LAWSUITS in a Market Economy

The Evolution of Civil Litigation

STEPHEN C. YEAZELL

Copyright 2018. University of Chicago Press. All rights reserved. May not be reproduced in any form without permission from the publisher, except fair uses permitted under U.S. or applicable copyright law.

EBSCO Publishing : eBook Collection (EBSCOhost) - printed on 2/10/2023 2:12 PM via
AN: 1647469 ; Stephen C. Yeazell.; Lawsuits in a Market Economy : The Evolution of Civil Litigation
Account: ns335141

Lawsuits in a Market Economy

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Lawsuits in a Market Economy

The Evolution of Civil Litigation

STEPHEN C. YEAZELL

THE UNIVERSITY OF CHICAGO PRESS CHICAGO AND LONDON

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

The University of Chicago Press, Chicago 60637
The University of Chicago Press, Ltd., London
© 2018 by The University of Chicago
All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission, except in the case of brief quotations in critical articles and reviews. For more information, contact the University of Chicago Press, 1427 E. 60th St., Chicago, IL 60637.
Published 2018
Printed in the United States of America

27 26 25 24 23 22 21 20 19 18   1 2 3 4 5

ISBN-13: 978-0-226-54625-4 (cloth)
ISBN-13: 978-0-226-54639-1 (paper)
ISBN-13: 978-0-226-54642-1 (e-book)
DOI: https://doi.org/10.7208/chicago/9780226546421.001.0001

Library of Congress Cataloging-in-Publication Data

Names: Yeazell, Stephen C., author.
Title: Lawsuits in a market economy : the evolution of civil litigation / Stephen C. Yeazell.
Description: Chicago ; London : The University of Chicago Press, 2018. | Includes bibliographical references and index.
Identifiers: LCCN 2017033931 | ISBN 9780226546254 (cloth : alk. paper) | ISBN 9780226546391 (pbk. : alk. paper) | ISBN 9780226546421 (e-book)
Subjects: LCSH: Class actions (Civil procedure)—United States. | Class actions (Civil procedure)—Economic aspects—United States. | Class actions (Civil procedure)—Political aspects—United States. | Civil procedure—United States. | Actions and defenses—United States.
Classification: LCC KF8896.Y435 2018 | DDC 347.73/05—dc23
LC record available at https://lccn.loc.gov/2017033931

♾ This paper meets the requirements of ANSI/NISO Z39.48-1992 (Permanence of Paper).

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Contents

Preface vii

Introduction: Ladies and Gentlemen, We Have a Crisis, but What Is It? 1

CHAPTER 1. Civil Lawsuits in a Market Economy in a Democratic Federal Republic 8

CHAPTER 2. The Demography of Civil Litigation 18

CHAPTER 3. The Economics of Civil Litigation 35

CHAPTER 4. Privatizing Procedure, Restructuring the Bar 56

CHAPTER 5. The Politics of Civil Litigation 77

CHAPTER 6. Where We Are and Where We're Going (and a Bit about Where We *Should* Go) 92

Notes 119

Index 129

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Preface

Over the past three decades, I have tried to understand what happened to civil litigation in the United States since the turn of the twentieth century; this book is the result. The effort started very casually. I have the good fortune to be married to a wonderful person who is also a fine lawyer and whose work, unlike this study, is confined to transactional settings. In a series of dinner table conversations about litigation-related issues that she and her litigator colleagues had encountered, and in conversations with those colleagues themselves, I began to realize that many of the things that most interested or concerned them were topics that I had encountered neither in my law school education nor in any scholarly literature with which I was familiar. Moreover, these developments challenged the assumptions with which I had emerged from law school.

