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Can You Care for People and Still Count the Costs?

Dan B. Dobbs

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Marc Galanter, whom I do not know but wish I did, compels you to take him seriously. I react to almost every paragraph he writes; and for this reason, the editors of the *Maryland Law Review* were wise to request the briefest of comments. The limit of the comment, however, should not be taken to reflect a limit either of interest in his work or of the seriousness with which I take it.

I.

First, let me say I agree that litigation can produce wonderful results of the kind Professor Galanter describes and illustrates in his last pages. If his article had been addressed to members of the public, or to interest groups that consistently attack lawyers and litigation—doctors' groups, for example—I would have been more comfortable with its enthusiasm for the benefits of litigation. The article seems intended to redress what Galanter perceives to be an overemphasis on the costs of litigation. But we lawyers have on the whole always thought rather well of our profession and its processes. Whatever may be Professor Galanter's inner premises, his conclusions represent what, after all, we really want to hear: that our life's work is a noble thing. We lawyers already believe that litigation has important benefits; perhaps we need to be reminded that litigation has important costs as well.

In truth there *are* costs to litigation that parallel its benefits—both tangible and intangible costs. No one knows how much litigation's tangible, financial costs really are. The figures range from weak to almost nonexistent.[1] National standards of accounting for public litigation costs do not exist.[2] Even when states do furnish

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1. There is a good study necessarily extrapolating from limited data. *See* J. KAKALIK & R. ROSS, COSTS OF THE CIVIL JUSTICE SYSTEM (1983) [hereinafter KAKALIK & ROSS] and the helpful summary and review, Brunet, *Measuring the Costs of Civil Justice*, 83 MICH. L. REV. 916 (1985).

2. The authors of KAKALIK & ROSS had to be content with data from only three

some limited kinds of reporting on costs of court systems, these reports may or may not take into account expensive items such as amortized costs of building a courthouse, or maintaining it. Ways of figuring costs of retirement systems for judicial personnel, or court libraries, may differ. Public accounting ignores some costs altogether. Certainly some "overhead" costs of the legal system, such as the public costs of law schools, are not considered. The result is that we have inadequate information about costs, but we can be sure the totals are substantial.[3]

Costs paid by litigants—and then often passed on to consumers, many of whom never litigate about anything at all—are even higher. Although no one really knows, Cutler's estimate[4] that the legal profession, in money terms, is bigger than the electric power business could be correct. To say so does not suggest that the costs are not worth it; that is another inquiry, and one that would have to be accompanied by some assessment of alternatives to those costs. But it is certainly not true that litigation—or the legal system as a whole—is without substantial direct financial costs.

And just as there may be less tangible benefits of litigation, there may also be less tangible costs of litigation. Such costs could be investigated more or less empirically, although I remain unconvinced that every part of the floating world must be subjected to social science studies as it passes by. In any event I doubt that there is any more reason to deny that there are intangible costs than to deny that there are intangible benefits of litigation.

What could count as costs in the intangible sense? Just as litigation might induce potential defendants to provide a more appropriate level of safety (the Madison Parks example), litigation may also encourage defendants to provide more safety efforts than would be desirable, thus increasing private costs and sometimes even increas-

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states and a federal district court because discrepancies in the way figures were reported made it difficult or impossible to compare others. *Id.* at viii.

3. Public costs in trial courts of superior jurisdiction were estimated in KAKALIK & Ross at over $2 billion for fiscal year 1980. *Id.* at xix, Table S.9. This excludes many trial courts such as municipal courts. Given some of the problems of making the estimate, the figure may be rather conservative. In addition, there are items not listed that perhaps should be considered, in part, as costs of litigation. Prison libraries, for example, might fall in this category. Two billion dollars is of course a relatively small sum compared to, say, the defense budget; but as the saying goes, a billion here, a billion there—after a while it adds up.

