



When might claims of “too much litigation” be other than political sloganeering?

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Abstract

This paper answers “Too Much Litigation?” in three ways. First, when politicians presume or assert that the culture of the United States suffers too much litigation, they often trade in political talking points, expedient distortions, disingenuous enumeration, and opportunistic anecdotalism that tend to preserve or increase the advantages of those who have more over those who have less. Second, when analysts inquire what kinds of litigation serve what purposes well and what purposes poorly, “too much litigation” or “too much litigiousness” may rise above political sloganeering to the extent that scholars take into account how litigation affects the advantages and disadvantages of have-mores and have-lesses. Third, when scholars reconceive litigation as authoritative allocation of values beyond merely winning cases, reaping fees and rewards, and moving law or policy incrementally, notions such as “litigious” and “litigiousness” may become far more and far better than political sloganeering.

Key words

U. S. litigation; U. S. litigiousness; authoritative allocation of values; anecdotalism

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Resumen

Este artículo responde a la pregunta de "¿Demasiados litigios?" de tres formas. Primero: cuando los políticos presumen o afirman que la cultura de EE. UU. sufre de demasiados litigios, a menudo intercambian temas de debate político, distorsiones convenientes, enumeraciones falsas y anecdotalismo oportunista que tienden a preservar o aumentar las ventajas de quienes tienen más sobre las de quienes tienen menos. En segundo lugar, cuando los expertos preguntan qué tipos de litigios sirven bien o mal a que propósitos, los temas de "demasiados litigios" o "demasiada litigiosidad" pueden sobreponerse a los eslóganes políticos hasta el punto de que los académicos toman en cuenta el efecto que tienen los litigios en las ventajas o desventajas de quienes tienen más y de quienes tienen menos. En tercer lugar, cuando los académicos reconceptualizan el litigio como una dotación autoritaria de valores más allá del hecho de ganar casos, obtener beneficios y reconocimientos, y mover la ley o la política gradualmente, nociones como "litigioso" o "litigiosidad" pueden llegar a ser más, y mejores, que unos eslóganes políticos.

Palabras clave

Litigios en EE. UU.; litigiosidad en EE. UU.; dotación autoritaria de valores; anecdotalismo

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1. Introduction

A workshop on “Too Much Litigation?” inclines us to ask whether it is possible to inquire about quantities of litigation or tendencies to litigiousness without lurching or lapsing into partisan talking points, ideological banter, political shibboleths, or other ever-present temptations to sophistries in pursuit of policy.¹ We find any simple response to the workshop’s question fraught with uncertainties and complications. A flat “No! It is not possible to assert ‘too much litigation’ without sloganeering!” is too easy an answer in that any reasonably attentive observer must concede that some litigation is extortionate or bordering on barratry or frivolousness. At such extremes, “litigious” or “litigiousness” may even euphemize perfidy. Before we answer that one may ask about the quantity of litigation without falling for or into banter or blather, however, we confront routine appropriation of “litigious” by groups, coalitions, or policy entrepreneurs who make of “litigious” and “litigiousness” symbols, slogans, and shibboleths. Some such groups ingenuously traffic in second-hand phrases and fetching blather propagated by mass media. Other groups discourage civil claims, condition attitudes of civil jurors, and prejudice judges in civil actions all as tactics in a strategy to suppress civil litigation and to stifle use of courts to redress grievances. These latter groups disingenuously proclaim that runaway juries and rampant lawsuits threaten costs to all Americans and leave unstated that trial lawyers and civil suits threaten polluters and others who commit wrongs for the betterment of their bottom lines. Naïfs and knaves alike slather slogans opportunistically to blame have-lesses for threats to corporate profits, to shame plaintiffs’ attorneys out of striving for recompense, and to preserve jural regimes that favor have-mores who with their lawyers crafted laws, rules, doctrines, and procedures to preserve their fortunes and positions (see Haltom and McCann 2004).

Confident neither in an emphatic “Claims of too much litigation will always be rife with politicking” nor in a categorical “Claims of too much litigation often avoid crass politicking,” we proffer in this paper three answers to the query we pose in its title. First we answer that claims that the culture, society, or polity of and in the United States might be “litigious” or might suffer from excessive resort to litigation tend to furnish cunning talking points and expedient distortions much better than such claims serve intellectual reasoning or understanding, especially when such claims are bolstered by naïve or disingenuous enumeration and credulous or opportune anecdotalism. If assertions of too much litigation were to be backed by sensible statistics and illustrated by sober story-

¹ Talking points, banter, shibboleths, and sophistries exemplify but do not exhaust what we intend by “political sloganeering” in the title of our piece. We deploy “political sloganeering” to stand for instrumental communication in a pithy, memorable form likely both to short-circuit or supplant critical thinking and to elicit agreement or unwitting acquiescence from targeted audiences. We call the persisting forms instrumental because their effect on readers, viewers, and auditors matters more than either their verisimilitude, accuracy, or precision or their relevance for theories positive or normative. The guiding question of the 2019 IISL conference – “Too Much Litigation?” – calls to mind “jackpot justice,” “litigiousness,” “the litigation lottery,” and other slogans that corporate interests and their publicists designed and selected for persuasive impact with reckless disregard for aptness or veracity. We festoon this essay with symbols, distortions, opportunistic metaphors and other tropes, and jargon such as “hyperlexis” to illustrate the variety of political sloganeering and its diffusion into ossified “popular knowledge” and “common sense” in the U.S. context. It may go without stating that in the United States a leading source of misleading and often deceitful sloganeering would be Tort Reform (Nader and Smith 1996, Mencimer 2006).

telling, then something other than abject politicking and popular delusion might emerge, but that is not the way for savvy sociolegal analysts to wager. Our second answer is more positive but more qualified: When scholars, rather than presume too much litigation, inquire what kinds of litigation serve what purposes well and what poorly, then invocations of “litigious” and “litigiousness” and other markers of “too much litigation” may prove less captious and more revealing than the stark political banter we expect from showy statistics backed by contrived stories. Our third answer, too, is somewhat complicated. If we conceive of litigation as expression, performance, participation, and other means by which to allocate values beyond mere winning of cases, securing of prizes, and emendation of law or policy, “litigious” and “litigiousness” may become complex and subtle if suspect pronouncements.

By paper’s end we hope to have shown that discussions of “too much litigation” and “litigiousness” will always involve some politicking yet may tend toward politicking better or worse. Attention to how much of what sorts of litigation serves a polity well may involve political judgments and policy proclivities but may easily and directly facilitate and perhaps even improve reason and understanding. Awareness of the hazards of naïve and disingenuous or ingenious and cynical enumeration and credulous or expedient anecdotalism must straightaway lead us to expect opportunistic, unworthy rhetoric.

2. Answer One: Claims that the culture, society, or polity of and in the United States might suffer from “too much litigation” tend to forensic talking points and expedient distortions when they are bolstered by naïve or disingenuous enumeration and credulous or expedient anecdotalism

“Too much litigation?” – the theme of the 2019 IISL Workshop – denotes some expectation or norm about the quantity or range of litigation and connotes if not denotes some ratio of expected or needful or tolerable lawsuits to the total number of lawsuits in a society or polity. It follows that some quantification lies implicit if not explicit amid charges of litigiousness or in characterizations of “litigious”. Whether blatant or latent, such quantitative judgments long and often have ranged from abjectly opportunistic attempts to shock audiences to seemingly sincere attempts to persuade fellow citizens. Indeed, bogus figures and gee-whiz statistics may be likeliest when propaganda to protect those frequently sued by plaintiffs’ attorneys on behalf of have-lesses can be pitched as appeals to common sense and some allegedly shared interests. Metaphors such as “the litigation explosion” and other tropes manifest a strong tendency to exploit credulity, to politicize perceptions, and to publicize commonplace misinformation and, far too often, deliberate disinformation (Haltom and McCann 1998, 2004). Exacerbated by anecdotes that almost always distort episodes of civil justice into miscarriage of justice, miscalculations become common knowledge and common sense² that better numbers and more accurate renderings of cases can seldom dislodge. Phony fables and nonsense numbers presume then preserve then propagate misimpressions that in less forensic circles might easily be debunked.

² The Common Sense Product Liability and Legal Reform Act of 1995 was a legislative proposal to exploit the phrase “common sense”.