Roughly speaking, these lawyers tended to devote a lot of thought to what I have elsewhere called the "dynamics of civil litigation": changes in the financing systems, in the business models of lawyers on both sides of a civil case, in forms of settlement, in practice settings, and similar matters. The doctrine and rules that I teach to my first-year law students were in the background of these conversations (and occasionally in the foreground when a judicial decision or amended rule altered the landscape), but doctrines and rules mostly weren't what seized the imaginations and interests of these lawyers. Instead they were looking at developments on what one might call the outskirts of litigation: how suits were paid for, how the nature of a practice organization might influence litigation outcomes, why so few cases came to trial.

At the same time I began to read with increasing comprehension a set of studies—some academic and others produced by governmental or nonprofit organizations—that painted a statistical picture of what ordinary civil litigation looks like. That picture bears little resemblance to the pic-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

ture one might draw if one relied on journalistic—and some academic—accounts of fantastic recoveries, of ridiculous lawsuits, and of endlessly prolonged litigation. The story told in these studies was less gripping but also far less disturbing, with typical judgments or settlements hovering around a year's median family income; and that result was reached, on average, in less than two years. That picture differed sufficiently from the one I, and many of my students and colleagues, had in mind that it seemed worth exploring further. I've come to think of this aspect of the story as "litigation demography": how much civil litigation is there, what does the "ordinary" lawsuit look like, and how and why does it come to an end?

This book seeks to pull together these two strands—litigation dynamics and litigation demography—with the aim of describing how modern civil litigation works in the United States, why it works that way, and how it has changed over the past century or so. My aims are thus chiefly descriptive—I think the story is interesting enough without my slinging my personal preferences into the narrative. But in the closing pages I'll identify a few of my personal heroes and villains (not people but developments). I hope you'll find the journey as interesting as I have found it.

One other point may help frame the discussion: I believe that almost no assertion in the following pages is independently controversial: no blinding revelations or unheard of facts about lawsuits lie ahead. Instead, whatever value this study has consists of looking at the system as a whole, of seeing how a series of points that are separately well known will, when connected, let us see a relatively unfamiliar picture of the whole emerging. In that picture, and in the implications it has for procedural design and reform, lies the value of this study.

Although this book is not a collection of previously published articles, I have explored most of the themes here treated in various journals and books over the past decade or so. I am grateful to the editors and publishers of these publications for the chance to develop and share some of these ideas in, I hope, a more continuous way in this book; with the single exception noted below, I am the sole author of the listed works:

"The Misunderstood Consequences of Modern Civil Process," *Wisconsin Law Review* (1994): 631–78.

"Judging Rules, Ruling Judges," *Law and Contemporary Problems* 61 (Summer 1998): 230–52.

"Re-Financing Civil Litigation," *DePaul Law Review* 61 (Winter 2001): 183–218.

"Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation," *Notre Dame Law Review* 79 (October 2004): 2025–44.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"*Brown*, The Civil Rights Movement and the Silent Litigation Revolution," *Vanderbilt Law Review* 57 (November 2004): 1975–2003.
"Getting What We Asked For, Getting What We Paid For, Not Liking What We Got: The Vanishing Civil Trial," *Journal of Empirical Legal Studies* 1 (November 2004): 943–71.
"Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law," *Loyola of Los Angeles Law Review* 39 (August 2006): 691–718.
With Kevin Clermont: "Inventing Tests, Destabilizing Systems," *Iowa Law Review* 95 (March 2010): 821–61.
"Transparency for Civil Settlements: NASDAQ for Lawsuits," in *Confidentiality, Transparency, and the U.S. Justice System*, ed. Joseph W. Doherty, Robert T. Reville, and Laura Zakaras, 143–63 (New York: Oxford University Press, 2012).
"Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation," *UCLA Law Review* 60 (August 2013): 1753–91.
"Courting Ignorance: Why We Know So Little about Our Nation's Most Important Courts," *Daedalus* (Summer 2014): 129–39.

