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# THE LITIGATION CRISIS: COMPETITIVENESS AND OTHER MEASURES OF QUALITY OF LIFE

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## I. INTRODUCTION

It is alleged that there are too many lawyers,<sup>1</sup> that there is too much litigation,<sup>2</sup> and that legal costs are too high.<sup>3</sup> America, it is alleged, has seventy percent of the world's lawyers.<sup>4</sup> In a recent ten-year period, it is alleged, product liability suits increased eight hundred and fifty percent.<sup>5</sup> The legal system, it is alleged, costs \$300 billion a year.<sup>6</sup> Professor Galanter challenges some of these numbers, but I urge you to assume they are true and to then ask: *SO WHAT? IS THIS TOO MUCH OR TOO LITTLE?*

## II. COMPETITIVENESS

An alarm sounds in my brain when I am forced to deal with "too much" questions like these. I need to know "too much compared to what?" The topic for this discussion of overlawyering and competitiveness provides one framework for discussing what is the *optimal* number of lawyers or amount of litigation. Relating *overlawyering* to global competitiveness, as the organizers of this program did, suggests that laws, lawyers and lawsuits interfere with America's ability to compete with other countries.

Being *competitive* apparently means keeping production costs down in the United States in order to beat-out foreign goods in the international marketplace. Charging lower prices expands the market share of domestic corporations, increases employment, and makes us wealthier at the expense of others. This results in increased economic growth (in the United States, at any rate), which sounds pretty good. If the only purpose of lawyers is to contribute to competitiveness, then the optimal number of lawyers must be the number that leads to the greatest increase in economic growth.

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1. Stephen P. Magee, *How Many Lawyers Ruin an Economy?*, WALL ST. J., Sept. 24, 1992, at A17.

2. Marc Galanter, Address at the National Conference of Bar Presidents (Feb. 1, 1992).

3. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - and Why Not?*, 140 U. PA. L. REV. 1147, 1152-53 (1992).

4. Galanter, *supra* note 2.

5. Saks, *supra* note 3, at 1162-66 (discussing the basis for such a claim while not necessarily agreeing with it).

6. Galanter, *supra* note 2.

If competitiveness is our concern, we are fortunate that Professor Stephen Magee from the University of Texas Business School has calculated the optimal number of lawyers.<sup>7</sup> The "Magee Curve" is a rainbow arching from the point of no lawyers and relatively low economic growth up to a peak of high economic growth and the optimal number of lawyers, and ending down at the point of low economic growth and too many lawyers. You may be fascinated to know that the optimal number of lawyers — the peak of the rainbow — is twenty-three lawyers per thousand white collar workers.<sup>8</sup> We have thirty-eight lawyers per thousand in the United States,<sup>9</sup> a surplus of lawyers who apparently only interfere with the quality of life.

Shakespeare said, "The first thing we do, let's kill all the lawyers."<sup>10</sup> If he had been an economist, he might have said, "Let's kill fifteen of every thirty-eight lawyers." (Not iambic pentameter, but it might maximize growth rates.)

### III. OTHER PURPOSES FOR LAWYERS

The "Magee Rainbow" seems to confirm the suspicion that there are too many lawyers, but it also focuses our attention on why lawyers exist at all. Is the purpose of lawyers to generate economic growth? If so, we can cancel two-thirds of the law school curriculum. We'll just teach contracts, commercial law, and corporations. Naturally, we'll do away with tax, labor and environmental law, torts, and a hundred other offerings.

But somehow I had the impression that clients hired lawyers to vindicate their rights. I thought litigation was the means by which American citizens kept the government from exceeding its constitutional authority. I thought tort law was to deter wrongdoers,<sup>11</sup> to furnish compensation<sup>12</sup> and to provide us with a civilized outlet for our anger at those who cause injury.<sup>13</sup> What happened to these purposes of the law? Another author, complaining about the costs of litigation, raises the ultimate horror. "[L]ife would be intolerable," he says, "if every man insisted on his legal rights to the full."<sup>14</sup> The Insurance Information Institute complains that "the civil justice system is being used to right every imaginable wrong."<sup>15</sup> How rude that people in a civilized society should resort to the courts! They should be in the streets, throwing bombs, assassinating public officials, and blowing up police stations!

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7. Magee, *supra* note 1, at A17.

8. *Id.*

9. *Id.*

10. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH act 4, sc. 2.

11. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.14 (4th ed. 1992).

12. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1, at 5-6 (5th ed. 1984).

13. *Id.* at 16; see also ROBERT L. RABIN, PERSPECTIVES ON TORT LAW 1 (1976).

14. WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 223 (1991) (quoting Frederick Pollock, JURISPRUDENCE, but not citing any identifiable source), quoted in Randy M. Mastro, *The Myth of the Litigation Explosion*, 60 FORDHAM L. REVIEW 199, 200 n.18 (1992) (book review).