Two less forensic circles – academia and serious feature journalism – have generally routed quantifications bandied about in public speeches, popular appeals, and public relations. Indeed, some numbers (and concomitant stereotypes) bruited about by critics of civil litigation in the United States were undone by sociolegal research that predated the criticisms. The Civil Litigation Research Project (Felstiner *et al.* 1980–81) marshaled empirical evidence that demonstrated convincingly that in the U. S. the aggrieved seldom sued and that lawsuits or even contacts with lawyers were far from modal responses of those injured. Convincing data showed that, individually, Americans were not prone to barratry, hardly ready to sue at the drop of a hat (or cup of coffee), neither looking to collect “jackpot justice” nor longing to pick “deep pockets”.³ These findings have been so long established and so often confirmed that David Engel’s magnificent study, *The Myth of the Litigious Society: Why We Don’t Sue*, 35 years after the debut of the disputing pyramid undertook to explain why so many individuals “lump it”⁴ rather than even begin to litigate (Engel 2016).

About the time that tort reformers were cranking up their public relations campaigns and concocting numbers in support of “litigation explosions” and other dubious tropes (Malott 1985, Huber 1988, Olson 1991, Garry 1997), sociolegal scholars quickly but painstakingly debunked bogus statistics regarding individual litigants and the civil justice system as a whole in studies too numerous for us to recount here (Galanter 1983a, 1986, 1993a, 1993b, Saks 1992, Chesebro 1993, Koenig and Rustad 2002). Multiple studies by the Rand Corporation revealed that the civil justice system, complex and varied, was hardly recognizable in advertisements and agitation for tort reform and similar causes (Peterson 1984, Hensler 1986, 1994). The United States of America was not the most litigious nation-state on Earth no matter how many times politicians asserted such (Kritzer 2002, Figure 1; p. 1982).

By the time that Haltom and McCann surveyed the civil justice battlefield, sociolegal research had won the day among intellectuals and specialized journalists (Haltom and McCann 1998, 2004, Ch. 3). Of course, in popular and forensic arenas “common sense” persisted because political sloganeering – tort reform catchphrases, campaign canards, and especially outrageous anecdotes – established “common sense” beyond the power of sociolegal researches and law review articles to overcome with uncommon sense. While we fear that examples of misinformation and disinformation about civil disputing in the United States may understate the debacle when florid bombast collided with scholarly acumen, we hope that our recalling some classic, comprehensive studies will remind present-day readers just how long ago and just how emphatically the political sloganeering that relied on bogus quantification and tort tales (Strasser 1987, Cox 1992) was not merely rebutted but refuted. We recall these Pyrrhic victories to answer the question in the title of this paper – *When Might Claims of ‘Too Much Litigation’ Be Other than Political Sloganeering?* – with a weary: “In public forums and public relations, seldom”. In public forums and in public relations, pursuit of profits and protection of assets guided business interests to set up fake grassroots organizations to do the bidding

³ “Deep pockets” is political slang for persons and entities that have enough money to pay stratospheric judgments.

⁴ The English cliché “like it or lump it” (see <https://www.phrases.org.uk/meanings/like-it-or-lump-it.html> accessed 27 April 2019) stands for the injured who might have causes of civil action that they elect not to pursue.

of Big Tobacco and other reckless economic entities fearful of lawsuits. Tropes and slogans crafted by publicists to protect economic behemoths passed into common sense and were disseminated by and through mass media until stand-up comics, writers of television shows, and talking heads dispensing talking points were spreading alarms and trafficking in hackneyed representations. Misleading misrepresentations then could bamboozle even educated luminaries who ought to know better, such as doctors and nurses (Baker 2007; but, of course, had economic incentives to believe the sloganeering).

What researches have revealed chronically and consistently researchers have reinforced acutely: claims of too much litigation and too many litigious Americans are forensically useful not despite their being ungrounded in serious enumerations but owing to their being unmoored from serious accounting. Perhaps the most imposing accounting was performed by Professor Michael Saks (1992). Saks found, most important, that credible, comprehensive data on the system of civil justice in general and on torts in particular were as yet unavailable. Saks then concluded with some rue that absence of reliable, valid data freed publicists and propagandists to make up data by reverse engineering bluster. As early as 1992, then, Saks answered our question with pessimism: Absent data or valid information, expect forensic talking points and expedient exaggerations.

Emerging from his repudiation of political sloganeering, in a second article Saks offered a hopeful note (Saks 1993, p. 8):

For some time, the absence of data or the existence of only limited and superficial data permitted rash and alarming claims to be made and to be taken seriously. As more complete and better understood data gradually came into being, those early assertions were directly discredited. Now we are fast approaching the point in this development of knowledge where few, if any, informed students of the subject pay much attention to those earlier statements. At the same time, the accumulating data and reflections about what inferences may be drawn from those data have also sharpened our appreciation of how limited our knowledge remains (...).

Dr. Saks' hope was soon dashed, for a year after his second article appeared *Common Sense Tort Reform* that relied on numbers and anecdotes repudiated decisively and often figured prominently in the *Contract with America* that, along with other appeals, gave the Republican Party a majority in the House of Representatives for the first time in 42 years. The Common Sense Product Liability and Legal Reform Act (1995) was aptly named, for it resounded with common stereotypes and slogans and resonated with tort reformers' statistics and stories. In the absence of valid, reliable data, this "common sense" thrived and suited the litigational strategies of corporate attorneys – for example, lawyers for embattled Big Tobacco (Haltom and McCann 2004, Ch. 7) – as well as everyday prejudices against ordinary folks who "play the victim".

Among the slogans about the civil justice system were claims that eventually had to be presumed because no sober counting could validly sustain the claims. Barely had claims that the United States was reeling from litigation that had exploded or mushroomed or skyrocketed been raised (Haltom and McCann 1998) when Professor Marc Galanter (1986) and reporters William Glaberson and Christopher Farrell (1986) answered convincingly that no "litigation explosion" could be detected or verified. This, of course, did not stop one author from the Manhattan Institute (see Chesebro 1993, pp. 1707–1722) from presumptuously proselytizing about a litigation explosion two years thereafter

(Huber 1988) and another author from the Manhattan Institute's group from publishing five years later *The Litigation Explosion* (Olson 1991). Tort reformers and other civil justice warriors alarmed some attentive citizens and many more political entrepreneurs with such slogans as "litigation lotteries" and "jackpot justice": spates of frivolous, fraudulent lawsuits that ripped off or bankrupted blameless civil defendants with "deep pockets" while careful, critical students of the U. S. civil system could not locate or even establish the existence of reliable, valid data that would sustain the villains, victims, or existence of such systemic corruptions. A lurid "tort tax" likewise so expediently undergirded proposed tort reforms that mischaracterizations – too baseless to be called miscalculations – of the civil justice system in the United States as confiscatory, anticompetitive, and devastating passed into common knowledge among chattering commentators and tort reformers.⁵

We have focused our review of misinformation and disinformation on claims of too many lawsuits or too much litigation, but even our truncated review demonstrates that slogans based on or backed by faulty quantification long have been and to this day are bereft of credibility before educated and expert audiences. Despite decades of empirical and statistical drubbings, the slogans and statistical spin endure in popular culture and among even – perhaps especially – attentive, informed citizens and active, opportunistic politicians. Laments about individuals suing businesses have greatly outnumbered complaints about businesses using civil courts to collect debts from individuals, businesses suing other businesses over contracts, patents, copyright, and the like, or businesses suing governments (Galanter 1983b, Center for Justice and Democracy 2012). Far more "silly suits" that involve ordinary people festoon tort reform websites than seemingly frivolous lawsuits by major corporations against powerless defendants.⁶ Memes insisted and continue to insinuate that the civil justice system is costly, inefficient, and unfair owing to plaintiffs' and trial attorneys' ripping off the system and being personally irresponsible and morally deficient; that corporations "sue and settle" has not been explored or exploited in mass media nearly as much. Over the decades since invention of slogans covered above, suits regarding civil rights, health and safety, environment, political correctness, and especially racial, ethnic, and gender equities have fanned resentments. Popular myths about malpractice have been shown to be at best problematic as concerns the system of malpractice law and insurance (Baker 2007) and with regard to "bad baby" cases in which parents of seriously compromised children must, in a system without universal health care, either allege negligence or be unable to raise their children (Werth 1998). Haltom and McCann (2004) recapped scholarship since the 1990s that showed how exaggerated when not flat-out fabricated slogans and shibboleths were and argued that the slogans pandered to ordinary moralistic resentment by media and ordinary people as well as expensive, relentless campaigns by big spenders. Readers and viewers have long enjoyed "loathing" shyster lawyers and laughing at stupid plaintiffs (see Galanter 2006). This pandering and vilifying continues

⁵ The original "tort tax" (Huber 1988, p. 4) and other "estimates" for how much civil litigation costs the economy were immediately ridiculed (Galanter 1992) as political blather, but subsequent attempts need not plunge to the level of political sloganeering (see McQuillan and Abramyan 2007) even though they are misleading (see Cross 2011).