4. Cutler, *Conflicts of Interest*, 30 EMORY L.J. 1015, 1016 (1981) (estimating lawyer's charges at $30 billion annually). Crampton, *The Trouble with Lawyers (and Law Schools)*, 35 J. LEGAL EDUC. 359, 360 (1985) suggested that the figure is closer to $40 or $50 billion annually. Neither estimate purports to be based on a rigorous empirical investigation.

ing actual hazards. The doctor practicing defensive medicine, for example, may order additional operations in an effort to provide more safety; but this may increase the risk that the patient will succumb to a properly administered but wholly unnecessary anesthetic.

Similarly, the university administrator, fearing suit by a teacher if tenure is ultimately denied, may actively avoid any good comments in the teacher's file. The administrator may adopt a stance my colleague Kenney Hegland calls "instant adversarialness"—effectively denying the young teacher the support needed to develop into a good teacher and scholar.

Or the publisher, under constant threat of suits for libel or invasion of privacy, may censor itself rather than run the risk of the very high judgments sometimes secured in defamation cases—or the legal costs of defending.[5] If the potential for litigation induces the young gentlemen of a Princeton eating club to take their meals in the presence of women, a practice I feel sure will not prove harmful to their personal development, then the potential for litigation may equally induce newspapers to become their own censors, a practice that is most distinctly harmful to a free society.

There are many kinds of costs that can flow from litigation. Some kinds of claims offer potential recoveries so great that many people may be induced to assert them, even though the win-rate is very low. But if one out of every ten plaintiffs is able to win such a claim, that means nine out of ten defendants must pay attorney fees and other expenses of suit even though they are entirely innocent. The innocent nine are hostages for the liability of the tenth. The costs to them in money and in life disruption may far exceed the gains to the one plaintiff. I count this a very high cost indeed. It will be difficult to estimate such a cost, perhaps impossible to estimate it by social science methodology. But whether injustice to the innocent hostages is sufficient in any given class of case to outweigh the benefits of litigation, that injustice is a real cost that ought to be assessed, along with other costs.[6]

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5. Avoidance of self-censorship in defamation cases was the aim of New York Times v. Sullivan, 376 U.S. 254 (1964). Although the rule in *Times-Sullivan* has been substantially undermined by the vacillations of a divided Court as well as by decisions of lower courts, the ideal that censorship is to be avoided has not itself been questioned. Whatever the shimmering rules of the moment, then, self-censorship must be counted as a cost.

6. This is no place for development of the idea sketched out freehand in this paragraph, but I should notice one strong counterargument. All of us have the right to sue and, somewhat reciprocally, the liability to being sued. A defendant, who may use the court system as a plaintiff or counterclaimant, has no reasonable claim that she is being

There are other intangible costs; readers who practice law will think of some of them. I do not believe we should ignore the costs in litigation any more than we should ignore the benefits. Professor Galanter does not counsel us to ignore the costs, but I think his focus is so strongly upon the benefits of litigation as a potential weapon for those without power that he does not give adequate attention to the costs—which surely must ultimately be considered if the legal system is to improve. Improvement is a goal I think we might entertain even if we do not think that over-litigation is a "portent of doom."

II.

Second, as to the thesis I take to be central in Professor Galanter's present article: litigation has not increased substantially, but if it has increased, there are very good reasons for it—much of what I have said in comment on the last portion of the article is relevant here as well.

Perhaps here we should arm ourselves against statistics and against Professor Galanter's candor in admitting that figures are untrustworthy. I say we should arm ourselves, because while he discounts some of the figures, he does not seem to discount them equally.[7] But I think we should discount them all for a variety of reasons, not the least of which is that the number of cases filed in court is probably a rather poor index of the real amount of litigation.[8] Many claims are pursued successfully without filing at all, be-

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treated unjustly merely because she is sued. But as the plaintiff's claims become less and less justified—as we approach the one-in-ten ratio of success—reciprocity ceases to justify the costs imposed upon the innocent defendant, as the law of malicious prosecution would imply. You might not find injustice until reciprocity has significantly diminished, but you would surely have to say there are "costs" long before that—at least in any case in which the costs imposed upon innocent defendants exceed the gains to the winning plaintiff.