15. Saks, *supra* note 3, at 1157.

## IV. GROWTH VERSUS (?) QUALITY OF LIFE

When thinking about how much litigation is "too much," we should think in terms of the broader goals of a legal system and a set of legal doctrines. Proponents of rules facilitating recovery by torts plaintiffs, for instance, particularly in the products liability area, come from both liberal and conservative political perspectives. The liberals' main concern is fairness in sharing the burden of accident costs<sup>16</sup> and promoting safety.<sup>17</sup> Imposing liability on manufacturers addresses these concerns because manufacturers can sometimes spread the costs to customers, and, where they cannot, they can explore and implement safety measures.<sup>18</sup> The conservatives' main concern is maximizing society's wealth, which imposing liability on the manufacturers would do, at least whenever manufacturers can avoid the risks of a product at the lowest cost.<sup>19</sup> Whatever their goals, all would agree that making some manufacturers of defective products pay for injuries caused by their products improves what they perceive as the quality of life in America.

It is hard to escape the fact that quality of life has a variety of dimensions. Tangible increases in wealth or Gross Domestic Product appeal to conservatives concerned with efficient shifting of risks among those involved in accidents. Intangible improvements in victims' ability to redress wrongs and redistribute wealth appeal to liberals. But the national debate over the litigation crisis and competitiveness ignores the fundamental purposes of litigation, the fundamental goals underlying the purported expansion of legal doctrine, and the fundamental tradeoff between tangible and intangible well-being. Even though compensation by defendants may interfere with increases in economic growth, a rational society could still desire compensation.

Many social goals may, in the short run, interfere with global competitiveness, but that does not mean we should abandon those goals. The large number of lawyers may very well decrease the rate of economic

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16. See Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 31-32 (1988).

17. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) ("It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot . . . Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection."). *Id.* at 440-41.

18. *Id.* at 441.

19. See, e.g., GUIDO CALABRESI, *THE COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS* 26 (1970). According to Calabresi:

Apart from the requirements of justice, I take it as axiomatic that the principle function of accident law is to reduce the sum of the costs of accidents and the costs of avoiding accidents. (Such incidental benefits as providing a respectable livelihood for a large number of judges, lawyers, and insurance agents are at best beneficent side effects.)

*Id.* See also STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 298 (1987). Shavell states: Whether liability can be so justified for a particular area of accident is a question that will merit careful consideration in view of the opportunity to employ safety regulation and other approaches for controlling risk, in view of the administrative costs of the liability system, and especially in view of the difference between the social and private interest in using the liability system . . . .

*Id.*

growth, but the number of lawyers is partially a function of the increased law school enrollments of women and minorities. Should the growth rate in the legal community of those disempowered groups be curtailed in order to reach some optimum and increase global competition? The *optimum* must take into account such side-benefits associated with the increased number of lawyers.

#### V. NUMBERS MAY NOT TELL ALL

It would not be surprising to find more lawyers per capita in the United States if Americans truly had more legal rights, more protection from public or private actors and a higher level of intangible well-being than people in other countries. If it takes lawyers to create this well-being and to protect those rights, then some countries may possess more lawyers because they want to protect more rights — a consideration independent of a country's desire for economic growth. In searching for standards for how much lawyering is "too much," Professor Galanter looks to other places and other times, comparing the number of lawyers in various countries and at other times in our country.<sup>20</sup>

Why not look instead at the quality of rights in other countries and see how that relates to litigation rates in those countries? In which countries would you guess people possess rights most like our own? Perhaps those reflecting the British common law system, the "Anglo-American" system of jurisprudence. In which industrialized areas would you guess litigation rates are in the same range as our own? England, Australia, and Canada.<sup>21</sup> The similarity cannot simply be cultural because European, African, and Asian cultures enrich our country. It is because our structure of legal rights is so fundamentally British.<sup>22</sup> Perhaps having more rights does require more lawyers.

#### VI. CONCLUSION

Professor Priest treats tort law as if the only goal worth worrying about is minimizing the costs associated with risks.<sup>23</sup> Imposing strict liability for injuries from products, for instance, shifts the risks to manufacturers, who then have an incentive to avoid the risks or to insure against them. Because society wants to minimize costs and because people can insure themselves less expensively than manufacturers can insure them, Priest argues, there is too much risk-shifting.<sup>24</sup> But there is more to tort law than the attempts to minimize costs by shifting risks. The desire to effectuate rights and compensate victims coexists with the desire to shift costs onto those in

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20. Marc 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, 51-61 (1983).

21. *Id.* at 52.

22. HARRY W. JONES ET AL., LEGAL METHOD, CASES AND TEXT MATERIALS 5 (1980).

23. See, e.g., George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); George L. Priest, *The New Legal Structure of Risk Control*, DAEDALUS, Fall 1990, at 207.

24. Priest, *supra* note 23, at 1524-25.

the best position to minimize them. The goals of minimizing conflict, internalizing costs, compensating victims, and creating incentives for accident cost-minimization all figure into the *optimal* level of lawyering and the *optimal* legal doctrine.

If lawyers and the law serve goals other than economic growth, perhaps we should be pleased we have more than the economically optimal number indicated by Magee's Rainbow — the more lawyers, the more service to society's noneconomic goals. The pot of gold is never at the top of the rainbow, anyway. It is at the end. So as you listen to arguments about whether there is "too much" lawyering and "too many" rights, think about whether there is more to law than promoting economic growth.