⁶ For example, *Pepsi is suing four Indian farmers 10 million rupees each for growing the potato used to make Lay's* (Dave and Bhardwaj 2019).

apace in such tort talking points as “judicial hellholes” (Silverstein 2019), but we suspect that over the decades more damage has been worked by the culture’s absorbing tort tales, myths, misnomers, and faulty or fraudulent arithmetic.

Indeed, Richard Abel, in arguing that the real tort crisis persistently and pervasively has been too few lawsuits, long ago demonstrated how malleable data and stats were and insisted that, to the extent that extant, reliable data proved anything, they attested to the very opposite of what tort sloganeers proclaimed (Abel 1987, p. 447):

... The real tort crisis is old, not new. It is a crisis of underclaiming rather than overclaiming. The tort system does not encourage fraud or display excessive generosity but fails to compensate needy, deserving victims. It does not place undue burdens on socially valuable activities but fails to discourage unreasonable risks. And it does not censure the innocent but fails to condemn the guilty. The rhetoric of those who deplore the burden of liability and insurance costs is simply another expression of the conservative backlash of recent years. It can be summarized in a sentence: ‘Let’s hang on to what we have, and when others seek the same privileges we’ll say our society can’t afford it’. This ideology embraces, reinforces, and unifies diverse positions. Although it concedes that the early civil rights movement expressed legitimate grievances, it contends that racial minorities no longer have any reason to complain and that affirmative action violates the rights of whites. Characterizing them as threats to the family, it rejects the claims of feminists, which never were granted the same legitimacy as those of blacks. It portrays environmentalists as a privileged few (...). Insisting that Americans always have been excessively litigious, it declares that this indulgence now has gotten out of hand. It blames our alleged contentiousness on the fact that we have ‘too many’ lawyers – largely because women and minorities insisted on entering the profession beginning in the mid-1960s. Advocates of these views propose a number of solutions. They favor delegating significant areas of social relations. They propose alternatives to the formal legal system. They favor deregulation of the economy. And they seek to privatize as much of the public sector as possible (while enormously expanding the military, police, and prisons). Diatribes about the ‘tort liability crisis’ are simply another manifestation of this defense of privilege. From its perspective, tort victims are like welfare cheats – social parasites who seek riches without effort and often commit fraud to get them.

Professor Abel’s remarks quoted at length above seem political or even polemical; nonetheless, his remarks are no more political or polemical than alarums about a “liability explosion” (Malott 1985) or “hyperlexis” (Manning 1977) and far less freighted with bogus numerology such as “the tort tax” (Huber 1988) or with manicured anecdotes (Olson 1991). More to our immediate point, Abel marshaled quantitative information and authoritative studies far superior to numbers and authorities cited by well-funded publicists and propagandists. Evidence for the slogans and shibboleths of the tort reformers was then and remains now meagre. Perhaps we need not add that the slogans and shibboleths were then and remain politically effective “common sense” while Abel’s sensible data and sophisticated claims hide in law reviews and other scholarly conclaves or catacombs.

What is more, Abel and other sociolegal scholars have had in mind, among other matters, policy reform litigation and litigators who use cases to alter policy. That policy reform litigation once was dominated by liberal public interest and civil rights groups, often through class actions, from the 1960s to the 1980s. In response, conservative, pro-

business and New Right groups narrowed the room in law for such action, killed off class actions, and at least neutralized litigation that favored progressive policies and have-lessees. Starting in the 1980s, conservative groups mimicked the strategies and tactics of litigators who used lawsuits to alter policy, arguably with more success due to more resources and increasing right wing allies in the courts and elected branches (Hatcher 2005, Teles 2010, Hollis-Brusky 2015) and owing to the fact that conservatives were trying to stop regulation or other exertions of government on behalf of those who had less, as opposed to liberals, who often were looking for more regulation and government intervention to fix problems. Efforts to vilify progressive litigation and litigators pursuing change usually “count” more in accounts of “too much litigation” than does emulation on the right. Those who seek to change society often require intervention by government and alteration of mindsets on behalf of the disadvantaged, whereas who defend the status quo often need only neutralize on behalf of the advantaged. Moreover, even more sophisticated statistical disputation all too often involved reasoning motivated by issue or policy expedients as opposed to sociolegal scholars’ attempts to get matters right. Advocacy and rhetoric based in and on faulty calculations have forensically bested scholarship and evidence (see Kritzer 2004). For at least the last three decades, civil justice has been denounced as too expensive when have-lessees, individually or in class actions, have sought to vindicate themselves, their rights, or their interests against commercial enterprises. Meanwhile very hierarchical litigation by have-mores has largely escaped notice in mass media.

How do misleading numbers and like misimpressions persist despite a paucity of reliable information? Pundit Max Boot in *Out of Order* inadvertently revealed how bogus stats and misleading rhetoric resist correction. In what he described as a passionate polemic (Boot 1998, p. xviii), Mr. Boot dismissed in but three pages experts who doubted that the United States had endured any “litigation explosion” (Boot 1998, pp. 149–151). In his dismissal, Mr. Boot derided Marc Galanter’s objections to over-reliance on anecdotes with risible, sophomoric equivocation: “... the whole basis of the common law is the compiling of individual cases, a.k.a. anecdotes, to reach a general conclusion” (Boot 1998, p. 149). He then attacked Michael Saks’s insistence that no one knows enough about the tort system to justify any bold policy ventures with another non sequitur: “It’s true that statistics about the civil justice system, especially at the state level, are fragmentary and incomplete. But it’s impossible to wait until 100 percent of the evidence is in before reaching a conclusion; by that standard, we’d still be debating whether Galileo was right” (Boot 1998, p. 149). Brushing aside an American Bar Association report with contrary statistics, Mr. Boot concluded “(d)efenders of the system will offer a few other equivocations and justifications as to why no litigation explosion exists, but the jig is basically up. The numbers we’ve examined confirm the evidence of our own eyes: There are lots of suits, many of them frivolous, and the number is growing” (Boot 1998, p. 151).⁷ The mass of evidence to the contrary of his propositions notwithstanding, Mr. Boot just knows that lawsuits are proliferating, perhaps burgeoning, maybe even mushrooming, if not exploding. What is more, Mr. Boot bases his knowledge largely on evidence before his readers’ own eyes. Boot then summarizes that evidence in a phrase

⁷ Mr. Boot was at the time he wrote *Out of Order* the op-ed editor for *The Wall Street Journal*, a position that would surround him with pro-corporate and anti-plaintiff information and innuendo. We do not know to what extent his “day job” misled Mr. Boot.

with which very few respondents would take issue: “There are lots of suits, many of them frivolous, and the number is growing”. A 1998 presentation to the American Political Science Association dubbed this tactic “advancing by retreating” (Haltom and McCann 1998). Learned, astute observers of the tort system tend to agree with Mr. Boot that civil suits are many and more annually, and, as a result of proliferation, more of them are petty. Still, careful students of the civil courts are also certain that litigation has not exploded, the claim that Boot advanced before he retreated, the claim that Mr. Boot will presume for the rest of his chapter despite that claim’s having been refuted convincingly by many more specialists than we have cited above.

Mr. Boot provides one example of how advocates exploit equivocation implicit in “litigious” and similar symbols, slogans, and shibboleths. He asserts anew common sense and common knowledge after denouncing scholars for confusing or complexifying matters with evidence and logic. This deflection works to the extent that talking points and spin provide familiar facts that counter the esoterica of sociolegal scholars. Commonly, popularly acknowledged “facts on the ground” occupy one pole of a range of views; a mass of sociolegal findings constitute “alternative facts” at an opposite pole; and Professors Galanter and Saks among others hold down a middle position that the crucial data and evidence are unknown and perhaps unknowable. Pundits, propagandists, and other everyday observers of politics and society presume too much litigation (and other negative features of civil justice) and wall off this taken-for-granted reality against sociolegal scholars who struggle in vain in specialized media against the profusion of reiterations broadcast through mass media (Bailis and MacCoun 1996). If experienced, expert sociolegal specialists pursue empirical evidence and warranted inferences, ingenuous or disingenuous policy entrepreneurs and political operatives pursue “too much litigation” and other slogans as facile if not cunning answers to ill-formed, unanswerable questions, questions all the more efficacious politically because they are unanswerable.