7. The different ways in which figures are used may be characteristic of social science writing. In this case, Galanter, I think rightly, tells us that "figures like litigation rates are theories, [and] especially slippery ones . . . ." Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 15 (1986). He makes the point to warn us that the great percentage increases reflected in his Table 2 should not be taken at face value. But elsewhere he not only develops a mass of figures, he appears to build parts of his platform from them. Thus he concludes that "some kinds of cases are increasing while others are decreasing" (*id.* at 8)—a conclusion he reaches in spite of slippery figures and in spite of the added concession that the number of cases filed does not provide a "satisfying measure of litigiousness." *Id.* at 7. It appears to me that Galanter found a differential in slipperiness of the figures. My view is that none of the figures should be taken as dispositive.

8. Elsewhere Galanter suggests that we "visualize litigation as the arrival at courts

cause litigation itself is a threat and sometimes a very one-sided threat. Perhaps more important, the amount of litigation activity in claims actually filed undoubtedly has increased in the past generation as lawyers have engaged in very substantial discovery and motion practice. Even if the figures submitted about caseload and case filings should be taken as accurate, then, they should not be taken as realistic estimates of judicial activity.

More than this, Professor Galanter's conclusion that "[h]igher caseloads do not represent a heightened appetite for adversarial combat," is not one that rests on figures at all, in spite of the fact that figures dominate most of the discussion in the first portions of the paper. We should not, in other words, take it that the conclusion has been proven by facts or figures merely because figures appear in great quantity.

But more important to me than any of this is the question about why there is a question. In the end Professor Galanter seems to grant that the caseload is "heightened" but seems to insist that it is only "heightened," not overwhelming. The real meat of his conclusion, however, is his speculation about why people *perceive* a litigation explosion. He believes that people find a litigation explosion because they do not like what they see in the results—more regulation, more liability for the "haves," and more "rights" for the "have-nots." I think his speculations are at least partly correct, but their correctness and importance are wholly unrelated to whether there is in fact a litigation explosion.

In fact, though it would be interesting to know whether litigation is increasing in some sense, I think that may be far less significant, even for Professor Galanter's own conclusion, than some other issues related to it. Even if litigation filings had not increased at all, litigation costs are certainly up. If, as Galanter asserts at one point, most claims are settled without "full blown" litigation, today's motion practice consumes time and money in excess of many "full blown" trials a generation ago. Even unbiased observers might

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of disputes . . . ." Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4, 11-12 (1983). If litigation is merely the arrival of a dispute in court, the number of cases filed is the only index to litigation. But while this definition provides something more or less measurable by social science methods, it does not permit even an estimate of what is going on after the arrival of a complaint in the clerk's office. And it would exclude what lawyers think of as litigation—those "cases" that are being seriously investigated, researched, and negotiated, but that have not been "filed" in court. I do not read Galanter's present article as attempting to define litigation so narrowly.

think that this is a meaningful increase in litigation, no matter how many actual complaints are filed.

But even if the number of cases filed had not increased one iota, even if costs had not increased, litigation might still be too expensive either in tangible costs or intangible costs or both. Even if costs and filings had remained constant, litigation might have been too expensive all along; or it might have become too expensive in the light of other social needs or in the light of alternative solutions to litigation. What *are* the real costs of litigation? Are they too much in the light of benefits and alternatives? Those are, I think, more important questions than increase in litigation as such.

We need to be willing to improve the system for which we as lawyers and judges are, more than any other group, responsible. It is worthy to recognize its values, but it is also worthy to recognize that improvements might be made—not merely for the benefit of the "haves," but for the benefit of everyone. If I read him rightly, Professor Galanter sees the legal system as an equalizer or potential equalizer in which those without power have at least a chance at justice.[9] In my view this is true and worthy. But to perceive this important liberal value of the legal system does not require us to back into the view that is the most conservative view of all—that everything that is, is right. The legal system is *not* perfect. There are costs to our system and we ought to identify them. We may differ about when costs are "too high," but we cannot even begin the task of improving litigation without focusing on costs as well as on benefits of litigation.

9. "Law is a way to control and hold accountable remote and overwhelming actors." Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 14 (1986).