.

Thus we might expect to encounter congregations of cases in which this repertoire of possible effects works itself out in different combinations. We might imagine a kind of litigation in which filings decreased while the underlying activity remained unchanged. Or we might imagine a kind of litigation that generated strong preventive effects by bringing about rearrangement of the underlying activity, but at the same time produced a rise in filings. (Is this medical malpractice?) Or filings might remain steady for decades while the impact on the underlying activity changed radically.

IV. HOLISTIC AND CAREER EFFECTS

We turn to those effects of litigation that are associated with the size, distribution, and character of a case congregation and the way in which that congregation unfolds over time. For mnemonic convenience I will call these effects, which are mostly specifications of the kinds of effects discussed above, holistic effects and career effects.

Holistic Effects

I borrow the term *holistic effects* from Robert Emerson (1983), who criticizes the tendency of studies of social control to treat individual cases as the units of analysis and suggests that this reflects

[19] Gans and Rheingold (1984: 16A–97). Interestingly, the authors justify the plaintiff's lawyer "cashing out" on the ground that his "primary obligation . . . is to do the best job for his *present* clients, and if he can command a premium for their cases or settle their cases earlier than otherwise on the basis of this agreement it would seem his duty to do so." Brodeur (1985: 92) reports an agreement extracted from successful asbestos plaintiffs' lawyers in 1977 "not to take on any new clients from the Tyler factor work force . . . [and] that whatever evidence we had obtained in the course of our discovery . . . would not be handed over to subsequent plaintiffs."

[20] This distinction between effects on the underlying activity and on disputing behavior is not absolute, for many activities (for example, loans, franchises, and leases) routinely incorporate—and may even be said to be constituted largely of—arrangements for potential breakdown and dispute.

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an assumption that social control agents themselves "examine and dispose of cases as discrete units, treating each on its own merits independently of the properties and organizational implications of other cases." He argues that in many instances "[p]articular cases are . . . processed not independently of others but in ways that take into account the implications of other cases for the present one and vice versa" (*ibid.*, p. 425). In addition to the effects of sequence and precedent, which I have incorporated in my notion of career effects, he identifies two other ways that actors' responses are "shaped by reference to larger, organizationally relevant wholes" (*ibid.*, p. 427), relativization and rationing.

Relativization. Judgments about individual cases are affected by notions of the composition of the whole—for example, judgments of the seriousness of an offense are relative to the expected profile of the whole congregation, experienced and anticipated.[21] Similarly, lawyers' judgments about the attractiveness of cases are affected by their expectations about others in the set. And the very size of the set may undermine the seriousness attributed to each single case. Thus, Balbus (1973: 250) reports that participants in larger riots received less severe sentences than participants in smaller riots. In civil cases, there seems to be a discount for quantity—i.e., multiple plaintiffs receive less on the average than similarly injured individuals.[22]

Rationing. A given case in hand competes with like cases for the attention and resources of the actor. Scarce resources are allocated to cases with an eye to the demands of the whole caseload. Thus actors find it necessary to depart from their sense of the optimal response to accommodate the demands of their caseload. For example, lawyers may decide which cases to take on with an eye to maintaining a full docket; sometimes they make package deals in order to reduce an overload. Similarly, judges find it necessary to ration attention to cases (Emerson, 1983: 440–41).

Career Effects

Where a set of cases unfolds over time, these holistic effects merge into what I call *career effects*. By career effects I mean changes in litigation behavior that result from the temporal se-

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[21] I was reminded here of the situation of assigning a grade to the first of a pile of examination papers, when the grader is committed to apply a uniform standard but can only surmise the contours of the whole congregation.

[22] Chin and Peterson (1985: 48) report that Cook County (Ill.) juries award multiple plaintiffs 27 percent less than comparable single plaintiffs. Kakalik *et al.* (1984: 44) report that recovery by asbestos plaintiffs declined from an average of $88,000 in single-plaintiff lawsuits to $63,000 with 2 to 10 plaintiffs to $52,000 with 11 to 25 plaintiffs to $21,000 with 26 or more plaintiffs. See also Coffee (1987: 915–17) on this discount in class actions.