Beyond the degree to which everyday vernacular and concomitant images and slogans generate notions and nostrums that mislead regarding litigiousness and litigation but match common sense and common knowledge, everyday vernacular presumes anecdotes and apocrypha that penetrate popular consciousness, permeate public discourse, and perpetuate ordinary (mis)understandings of “too much litigation” or “too much litigiousness”.

We introduce anecdotalism less for deployment of tort tales selected for their unrepresentativeness – hence, cant in service of corporate interests and have-mores – and more for use of tort tales to validate naïve or reckless or cynical or mendacious pseudo-accounting, which in forensic appeals passes for knowledge. Far too numerous to recount here, anecdota and apocrypha complement the faulty figuring of critics of civil justice (see, for example, McQuillan 2009, p. 9). Tort tales and legal urban legends (Saks 1992) illustrate and exemplify in memorable simplicity and, most insidious, persist in public memory as if they were data. Largely discarded in academic discourse, misinformation lives on in journalistic or public discourse even as academic discourse has moved on. As David Engel brilliantly explains why Americans are so reluctant to sue and why they “lump” injuries and slights far more often than litigate them (Engel 2016) – both propositions contrary to taken-for-granted stereotypes of litigious

Americans – journalists and commentators suffuse mass media with tort tales, phony calculations, and other puffery.

We underline that our research aims not just to expose and critique the misinformation and baseless anecdotes regarding excessive litigiousness that saturate popular culture but also to implicate these narratives and slogans social and political power relations that sustain the dominance of have-mores over have-lesses. We note here at least three ways that legal fictions express and reproduce unequal power. First, myths of hyper-litigiousness did not just not emerge as common sense from experiences of ordinary people or from divine inspiration. Rather, we have documented at length that the anecdotes, narratives, jokes, and other forms of knowledge were generated by instrumental corporate campaigns to convince citizens about the dangers of rampant litigiousness and then recycled through the ordinary institutional practices of news reporters, editorialists, late night comedians, television shows and movies for public consumption. The result was a fundamental shift in core ideological elements constituting American public consciousness, one that was undeniably political in motivation and effect. Indeed, we have reason to think that the repeated stories were so compelling that even those propagandists knowingly manufacturing and disseminating falsehoods often came to believe them, further evidencing the power of fiction to wield power.

Second, this common but distorted public knowledge about litigiousness further enhanced the power of big business. Ordinary citizens came to understand the stigma and shame of naming, blaming, and claiming rights against the corporate haves, while jurors, judges, and lawyers increasingly adopted the default understanding that plaintiffs were likely greedy and their claims unfounded (Hans and Vidmar 1986, Daniels and Martin 1995, 2002, Hans 2000). Corporate organizations long radically advantaged by legions of repeat player lawyers and other legal resources relative to consumers and workers thus gained a new ideological resource that worked to preclude disputes and unbalance the scales of official and unofficial legal justice yet further when disputes did arise. When nearly every tort lawyer begins presentation of a case explaining why the plaintiff's claim is unlike that of Stella Liebeck, the infamous McDonald's hot coffee claimant, we can see the increasing institutional bias at work.

Third, the sloganeering and anecdotal common sense likewise shaped agendas of public policy debate. Numerous proposals for expanding legal rights of consumers and workers as well as regulatory or administrative programs were effectively neutralized or killed by the threat of increased frivolous litigation that allegedly crippled effective policy institutions, increased economic costs, and undermined the moral integrity of civil culture grounded in a "responsibilized" citizenry. The most obvious manifestation of agenda setting power was supporting tort reform legislation at the state and national levels stacking the deck against plaintiffs. But the impact was far more widespread if often indirect. For example, the litigation myth and obsession with the hot coffee case effectively led to charges about the dangers of a "patients' bill of rights" that undid proposed Clinton era health care legislation (Haltom and McCann 2004, pp. 289-291). Knowledge is power, and shared knowledge is no less powerful when it is grossly inaccurate, especially if generated and manipulated by those already advantaged with unequal instrumental resources and hierarchical institutionalized position. In sum,

litigation and litigiousness are essentially contested concepts⁸ not amenable to rigorous definition, measurement, or deployment as well as substrates of discourses popular, political, and academic. “Too much litigation” and “too much litigiousness” retain utility as symbols, shibboleths, and myths presumed by politicians, news junkies, and journalists, but for that very reason “too much litigation” or “too much litigiousness” are at best troublesome questions to ask. Data regarding civil suits are available but tend not to bear on or bear out “lawsuit lotteries,” “frivolous lawsuits,” or other slogans and slurs.⁹ Political sloganeering presents a rampant, ever-present peril for policymakers and politicians, let alone sociolegal theorists, because everyday vernacular presumes slogans, symbols, and shibboleths. Although not every answer to some question about litigiousness need be misinformation or disinformation, “too much litigation” has often evoked and will often evoke responses far less than helpful for those committed to social justice and equity.

3. Answer Two: When scholars inquire what kinds of litigation serve what purposes well and what poorly then “too much litigation” or “too much litigiousness” may transcend political sloganeering to the extent that scholars take into account actual politicking and governing.

When might claims of “too much litigation” be other than ideologically loaded and powerful political sloganeering? In political venues, corporate boardrooms, and lobbyists’ skull sessions, seldom. We have shown above that “too much litigation” and “rampant litigiousness” are crucial rationalizations of common beliefs, attitudes, and, perhaps most important, the interests of various have-mores in the American polity. Now we turn to sociolegal scholars, who have translated “too much litigation” to “How much litigation of what sorts and when?” in their research, in collegiate classrooms, and in law reviews. Sociolegal scholars have abandoned fraught counting and misleading anecdotalism to formulate discernible if usually not measurable concepts. Unable as well as unwilling to rehabilitate “too much litigation” or “too much litigiousness” from policy polemics, sociolegal scholars have questioned sensibly and skeptically the capacities of litigation, litigiousness, and judicialization. They have reckoned the economic, political, juridical, and pragmatic costs and benefits of winning and losing cases, of securing and collecting monies, and of moving law or policy in increments and decrements. These studies, taken separately and taken together, offer and to differing extents realize the promise of a second, sunnier answer to the question posed by the title of this paper. When and to the extent that scholars and analysts and policy wonks move from “litigious” and “litigiousness” to concepts and perspectives less captious and more revealing and, rather than presume too much litigation, inquire what kinds of litigation serve what purposes well and what poorly then “too much litigation” or “too much litigiousness” may transcend political sloganeering, especially if scholars take into account actual politicking and governing. When might claims of “too much litigation”

⁸ “Essentially contested concepts” are constructs the denotations of which are subject to disagreement by users proceeding from different assumptions or positions (Connolly 1993, Ch. 1).

⁹ What Professor Kritzer concluded regarding the effects of fee arrangements on patterns of litigiousness applies more generally to U.S. states and localities: “First, it is difficult to find good data comparing litigation patterns across countries. Second, even if one finds data that allows [*sic*] comparison, setting out the factors that account for differences is by no means straightforward” (Kritzer 2002, pp. 1980–1981).

be other than the set-ups of stand-up comics and situation comedies and the conventional wisdom of talking heads? We answer “in sociolegal literature, more often than in public forums and public relations”.

We adduce as our first exemplary text to show how moving away from pseudo-quantification of propensity to litigate could enhance theoretic and practical understanding Professor Robert Kagan’s *Adversarial Legalism: The American Way of Law* (2001). Kagan’s refined notion of litigiousness does not rely on naïve or disingenuous counting but on subtle and ingenious consideration of “too much litigation” of the wrong sorts resulting in costs to society and litigants. In his comprehensive, ambitious work, Kagan investigated “formal-legal contestation” and “litigant activism” as distinguishing the U.S. “way of law” from other systems of civil disputing.¹⁰ This comparative angle improves on pseudo-calculation by supplying, if not quite a denominator, at least a reference relative to which incidence of U. S. litigation – mixes of litigation in courts and negotiations outside courts (Galanter and Cahill 1994) – would be assessed. The United States suffers “too much litigation” compared to what? Kagan’s answer is that formal-legal contestation involves U. S. disputants in translation of disagreements into rights and responsibilities, duties and obligations, and negotiations and trials beyond resolutions of disputes in comparable polities and systems. As the American cliché would have it, Americans tend to “make a federal case out of” squabbles that would be resolved without recourse to formal processes elsewhere.¹¹ At the least, then, those who assess litigation had better discover considerable benefits to outweigh the costs of formal litigation. By means of his other key concept, “litigant activism,” Kagan argues that disputing parties and their lawyers in the United States manipulate informal and formal authorities to shape formal-legal disputes tactically and strategically with greater passivity from judges and other officials than we should expect in other systems that feature frequent, momentous litigation. At the least, then, those who assess litigation should offset losses of administrative control and efficiency with rewards that accrue because attorneys rather than judges or bureaucrats are controlling litigation. An upshot of Kagan’s seminal synthesis is that civil litigation in the United States resolves disputes, makes policies, and implements those policies through strategies and tactics selected by litigants rather than administered by judges and bureaucrats as would be the case in countries and systems with less “adversarial” styles. Thus does Kagan diverge from sloganeering about U. S. litigiousness to consider the subtler notion that greater reliance on adversarial, formal litigation yields such benefits as openness to participation and influence by have-lesses, albeit that benefits may be offset by such costs as greater delays, uncertainties as to rules and policies, and transaction costs and other inefficiencies. Adversarial legalism, then, invites observers and analysts to determine or at least to argue whether the U.S. has too much litigation of certain kinds. This approach is much likelier to lead to dispassionate yet critical assessments and generalizations than aggregation in service of interests, groups, and

¹⁰ Kagan’s “adversarial legalism” extends beyond civil disputing to criminal adjudication and other aspects of modern governance by formal-legal processes and institutions. We restrict our discussion to civil litigation.

¹¹ Perhaps it goes without saying that the cliché should not be taken literally, for most civil cases in the United States are conducted in judicial systems of states.

clients, which might be expected to result in less sloganeering, shibboleth, and nonsense “common sense”.

What may be more, attention to adversarial legalism directs assessors and analysts to the institutional and cultural settings in which litigotiation transpires. Kagan assessed benefits and costs of using lawyers and litigation relative to more bureaucratic or more legislative alternatives. He especially stressed the paucity of bureaucratic or administrative processes to resolve disputes (or, perhaps more important, preempt disputes as, for example, universal health care in Europe obviates many grounds for suits) in the United States relative to other systems that experience frequent litigation. This attention to the checks and balances of U. S. systems national and state yields implications for dispute resolution, evolution of policies in litigotiation, and implementation of policies once courts have settled on them.

Owing both to Kagan’s emphasis on adversarial lawyering as opposed to bureaucratic regulation – “the American way of law” presumes that bureaucratic regimes are weak and thus usually less likely to avail activists – and to Kagan’s appreciation of distinctive benefits alongside distinctive costs of the U. S. legal system, Kagan’s insights have encouraged sociolegal scholars to attend to litigation and alternatives to litigation (Miller and Barnes 2004, Farhang 2010, Barnes 2011, Barnes and Burke 2015, Burke and Barnes 2017) These students of courts and cultures would not, we imagine, have fallen into the “too much litigation” trap in any case, but we suspect that Kagan exemplified the more sophisticated, more sensible understanding to be gained when one does not dwell on the incapacities or inadequacies of judicial policymaking (Horowitz 1977) or belabor how rights and other legal entitlements can be unwieldy relative to other policymaking without considering whether alternative means of policymaking are practicable (Glendon 1989, 1991) that considered the capacities and potential of courts in the abstract. Before and after Kagan many sociolegal scholars have questioned the political wisdom of relying on litigation as a means to regulate complex, multifaceted public policy problems, but the most useful keep in mind whether those who seek change have ready, practical alternatives. If courts may fail but other avenues will fail and have failed, analysts understand why litigants may rely on courts rather than simply “lump it”. Thus do sociolegal scholars avoid slipping away from contextualized analysis and toward the political sloganeering of aggregators and storytellers we have criticized above.

In a similar manner but with different vocabulary, Professor Gordon Silverstein in *Law’s Allure* (2009) has plumbed when “juridification” might be a more suitable strategy or tactic and when a less suitable one, so his work provides a second example of moving from counting, story-telling, and concomitant sloganeering to more nuanced and accurate assessments. “Juridification” denotes reliance on formal-legal language and procedures as opposed to words and processes of ordinary policymaking in legislative, executive, administrative, and bureaucratic institutions. Silverstein posited that juridification may complement efforts to mobilize reformers, may idealize reforms as politicking transcending everyday policymaking by reference to lofty principles and uplifting rights, and may foment changes unlikely to be achieved otherwise owing to inertia or opposition in alternative branches or institutions. Unlike some previous studies that focused on the inadequacies of litigation, Silverstein noted that litigation may be constructive when litigators and those in other institutions cooperate but may be

less constructive when litigators and those in other institutions conflict, compete, or cooperate. Rather than aggregating as tort reformers too often have, Silverstein disaggregated by the subjects and objects of litigation: poverty and abortion, environmental regulation, campaign finance, separation of powers, war powers, and tobacco are among the *Patterns, Process, and Cautionary Tales* Silverstein used to test how constructive, destructive, or mixed patterns of policy through litigation have tended to be (Silverstein 2009, Part II). He argued that juridification often allures but sometimes tantalizes. His mixed verdicts and nuanced judgments easily surpass slogans, shibboleths, and signifiers favored by those who tote figures to conjure “too much litigation”.

Like Professors Kagan and Silverstein, Professors McIntosh and Cates asked what kinds of litigation serve what purposes well and what poorly and answered with a comparative angle that throws into revealing relief large-scale litigation for social change. McIntosh and Cates made clear from the first two paragraphs of *Multi-Party Litigation: The Strategic Context* that they were not writing briefs for the proposition that there are too many or too few lawsuits even though that is where they found some scholarly debates (McIntosh and Cates 2009, pp. 1–2):

Litigation? Is it the most effective response to the sometimes malignant behaviours [sic] of corporations, governments, and other large institutions? Or is litigation itself a cancer spreading through, and even beyond, the body politic? (...) In any event, this public face of litigation – the entertainment – offers a very mixed message.

This book is about the politics of lawsuits – a form of politics that has become more sophisticated and hard-fought over time, as opportunities have developed enable plaintiffs to attack large powerful entities, attempting to hold them accountable for their increasingly far-reaching actions. To construct a meaningful court-centered strategy requires an institutional context that not only accommodates such an approach but also holds promising impact potential. Procedural rules set the parameters for action and are exploitable by those with sufficient resources (an important prerequisite) on either side of the issue. Although some have been rendered far less accommodating in recent years, the US rules allowing litigation to proceed with flexible structures for settling attorney fees have long met with criticism as making the system too available and encouraging entrepreneurial lawyering. Comparable rules in the United Kingdom, Australia, and Canada have been considered by some critics as being historically too restrictive, although they are evolving in a more accommodating direction (...).

After this *A Tale of Two Cities* opening McIntosh and Cates explored “judicial entrepreneurship” (McIntosh and Cates 1997) as strategy and tactics for overcoming advantages that “have-mores” hold over “have-lesses” in civil litigation (Kritzer and Silbey 2003, Galanter 2014). They concluded that the have-mores, possessed of greater experience and resources and greater access to lawmakers to whom they contribute, have tended to overwhelm have-lesses in battles to regulate tobacco and firearms and at least to stalemate plaintiffs massed to litigate food.¹² What is more, have-mores tend to possess greater ability to shape laws, rules, and policies that preclude their being sued and, when they are sued, enable civil defendants to prevail. McIntosh and Cates

¹² McIntosh and Cates bring to mind one “hot take” on Ecclesiastes Chapter 9, verse 11 for David-versus-Goliath cases: “The race is not always to the swift, nor the battle to the strong; but that is the way to bet” <https://quoteinvestigator.com/2015/06/04/race-swift/> [Accessed 1 June 2019].

considered U. S. civil litigation in comparative perspective to place the quantities and qualities of lawsuits into revealing relief. Thus, as did Kagan and Silverstein, McIntosh and Cates moved from facile understandings of “litigious” to concepts and perspectives less tendentious and more revealing and thereby transcended political sloganeering.