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quence of similar litigation. Let me illustrate with an example of career effects in a different realm, TV soap operas:

> Over the years . . . cliffhangers have become expected fare at the end of each season for shows like "Dynasty," "Dallas" and "The Colbys". . . . Producers of many nighttime dramas say they are pruning their shows for next season, cutting the casts by as much as half. The reason: Programs have become too expensive to produce and too confusing for audiences to follow. The results: Fewer people will emerge from San Francisco Bay in September than audiences might expect. . . . Each episode of the average nighttime soap opera costs about $1 million to film. The longer a show has been on the air, however, the more expensive it becomes, because actors who were hired as relative unknowns become stars and demand salaries that suit their new status. . . . As shows get older, they also become more complicated, and producers believe viewers may be growing frustrated trying to keep track. "You can't follow 17 characters—it's too much," ["Knots Landing" producer Lawrence] Kasha said. "We found we kept adding characters as catalysts to stir up the pot, and then we needed more people to stir up their pots. Now we're going back to our nucleus." (Belkin, 1987)

Increased cost and increased complexity and sudden simplification are career effects. The succession of episodes creates new opportunities for actors and writers; but the cumulative use of these new opportunities creates new inducements to producers to respond to the new situation by simplification. Case types are like soap operas. They change over time, as claimants are mobilized, lawyers specialize, knowledge accumulates, and so forth. Actors reflect on the sequence, estimating what is to come and investing according to their notions of advantage.

The Anticipation Effect

Emerson (1983: 472) points out that "the fact that a particular case is the *first* of a known or anticipated *sequence of cases* can have major implications for how it is handled." He gives the example of the teacher who, to establish who's in charge, comes down heavily on student disobedience on the first day of class. When decisions are seen as part of a series in which actors and audiences will carry along expectations from early ones, investment in these early cases will be disproportionate to their stakes taken in isolation. In his study of litigation between automobile dealers and manufacturers, Macaulay (1966: 99) found that manufacturers' lawyers, anticipating a stream of cases under new statutes favorable to dealers, "overinvested" in the preparation of the earliest cases.[23] And of course, since at any point, actors' knowl-

[23] As this example reminds us the incentives for such anticipatory investment may be distributed unequally (see Galanter, 1974a).

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edge of how the series will unfold is incomplete, these investments will not always appear optimum in retrospect.

Information-sharing and Coordination Effects

Lawyers who have similar cases, especially ones that require elaborate preparation, may form networks for information sharing and strategic coordination. Such networks or litigation groups may engage in various activities, such as providing clearinghouses to share the products of discovery and research, supplying document packages, preparing trial handbooks, locating and monitoring experts, and even occasionally commissioning scientific studies (Galanter, 1985a; Rheingold, 1982).

Such sharing is more congenial to some actors than others: for example, plaintiffs' lawyers, although competitors to acquire clients, are natural allies once they each have a client with a case of a given type. If lawyer A's client wins big, that makes lawyer B's similar case more valuable. It pays for B to help A and to insure herself against the depreciation of her case. Also, for plaintiffs' lawyers working on a contingency fee, collaboration to share the costs and reduce the risks in the litigation is attractive. Even here, though, the possibilities for coordination may differ according to the character of the underlying incident, the number and resources of clients, and the like.[24] Lawyers for defendants on the other hand are not only potential rivals for the custom of repeat clients, but their clients may have conflicting interests regarding the distribution of liability and bearing of litigation costs. Also, defense counsel paid by the hour would experience a reduction of their fees to the extent that work was allotted among various defense lawyers.

Coordination may be supplied by other sorts of actors, such as "back-up centers" (e.g., the National Consumer Law Center or the Migrant Legal Action Project) or organized groups dedicated to particular constituency (e.g., the NAACP Legal Defense Fund). Information sharing may also take place without specialized organizations. The emergence of organized litigation groups is relatively rare. Most information sharing is either more ad hoc and individualized on the one hand or less specialized and more impersonal. The latter is exemplified in the proliferation of specialized litigation reporters. In 1983, one company published fifteen, including the biweekly *Asbestos Litigation Reporter* and the *Iranian Assets Litigation Reporter* (McHugh, 1983).

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[24] For example, Rheingold (1982: 2) suggests an interesting distinction between what we might call epidemics (like asbestos) and disasters—congregations that come into being with a single event. If a set of cases starts gradually, he observes, "a few lawyers have already done considerable work and are thus less disposed to share the data they have created."