The foregoing works and the many others that we do not mention herein show how alternatives to the fraught “too much litigation” have been developed and deployed to escape the workaday political tactics of soundbites and “hot takes” and to embrace if not quite apolitical analysis assessments as reasonable and as objective as sociolegal specialists can make them. These works question sensibly and skeptically the capacity and pragmatism of litigotiation, but their questions cannot rehabilitate “too much litigation” or “too much litigiousness” because no one and nothing can save “too much litigation” or “too much litigiousness” from the connotations and denotations of “litigious” and synonyms. What the foregoing can do is model more sophisticated analyses to establish the contexts and conditions that tend to facilitate change through lawyering and the contexts and conditions that tend to hamper politicking and governing and to deform change.

Why do we so emphasize context? These works also vary in the degree to which they abstract litigotiation from long-standing premises and practices of U. S. politicking that activists and other litigants confront and must contemplate. While it makes some sense to separate litigation or juridification from other arenas and contexts of U. S. politics and government, public interest groups and others who pursue change and mobilize causes through courts calculate strategies and tactics with considerable attention to benefits and costs of alternative courses of action. Professor Kagan’s explicit, painstaking attention to the relative fragmentation of U. S. bureaucracy, for instance, inclines him to consider options as activists and other adversaries likely perceive them. By contrast, the late Martha Derthick relied on Kagan’s concepts and categories to critique formal-legal efforts to reform Big Tobacco with, in our view, far less attention to plausible, practical alternatives to litigotiation for those who would reduce tobacco-related afflictions individual and societal (Derthick 2011). As a result, Professor Derthick, in our reading, engaged in analysis more political in motivation – not quite to say polemical – than Professor Silverstein’s despite the title of the latter’s chapter, *Tobacco: How Law Saves – And Kills Politics* (Silverstein 2009, Ch. 9; see also Mather 1998, Deal and Doroshov 2000, Haltom and McCann 2004, Ch. 7). Whatever defects sociolegal analysts and advocates attribute to American litigiousness, they must match those defects to contexts litigants perceive if they are to persuade.

Those who seek to remake policy in and through courts often perceive in practical, concrete circumstances few effective alternatives to use of law and lawyers to agitate, mobilize, and organize. While elite clients and their political operatives may stop short of outright hegemony, they long have tended to dominate U. S. politicking and governing in many realms of policy. Classic works of social science long ago established capacities of established, entrenched interests in the United States to expand or to contract conflict to set governmental agendas and to defeat alternatives to top-down direction by denying other perspectives attention (Crenson 1972, Schattschneider 1975, Gaventa 1980). What is more, elite interests have displayed considerable alacrity in orchestrating agitation, activation, acquiescence, and appeasement of citizenry through

symbols and images in mass media (Edelman 1971, 1988). Majoritarian institutions and bureaucracies continue to over-represent have-mores and under-represent have-lesses (Schlozman *et al.* 2013, Gilens 2014, Achen and Bartels 2017, Page and Gilens 2017) when such institutions represent have-lesses at all beyond symbolism. Litigotiation may offer realistic if risky avenues for circumventing the grip of organized, established interests on legislatures, executives, and administrative agencies (Nader and Smith 1996, Mencimer 2006), but pursuit of social change through litigotiation is more misplaced faith in “the myth of rights” than in the habitual winners in the judiciary (Scheingold 1974, Rosenberg 2008). Lawsuits must deal with juries and jurists influenced by bogus statistics, anecdotes, narratives, apocrypha, and other publicity that propagated by and in mass media (Deal and Doroshov 2000), which means that settlements likely are shaped by “the shadows of”¹³ courthouses strongly biased toward the status quo and constrained by rules that élites have shaped to create hierarchical institutional biases.

4. Answer Three: When litigation is conceived as allocation of values other than winning cases, securing monies, and moving law or policy incrementally, notions such as “litigious” and “litigiousness” may become far more and far better than political sloganeering

When might claims of “too much litigation” be other than political sloganeering? Our first answer above was that in political venues, corporate boardrooms, lobbyists’ skull sessions, and publicists’ stratagems “too much litigation” will often generate exaggeration, bluster, or mendacity. Our second, more hopeful reply above was that, in sociolegal studies that inquire what kinds of litigation serve what purposes well and what poorly and that take into account actual political and governmental contexts and options, investigations of “too much litigation” may surmount crass political posturing and cynical struggles for advantage more often; indeed, such inquiries may point to more edifying politicking and governing worthy of a democratic republic. Our third response below is that when sociolegal studies in addition have conceived litigotiation as expressing and allocating values other than moving monies and moving law or policy incrementally, claims that Americans are “litigious” or that “litigiousness” is rampant or that “too much litigation” roils society may seem at least problematic if not absurd. If and when we consider lawsuits as aspirational, dramaturgic, communicative activities that vindicate and allocate cherished or even amend and extend values, we become less inclined to deem participation in lawsuits excessive or pathological and more inclined to attend to the democratic potential of litigotiation. After all, one seldom denounces practices [publicly] for advancing “too much democracy” or for vindicating “too many cherished principles”.

What tasks may litigation perform beyond winning cases, pocketing awards, and effecting incremental changes in law and society? Professor Alexandra D. Lahav (2006) has suggested that litigation may further 1) recognition of laws and of the rule of law, 2) invention of reasoned arguments, 3) revelation of facts and augmentation of political and governmental transparency, 4) enforcement of the law, and 5) participation of

¹³ The phrases “in the shadow of the law” and “in the shadow of the courthouse” denote that out-of-court negotiations are shaped by the law as it would probably be enforced at trial. See Mnookin and Kornhauser 1979.

parties and of Bench and Bar in jural processes. We invoke “authoritative allocation of values”¹⁴ to remind ourselves and others that Lahav’s inventory of expressive, performative functions may move us away from material, mercenary, pejorative perspectives on civil suits and toward higher political and governmental callings of pursuit of changes in allocations of values through courts and lawyering. As we consider in turn each of the five expressive functions that Lahav has identified, let us highlight ideals and values that litigotiation is capable of realizing and that entrenched interests have stakes in delimiting. These ideals and values, we argue, provide politicking and governing far beyond sloganeering and, often but not always, politicking and governing that ameliorate disadvantages or even enlarge advantages of have-lesses.

4.1. Performing jural recognition

Parties to litigotiation **perform** practices, roles, and values that express the rule of law and the ideal of the rule of law through exertions in courthouses or in anticipation of adjudication (“in the shadows of the courthouse”). Civil trials and, far more often, civil settlements afford have-lesses some **recognition** from some official governmental body (for examples, judge(s) or juries) or from an adverse party that their claims or grievances have merit. Such performances of the rule of law may offset some of have-mores’ advantages in setting agendas and in precluding substantial reforms (contrary to agenda-setting literature cited already) as well as ameliorate some advantages of have-mores in publicizing causes as unworthy or frivolous. Performing processes and even rituals of recognition would seem an outcome of litigotiation to which even some tort reformers could not object too much (at least in public) without confessing unseemly indifference to “bottom up” grievances.

At the same time, most scholars recognize that the legal system works, both symbolically and institutionally, to contain and co-opt challenging legal claims. Indeed, legal officials work persistently to “kill” off as much as to authorize or endorse novel rights claims that aim to upset the larger political order (McCann 2020). Michael McCann’s summary of literature suggests that even have-mores should not protest jural recognition too much (McCann 2008, 231):

Although the U. S. legal system tends to be relatively responsive and open to citizen mobilization, ordinary citizens rarely mobilize law, leaving the bulk of legal mobilization activity to wealthy individuals and, especially, to large organizations. In this sense, the legal system more mirrors the political system than it offers a more responsive or democratic alternative to it. It is thus not surprising that many scholars of legal mobilization and civil disputing use the concept of **hegemony** to make sense of their findings. Hegemony refers to the aggregate of ways, and especially noncoercive ways, that societies produce consent, tame dissent, and secure order. Studies of law in the U. S. demonstrate that relatively open, responsive legal systems can be among the most stable systems for conservatively absorbing, channeling, and containing conflict.

Scholars who empirically study legal mobilization and contestation have demonstrated manifold complexities regarding when and to what extent legal claiming contains and coopts or catalyzes and even “radicalizes” claimants (McCann 1994, 2020). Nonetheless,

¹⁴ The late David Easton formulated “authoritative allocation of values,” one of the most common definitions of “politics” in political science, in *The Political System: An Inquiry into the State of Political Science* (Easton 1953).

jural recognition seems hard to overdo – except of course when recognizing what the law is and has long been and what norms and traditions long have prescribed and proscribed embarrasses have-mores who flout laws, norms, or traditions.

4.2. *Performing jural reason*

Litigation induces litigators and adjudicators to invent, present, and hone in public formal **arguments** about questions legal as well as political. Through adversarial trying of evidence and testimony in settlement conferences and in courtrooms, advocates and jurists **rationalize** law and policy to a far greater degree than ordinarily prevails in legislatures or campaigns. Litigation, thus, complements or to some degree overcomes dominance of framing and messaging in mass media, another form of participation by have-lesses and another product of litigation by those seeking justice that is hard to characterize as “too much” without too publicly squelching dissent and petitions for redress – or admitting preference for the personal or collective interests of have-mores over established or emergent reasoning that might favor have-lesses.

4.3. *Performing jural revelation*

Discovery,¹⁵ exhibits, and testimony in court and publicity prior to courts and, sometimes, even to filing a suit often have the capacity to make overt what was covert, to make what was latent patent and even blatant, and thereby to promote greater **transparency** in governance, regulation, and administration. Negotiations and settlements often transpire “in the shadows of the law,” but some filings, parleys, and publicity may illuminate issues far beyond wins and losses. Indeed, **revelations** amid losses may portend successes in future courts, legislatures, boardrooms, and electioneering (Bruun 1982, Haltom and McCann 2014). Tales and tallies of “too much litigation” seem far easier for have-mores and their mouthpieces to sell to the unwary than exposures and open government – especially when have-mores profit from covering up and from keeping covering-up unnoticed and unknown. Any exposure of backstage apparatuses may spoil a theatrical production for theater audiences; revealing a confidence scam by contrast may impress might-have-been marks as heroic service of which the polity might use more.

4.4. *Performing jural enforcement*

Contrary to Donald Horowitz’s classic catalog of shortcomings of courts in enforcing decrees (Horowitz 1977) and Alexander Hamilton’s characterization of the judiciary as “the least dangerous branch” because it possessed power neither of the purse nor of the sword (Hamilton 1788), litigation **enforces** or changes existing regulatory regimes and patterns of administration in ways that may overcome weaknesses in U. S. bureaucracies that Kagan noted. Focused lawyering may invoke **law** and symbols of legality to ameliorate to a degree overrepresentation of élites and underrepresentation of masses in the U. S. polity to which we referred above (Schattschneider 1975, Schlozman *et al.* 2013). Attention to this function of litigation led Professor Carl Bogus to write of the role of litigation in disciplining democracy (Bogus 2003), about which we shall have more to say later in this paper. Overcoming some advantages of élites, yet

¹⁵ In U. S. law the duty to disclose facts and evidence pertinent to one’s case is called “discovery”.

another role that most educated and aware observers would say the United States could use more of, not less – unless of course enforcing law imperils the schemes and scams of have-mores.

4.5. *Performing Jural Participation*

Mere publicization of grievances empowers citizens to **participate** in governing themselves and in articulating their own interests, beliefs, preferences, and values. This is especially the case for low-wage workers, have-lessees of color, women, immigrants, and others traditionally and habitually denied full participation and full rights (McCann 2020). Legal exertions that get beyond articulation of problems may promote the **direct** involvement of ordinary people in telling their stories and in demonstrating their capacity to comprehend their predicaments. In addition, citizens directly serve as finders of facts and declarers of justice on juries, as is seldom noted regarding the famous and often infamous “McDonald’s Coffee Lady” (Haltom and McCann 2004, Ch. 6). Distortions and disinformation about the McDonald’s coffee case, please recall, lampooned not only an elderly woman with few alternatives for recompense (one form of political sloganeering) but also the jurors (including the retired insurance executive!) who were too obtuse to realize that coffee was often served hot (another form of political sloganeering). Exuberantly indulging both forms of sloganeering against litigation, mass media and corporate tort reformers were able to calumniate participation by victims and by citizens. How might increased bottom-up participation in the rule of law be too much – unless of course more participatory governance might threaten have-mores who profit from confining conflicts (see Schattschneider 1975)?

We have recast Professor Lahav’s list of aspirational functions so that we might highlight how litigotiation may realize “authoritative allocation of values” through performances, albeit adversarial, competitive, conflictual performances that promise to assist some have-lessees. This “authoritative allocation of values” remains the late David Easton’s classic, widely accepted formulation of politicking and governing and perhaps the definition of politics most widely shared among social scientists. Professor Easton posited that politics in a democratic republic was a system in which one or more institutions and coalitions decided for society how shared perhaps even consensual values were to be applied in particular circumstances through sanctions positive and negative. For present purposes, we focus on allocation of values through manipulation of legal and extra-legal precepts, symbols, and commands in disputes.

The late Stuart Scheingold anticipated many if not all of the entries on Lahav’s list (Scheingold 1974) in his classic that predated almost all pothering about litigation’s exploding. Professor Scheingold acknowledged in *The Politics of Rights* that neither vaunted lawyers nor activist courts nor revered rights protected rights, liberties, and equalities of the have-lessees reliably, consistently, and chronically. Despite these shortcomings, Scheingold contended that declarations of rights might activate the previously quiescent and organize the previously disordered less through formal actions and legalistic language than through a “politics of rights” that strategically and tactically contested meanings and consciousness. Groups and leaders contested meanings and consciousness strategically and tactically by – in Lahav’s terms and in her order – pursuing recognition of claims to rights in arenas formally jural as well as unabashedly political; publicizing rationalizations for claims to rights; using formal discovery and

journalistic revelations to expose facts long hidden or camouflaged; soliciting entities legislative, executive, administrative, and judicial to enforce authoritative decrees; and, perhaps most important because so integral to the preceding four, inducing participation “from the bottom up” from groups and individuals mobilized to petition for redress. Overall, Scheingold urged a “politics of rights” in which rights were understood to be political assets the value of which would be worked out by contending organizations and institutions. What Scheingold lamented as “the myth of rights” tended to emphasize verdicts and victories, damages and awards, proclamations of principles, and other piecemeal outcomes of particular cases as if authoritative declarations of rights would largely enforce themselves. Scheingold counseled activists and progressives that the more perspicuous perspective was a “politics of rights” that peered through settlements and verdicts to express values, to mobilize proponents of such values, and to organize advocacy of principled, aspirational participation in society and polity in addition to litigotiation.

Professor Frances Kahn Zemans likewise pioneered understanding social and political mobilization of have-lesses as a directly democratic, effectively participatory mode of litigotiation (Zemans 1982, 1983). Zemans, like Scheingold, attended to the expressive as opposed to instrumental, majoritarian as opposed to litigious, popular as opposed to official performances of politicking and governing that Lahav would far later articulate. One of Zemans’ important contributions was to direct sociolegal scholars to citizens’ and activists’ exploitation of law and rights as factors at least as important as pronouncements from officials and authorities. Far from “the shadows of the courthouse” and the restricted linguistic codes of lawyers and judges, citizens and their leaders were voicing novel applications and allocations of shared values. Although we concede that have-mores accustomed to setting agendas, proscribing departures as deviations, and otherwise securing interests from the top down did not welcome these bottom-up exertions, the mobilization, organization, and agitation to which Zemans drew attention would probably not be reckoned too much by many have-lesses and many students of U. S. politicking and governing.

While Scheingold and Zemans anticipated Lahav’s list as a system of expressive, performative acts, many sociolegal scholars articulated consequences of appreciating litigotiation and reform beyond winning cases, changing law, and pocketing damages and fees.¹⁶ Many empirical studies of legal mobilization by social movements underline these “aspirational” dimensions of legal claiming and struggle that are not easily reduced to point scoring of instrumental gains or setbacks (McCann 2020). Students of juries, especially in civil suits, debunked the slogans of detractors who insisted that civil juries exemplified “bottom-up” reprisals against deep-pocketed insurance companies and corporations (Peterson 1984, Chin and Peterson 1985, Daniels and Martin 1986, 1995, Hans and Vidmar 1986, Hans 1989). Once again, demagogic slurs turned out to contradict demonstrable facts, findings that showed that juries and jurors usually performed their duties and realized their participation reasonably. Also once again: we suspect that tort reformers and other political operatives are somewhat inhibited in

¹⁶ Many of the works we have already discussed in this paper emphasize one or more of the functions on which Lahav dwelled, so we do not believe and do not want to be interpreted to presume that foregoing works were indifferent to the performative features of civil litigotiation.

denouncing **Jural Participation** by ordinary citizens, albeit that juries as an abstract collectivity may be quite easily decried.