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The Depletion Effect

Consider this 1979 account of the withdrawal by plaintiffs' lawyers from Title VII class action cases:

> Recent U.S. Supreme Court decisions have restricted the number of people entitled to relief and made discrimination harder to prove. The gap in sophistication between plaintiffs' lawyers and defense lawyers has disappeared. The easy cases have already been won, and companies themselves are trying to avoid policies that land them in court. (Sanders, 1979: 1)

Included in this complex mix of changes in rights, in procedures, in incentives, in actors, and in defendant responses is what I call the depletion effect: "the easy cases have already been won." One characteristic of case congregations is that the pool of the most eligible, attractive (easy, lucrative, highly visible, or whatever) cases may not be replenished. The presence of preventive effects (as in our Title VII example) suggests that defendants will act in ways that prevent replenishment. So the makeup of the congregation of cases will change over time; in these civil rights cases we would expect smaller groups, less obvious violations that are harder to prove, less attractive claimants, and more formidable opponents. This depletion factor distinguishes the congregations we are discussing from such immense populations as automobile accidents and divorces, which provide an inexhaustible supply of new cases that are very much like the old ones.

The depletion effect is most evident in a disaster such as a plane crash, in which there is a limited pool of claimants. Hence these disasters are the setting for aggressive solicitation by specialist lawyers (or would-be coattail riders) and aggressive efforts by defendants to prevent potential claimants from connecting with specialized disaster lawyers (Harris, 1980; Jackson, 1983; Tarr, 1985; Bean, 1986). But the depletion effect is also present in even large "epidemics" of cases like those related to a particular product such as asbestos. Lawyers who have developed routines and invested in skills that would otherwise be rendered obsolete undertake to find new batches of cases that can utilize these skills. Thus we find entrepreneurial asbestos lawyers reaching out to new groups of potential clients:

> With tactics ranging from dragnet medical screenings to direct-mail solicitations, . . . [lawyers] are sweeping new groups of workers and companies into the asbestos fray . . . just as the 10-year flood of asbestos litigation seemed to be ebbing. . . . Two West Coast Lawyers, for example, started a screening program last year that dispatched three rented vans equipped with mobile X-ray units to test tire workers at 72 local unions around the U.S. The result: nearly 1,000 new asbestos lawsuits with thousands more being readied. (Richards and Meier, 1987)

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Changes in the growth patterns of large corporate law firms have been attributed to a similar thrust to market specialized skills such as antitrust defense that could not be absorbed by their existing clients (Nelson, 1981).

Lawyer Expertise

As a particular kind of case takes off, lawyers gain experience, generate and accumulate knowledge, identify experts, and develop information-sharing networks.[25]

Lawyer Turnover

The lawyers who are attracted to a mature and profitable case type may differ in their orientation from those who pioneered that type. Altruistic pioneers, strongly identified with their clients' "cause" may be displaced by profit-seekers who can afford to finance the cases. Schuck (1986) has documented this succession in the Agent Orange case. Something like this seems to have taken place in Title VII class actions, in which those attracted to "soul cases" were displaced by those who could make the investments necessary to finance computer analysis of hiring patterns.

Outcome Stabilization

As more controverted points are decided, the law crystallizes and becomes more certain. As the number of verdicts and settlements grows, there is an accumulation of markers, so that outcomes become more predictable. McGovern (1986: 482) has proposed a "cyclical theory of mass torts" in which "a marketplace of multiple trials, over time, results in a rough equilibrium of case values."

> In the early stages of the cycle, defendants tend to win more cases than plaintiffs because of strategic and informational superiority. If the litigation has any merit, however, plaintiffs will eventually develop successful information and strategies and win an extremely high percentage of the cases tried. Next, the plaintiffs will bring cases for trial that stretch the envelope of viable plaintiffs too far, and defendants will create more effective counter strategies, resulting in a reduced percentage of plaintiff victories, Eventually, after full aggregation and dissemination of information, crystallization of the law, and thorough development of strategies, there will be a rough equilibrium of

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[25] After the first award of punitive damages against the manufacturer of the morning-sickness drug Bendectin, the plaintiff's lawyer, who had spent six years litigating Bendectin cases, observed:

> "we learn more in every one of these cases," said Mr. [Barry J.] Nace, who has yet to earn any contingent fees pending the resolution of appeals. "After working on it for six years, we are still finding new documents. This subject is filled with difficult areas to learn, and we are finally able to explain it." (Strasser, 1987)

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> trial results. Remaining variations will then be due to jury demographics, attorney caliber, and random events during trials. Although perhaps it is counter-intuitive, settlements will also reflect this equilibrium: the average settlement amount will be virtually identical to the average jury verdict. The variance, however, will be substantially different. Settlements for similarly situated plaintiffs will be extremely similar; verdicts will vary in accordance with idiosyncrasies of the trial process.

The magnitude as well as the variance of recoveries may change over time. Thus in the MER/29[26] litigation, settlement amounts for similar cases multiplied several times over the course of five years (Rheingold, 1968: 137).[27] It appears that a similar increase occurred in asbestos cases (Brodeur, 1985: 265).

Asbestos impresses upon us how complex the career of a case congregation can be. After an earlier generation of asbestos claims had been aborted (see note 18 above), a set of scattered cases, beginning in the mid-1960s, coalesced into an acephalous campaign that succeeded in establishing liability for asbestos exposure.[28] As plaintiffs' lawyers accumulated technique and information there were more victories and higher awards, including punitive damages.[29] The passage of time exposed more injuries after the long latency period; information about the injurious qualities of asbestos and about the possibility of recovery was broadly disseminated; and larger numbers of claimants were mobilized from the pool of asbestos victims. An experienced plaintiffs' asbestos bar emerged, developed networks for coordination, and routinized the bringing of these claims. On the defense side, there was more inclination to settle to avoid the punitive damages risk; primary insurance ran out and excess insurers entered the fray; conflicts developed over insurance coverage; litigation absorbed vast amounts of executive time; and besieged defendants suffered morale problems.

The character of the cases changed; "in comparison to other personal injury-products liability cases, [asbestos cases] were once complex and have become routine" (Willging, 1987: xii). Throughout, relatively few asbestos cases have gone to trial,[30] but the trials are getting much shorter (*ibid.*). Negotiations are simplified as

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[26] MER/29 was a drug marketed in the early 1960s as an agent for lowering cholesterol (see Rheingold, 1968).

[27] Rheingold (1968: 137–38) points out that this was in part a shift in decisionmakers. Cases outside metropolitan areas tended to come up for trial (and thus for settlement) earlier than cases in crowded metropolitan courts.

[28] On the course of the litigation, see Brodeur (1985); Hensler *et al.* (1985); Dungworth (1988: 35–38).

[29] But note that even as it was taking its fatal plunge into bankruptcy, Manville had won nineteen of twenty-eight tried cases (Brodeur, 1985: 255).

[30] Of asbestos cases from 1977 to 1986, 3 percent went to trial; of personal injury product liability cases in ten courts from 1980 to 1986, 9 percent went to trial (Willging, 1987: 25, 27).

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"pretrial, trial and appellate rulings have established patterns to guide case evaluations, which, in turn, support more settlements" (*ibid.*). The emergence of a cadre of specialized defense counsel has lead "in many instances to improved ability to evaluate and settle cases" (*ibid.*).

The mounting wave of claims was reckoned a crisis. Defendants sought, unsuccessfully, government bailouts and legislative intervention. A number of major asbestos manufacturers filed for protection under Chapter 11 of the Bankruptcy Act, most spectacularly, in 1982, the Manville Corporation. A large portion of asbestos claims thus shifted to a new forum with new rules, new lawyers, and new parties (including stockholders, bondholders, commercial creditors, insurers, and a new class of "property damage" claimants seeking recovery for the cost of removing asbestos from schools and other buildings). The bankruptcy proceedings in turn led to the recruitment of vast numbers of new injury claims and to provisions for representation of future claimants. In the Manville proceedings, a solution was eventually negotiated among contending groups—management, stockholders, various classes of creditors, insurers, injury victims, future claimants, and so forth—placing more than half of the company's stock in a trust for the asbestos injury claimants. The Manville Personal Injury Settlement Trust, an entirely new kind of creature, was established with a mandate to pay some $2.5 billion to present and future claimants over a twenty-six year period.[31]

Asbestos personal injury claims form part of the larger population of personal injury cases based on product liability, a population that includes a number of congregations built around specific products, a few sizable ones and many smaller ones (Dungworth, 1988). The asbestos congregation is tracing a very distinctive career. Asbestos filings continued to increase during the late 1980s, while the total number of cases involving other products decreased in number (see Figure 5).[32] From 1985 to 1989, filings of asbestos personal injury product liability cases rose by 94 percent while other personal injury product liability findings decreased by 37 percent.[33]

[31] Alternatives to the High Cost of Litigation (1988). In 1988 the Trust was joined by another trust with assets of $2.4 billion to administer the claims of Dalkon Shield victims (Cooper, 1988; Freudenheim, 1988).

[32] The figures given here are only for federal cases. On the asbestos cases in the state courts, see Hensler *et al.* (1985). On product liability cases generally in the state courts, see U.S. General Accounting Office (1988, 1989). The Administrative Office reports did not count asbestos separately until partway through the 1984 statistical year. Estimates of asbestos filings in earlier years are presented in Dungworth (1988: 36).