In the “shadow of the courthouse” or in the courtroom, laws routinely furnish participants with scripts and stages for **Jural Enforcement**. Indeed, Scheingold taught his readers, colleagues, and students that even authoritatively declared rights were political resources of uncertain value until those rights were implemented. Carl T. Bogus’ *Why Lawsuits are Good for America: Disciplined Democracy, Big Business, and the Common Law* (2003) argues that enforcement of existing law and expansion of emerging law are among the most important functions that lawyers and litigation perform. While those who would preserve the prerogatives of have-mores and stifle the opportunities of have-lesses often caricature enforcement of law as frivolous or class warfare, nonetheless articulating legal mandates and publicizing institutions’ and officials’ failings to see that laws be faithfully executed enjoy considerable legitimacy.

Concerning the capacity of lawyering and judging to expose wrongdoing, raise awareness of conditions, and stoke rage, scholars likewise have documented **Jural Revelation**. Richard Kluger is not a conventional student of law and courts, but his monumental *Ashes to Ashes: America’s Hundred-Year Cigarette War, the Public Health, and the Unabashed Triumph of Philip Morris* (1996) – kindly note the corporate have-mores who prevailed amid politicking ordinary and jural before the Master Settlement Agreement¹⁷ – repeatedly and dramatically chronicled how lawsuits exposed the perfidies and perversities of Big Tobacco (Haltom 1998, pp. 218–219). Mather (1998) and Haltom and McCann (2004; also McCann *et al.* 2013) showed how even repeated failures of lawsuits to pry a dime out of tobacco conglomerates pried discovery out of some files and thereby led to the Master Settlement Agreement and forever denied those who marketed and manufactured tobacco products the pretense that the science or the proof of the perils of consuming tobacco was not yet “in”. Although some fault deployment of lawyers and lawsuits to uncover proof of corporate misconduct (Derthick 2011), the importance of **Jural Revelation** in inducing Big Tobacco to cut their losses is undeniable.

A substantial part of driving Big Tobacco to the bar – where Tobacco’s “Scorched Earth, Wall of Flesh”¹⁸ (Zegart 2000, p. 85) tactics denied litigators victories in any conventional sense – and to the Settlement exhibited the capacity of litigation to prosecute **Jural Reason(ing)** even amid loss after loss. Haltom and McCann (2004, Ch.7; also McCann *et al.* 2013) explored the turnaround from Tobacco’s longstanding argument that, in jural terms, consumers had assumed risks of using tobacco products and, ethically, litigants were shifting responsibility for their choices onto deep pockets entities. Activists and lawyers shaped arguments based on the addictiveness of nicotine, the marketing of tobacco to pre-teens and teenagers when they were most susceptible to

¹⁷ “The Master Settlement Agreement (MSA) is an accord reached in November 1998 between Attorneys General of 46 states, five U. S. territories, the District of Columbia and the five largest cigarette manufacturers in America concerning the advertising, marketing and promotion of cigarettes. In addition to requiring the tobacco industry to pay the settling states billions of dollars annually forever, the MSA also imposed restrictions on the sale and marketing of cigarettes by participating cigarette manufacturers” (Public Health Law Center n.d.).

¹⁸ “Scorched earth” in this context conveys that lawyers for Big Tobacco used every substantive and procedural tactic to extend litigation and to drain plaintiffs’ resources. “Wall of flesh” caricatures the number of attorneys representing Big Tobacco at hearings and depositions.

peer pressure and least resistant to advertising puffery, and other means by which to reduce or eliminate personal responsibility and to enlarge or exaggerate corporate responsibility for patterns or consumption. These arguments provided judges, jurors, and eventually legislators formal-legal “hooks” on which to hang reform arguments. Howl about such jural jiu-jitsu as defenders of tobacco and of personal responsibility might, “naming, blaming, and claiming” – sociolegal singsong for identifying injuries, establishing sources of the injuries, and demanding redress for injuries – against those who profited from addicting users increasing persuaded jural decision-makers that liabilities abounded.

Jural Recognition may be most important of Lahav’s expressive performances, for a major objective of pursuing causes through litigotiation is to publicize perspectives that challenge rationalization of the status quo. “Naming, blaming, and claiming” may advance a cause or avail the injured even when the plaintiff gets neither settlement nor verdict, neither material award nor authoritative declaration. Studies of legal consciousness have documented that mere pursuit and promise of justice as seen by grievants and plaintiffs may justify litigotiation, especially for have-lesses (Merry 1990). Of course, such striving for jural recognition risks reinforcing victimhood and pessimism as well (Bumiller 1988; but see McCann 1994). Still, individual and collective awareness of problems and issues may be expanded by pursuit of recognition inside and outside jural institutions.

In sum, Scheingold and Zemans systematically and completely explored authoritative allocations of values beyond winning and losing lawsuits, securing judgments and awards, and nudging the law in directions litigants would prefer; other scholars since exemplify focused scrutiny on this or that expressive performative identified by Lahav. Taken together, Lahav’s insights and sociolegal scholars’ findings show that when litigotiation is conceived in terms of values beyond and in addition to instrumental wins and losses, notions such as “litigious” and “litigiousness” may become far richer and more sensible than slogans, shibboleths, symbols, and soundbites. To be sure, studies of less mercenary bottom lines and ramifications of lawsuits may partake of politics, but of a politics at once more theoretical and more empirical and less crass and less misleading than faulty aggregation and phony statistics backed by fabricated tort tales. Once litigotiation is understood in terms of its many dimensions and ramifications, “too much litigation” may become a query or an issue far more complicated, intricate, and interesting (which, of course, may be why have-mores who tend to get their way lobbying legislators and executives and contributing to campaigns oversimplify and exaggerate litigation). Once we make the implicit values clearer if not truly explicit, we may begin to contemplate resort to court from multiple angles, especially from expressive, participatory angles.

5. Conclusion

If one aims to agitate and to aggravate readers, viewers, and listeners, “too many lawsuits” or “too much litigation” too often portend crass maneuvering for advantage and gain. Hence, we answered first that mere counts and other simplistic aggregations cater to sloganeering and other chicanery. If instead we inquire what kinds of litigation serve what purposes well and what poorly, then “too much litigation” or “too much litigiousness” may transcend political sloganeering to the extent that scholars take into

account – as opposed to throw themselves into – politicking and governing. That was our second answer to our titular query. If in addition we keep in mind varieties of values at stake and how they are authoritatively allocated through negotiations and trials, “too many lawsuits” may cease to make much sense and may become a “wrong question”. As the late Alexander Bickel observed long ago, “no answer is what the wrong question begets” (Bickel 1962, p. 103). Anupam Chander more recently riposted, “The wrong answer is what the wrong question begets” (Chander 2005, p. 1204).

To the extent that such questions as “too much litigation?” or “too many lawsuits?” direct attention from have-mores – powerful, organized interests with ample resources to win in litigation as well as in electioneering, lobbying, and other politicking – to vilification or disqualification of have-lesses and of trial lawyers for occasional victories in “bottom-up” litigation, such questions are freighted with ideological, partisan, and policy biases. Such “wrong questions” are asked for the wrong answers they beget and the misimpressions they convey. To the extent, by contrast, that such questions introduce analyses that weigh litigation against alternative means by which those chronically disadvantaged may make use of jural processes and judicial institutions to offset their weaknesses in other political and governmental forums, many of the ideological, partisan, and policy biases in favor of have-mores if not against have-lesses may be reduced or excluded. Even if such analyses issue no clear, compelling answers, at least they do not advance wrong answers. And to the extent that such questions incline analysts to take into account the variety of benefits as well as costs of litigation, especially the benefits of which Professors Scheingold, Zemans, and Lahav reminded us, “too much litigation?” and “too many lawsuits?” may approach such inquiries as “too much participation in self-government?” or “too many petitions for redress of grievances?” or “too much attention to (in)justice?” or “too much concern for have-lesses?” in putting off those who are asked.

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