[33] The drop in nonasbestos product liability filings presumably reflects changing trends in the outcome of such cases. In a pioneering analysis of outcomes of product cases, Henderson and Eisenberg (1990) found that after the early 1980s plaintiffs were less successful at trial and defendants won an increasing portion of doctrinal victories.

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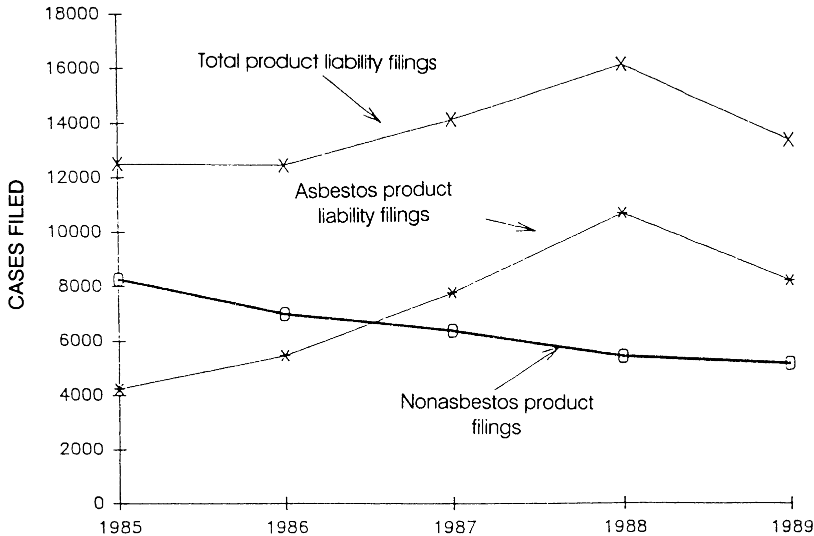

Figure 5. Personal injury product liability cases filed in U.S. district courts, 1985–1989.

SOURCE: U.S. Administrative Office of the United States Courts, *Annual Reports*.

Asbestos litigation has given rise to a variety of institutional innovations. The plaintiffs attorneys' Asbestos Litigation Group, an inspiration for many organized plaintiffs groups, was matched by less successful efforts to coordinate on the defense side. Courts inundated by asbestos cases adopted innovative case management plans, such as the Ohio Asbestos Litigation Plan (Orlando, 1988). Other courts devised novel procedures for handling massive insurance indemnification litigation. In 1985 thirty-four asbestos producers and sixteen insurers established the "Wellington Facility" to use "alternative dispute resolution" techniques to resolve claims. The Facility collapsed in 1988 (Mitchell and Barrett, 1988), leading to a reported surge of asbestos trials (Carter, 1988).

Although there may yet be surprising turns, it appears that eventually there will be no more asbestos cases. The property damage claims will be litigated and settled. The insurance coverage issues will be resolved. There will be a tail of injury claims. But the pool of personal injury victims will be depleted, due first to the deadly effects of asbestos and second to powerful preventive effects produced by the asbestos litigation! But when the last cases are gone, asbestos will leave a legacy of legal doctrine, institutional structures and models, bar capabilities, and symbolic endowments whose effects will continue to ramify.

Asbestos is perhaps the most complex of case congregations—actually a cluster of congregations—and the most dramatic in its effects. It is a mature, aging congregation. Many of the features

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we observe there will, we expect, surface in new combinations in other, younger congregations. To appreciate the interactive complexity of these features and the limits of our predictive powers, I want to conclude by looking briefly at a congregation in its early, formative stages, cases involving liability for the sale of tobacco products.

Like the asbestos cases of the 1960s, the current wave of tobacco products liability cases have a prehistory of aborted efforts to establish liability and a record of lost battles with antagonists who invest immense resources to prevent any breach of their impunity. Unlike their asbestos predecessors, the tobacco plaintiffs' bar is supported by antismoking activism in legislative, media, and public health arenas. A litigation group was formed three years *before* the first jury verdict favoring the plaintiff in June, 1988 (Ranii, 1985; Jansen, 1988). If the campaign against them is more coordinated, tobacco defendants, who are fewer and larger, are also more capable of pursuing a coordinated and intransigent strategy. Although they have successfully resisted liability, they are not unaffected by the shadow of liability (and by other threats to smoking) that have caused them to alter their corporate identities by diversifying.

Whether the verdict in *Cipollone v. Liggett Group, Inc.*, 82-2864 (D. N.J., 1988), is the first crack in the dam or a sport remains unclear. In spite of the verdict for plaintiff, tobacco litigation withered. In early 1990 it was reported that "since the Cipollone verdict . . . 52 tobacco cases have either been dismissed by courts or dropped by plaintiffs, and only 12 new ones have been brought. Only 59 suits are currently pending against tobacco companies, down from 155 cases two years ago" (Cohen, 1990). Yet the overturning of the verdict by Third Circuit Court of Appeals, 88-5732 (CA 3, Jan. 5, 1990), contained several rulings that many expected to facilitate further recoveries (Cohen, 1990; Blum, 1990). The smoking litigation is part of a national debate about responsibility for the havoc of tobacco, being conducted in a multitude of forums, at the same time that it is part of the national controversy over tort liability. As the players maneuver at the intersection of these arenas, they are aware of the course of earlier congregations. The corporate decapitations of Manville and A. H. Robins (the manufacturer of the Dalkon Shield) are a gruesome portent to some, a shining hope to others.

As these examples remind us, a case congregation is not just a succession of cases in which each is measured against a fixed (or slowly changing) framework of law. Instead, it is a changing stream whose course shifts and turns, widens and deepens, diverts and quickens. Law, lawyers, parties, audiences, practices, institutions, outcomes, stakes, expectations, discourse, meanings—all of these may undergo change as one of these congregations runs its course.

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V. CONCLUSION

These speculations about the careers of different congregations of cases suggest a dual picture: at the same time that case congregations are driven by external forces, they display a kind of internal dynamic. To some extent, litigation lives "a life of its own," partly independent of the underlying events in the outside world.[34] But if it is not entirely dependent on external developments, neither is it wholly autonomous in the sense either of bring part of a legal order that is "in charge" of the wider society, or of exemplifying inexorable scientific laws of social control.

We can, I think, identify many regularities in this process, many paths by which a variety of influences work. Whether these can be subsumed in a comprehensive master pattern seems doubtful. No one is in charge: a case congregation is "the product of the action of many men but . . . not the result of human design" (Hayek, 1973: 37) It is an interactive system that "utilize[s] the separate knowledge of all its several members, without this knowledge ever being concentrated in a single mind, or being subject to those processes of deliberate coordination and adaptation which a mind performs" (*ibid.*, pp. 41–42). External events and the litigation system are simultaneously connected and separated by the strategies of the actors. External changes affect the litigation system as they are filtered through the strategic considerations of the parties. That is, we are dealing with a kind of behavior in which people are acting strategically; they are thinking about stakes, probable returns, and tactical options. This is not to say that their motives are solely economic. They may want vindication or revenge. They may be poorly informed or may miscalculate. But generally their behavior is not impulsive and irreversible: they recruit advisers and allies, ponder options, assess what the other side is doing, and act after some deliberation. So when we see changes in litigation over time, we see reflections of changes in the resources, alternatives, and strategies available to the players.

To imagine the connection between the litigation system and the wider society, consider the following extended analogy. Imagine a strange variation of billiards in which when one player is shooting, the other can change slightly the position of the balls on the table. Imagine such a match being played on an immense table on which innumerable such games are taking place simultaneously. Games are playing through one another, so the balls in one match may ricochet unexpectedly from the strokes in another match. The surface of the table, rutted and torn by constant wear, changes imperceptibly between plays. Only part of the throng in the vast hall is intermittently diverted from other amusements to

[34] This seems to fit neatly with Abel's (1973) notion of the mix of dependence and autonomy that characterizes highly differentiated dispute institutions.

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attend to the billiards table. Those who play and observe apply several overlapping and changing systems of keeping score. Tokens for play are distributed partly on the basis of recent scores but partly according to chance contact and intensity of interest. Would-be players press forward or depart on the basis of rumors about the course of play and the pull of rival entertainments. The changing band of players brings different combinations of agility, coordination, calculation, boldness, experience, and so forth.

What would an observer perched above the table see? Balls colliding, deflected; energies dissipated and transmitted. The course of the balls is not random. Much of what happens can be traced to the moves of the players, and these moves can be understood as pursuit of their goals. Yet the overall pattern is not traceable to or deducible from the goals or strategies of any of the players. For each is surrounded by unknowable contingencies, including in part the cumulative effects of the actions of the others. Although the course of play is influenced by many things that happen in the hall—the composition of the crowd, the volume and appeal of the other amusements—it is not a direct reflection of any of these.

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