On this journey I have had lots of help, starting with my wife, Ruth Fisher, and her colleagues, whom I have cornered at various social occasions to ask about this or that and who have at least feigned interest in my questions. One who went far beyond such feigned interest was Allen M. Katz, a brilliant lawyer (and friend) whose insights into contemporary practice have helped me greatly. Beyond these casual bits of "research," I have had much help from the UCLA School of Law's indefatigable librarians, led first by Myra Saunders and now by Kevin Gerson. One of the Law Library's notable contributions to the UCLA School of Law's community has been its student research assistants, whom it first recruits and matches with faculty needs, then trains and supervises. I am in debt to multiple generations of such helpers, too many to name, who have tracked down odd bits of data, usually in sources far beyond those in ordinary legal scholarship. I am also grateful for the support, financial and moral, of the UCLA Academic Senate research funds and of seven deans of the UCLA School of Law—Murray Schwartz, who hired me and for a decade or so thereafter regularly asked me questions I could not then answer (a few of which I think I have figured out and appear in the pages that follow); William Warren; Susan Prager; Jon Varat; Michael Schill; Rachel Moran; and Jennifer Mnookin—who, with scores of my colleagues, have helped make this such a wonderful, stimulating, and nurturing academic climate. I am grateful beyond words.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

INTRODUCTION

Ladies and Gentlemen, We Have a Crisis, but What Is It?

Consider two meetings of lawyers and judges, held about a century apart. At the start of the twentieth century, the leaders of the US bar concluded that the legal system, particularly the civil branch, was in a crisis. Accordingly, they met to diagnose it and prescribe remedies. At the start of the twenty-first century, a new generation of professional leadership reached a similar conclusion and held more meetings. But the two "crises" reflected opposite concerns, so the elite of the American bar, running in one direction at the beginning of the twentieth century, had reversed field by the end of it.

In 1900 the complaint was that the legal system was drowning in repeated trials of the same case, never achieving finality. In a famous address to the American Bar Association, an address that set the agenda of procedural reform for half a century, Roscoe Pound, who later became dean of Harvard Law School, asserted, "The worst feature of American procedure is the lavish granting of new trials."[1] Pound set forth a program of procedural reform to solve this and related problems, and the implementation of that program occupied most of the next fifty years.

So thoroughly did this program succeed that at the start of the twenty-first century the bar leaders assembled once more (now the successors of those who had heard Pound), again to discuss the civil legal system. But the terms of the problem had entirely changed. Patricia Lee Refo, then chair of the American Bar Association Section on Litigation, described "the largest single initiative the Section has ever funded," a symposium titled "The Vanishing Trial." In her introduction to the symposium papers, Refo noted that the project had "touched a nerve . . . spawn[ing] a blizzard of publicity in both legal and mass media." She thought the questions to ask were

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"what the diminishing trial means for our justice system and our society [and] what, if anything, the organized bar should be doing about it."[2]

Whether or not there was a crisis, Refo and her colleagues were right about the numbers. Good statistics for the early part of the twentieth century are hard to come by. But Moorfield Storey, addressing the Yale Law School in 1911 on the reform of legal procedure, estimated that about one-third of filed cases resulted in trials.[3] A hundred years later, an elaborate statistical analysis concluded that about 2 percent of federal civil cases and about 15 percent of state cases terminated in trial, both figures representing the culmination of a decades-long downtrend.[4] Moreover, not only the proportion of cases ending in trials but the absolute *number* of trials showed a similar decline. Roscoe Pound's and Moorfield Storey's world had turned upside down.

More than the number of trials had changed. Civil litigation itself had become a topic not only for lawyers and academics, those who had heard Pound. As Refo's comments about the press suggest, lawsuits—their incidence, their outcomes, and their social consequences—had become a matter of popular and political interest. The ABA symposium on vanishing trials occurred in December 2003; the following year saw a presidential political campaign. In that campaign one plank of the Republican party platform pledged to "Reform . . . the Litigation System."[5] That platform mentioned lawsuits ten times; eight of those instances employed the adjectives "junk," "frivolous," "baseless," or "unwarranted," and the other two instances made it equally clear that civil litigation was a bad thing—something hindering honest businesses, good physicians, and wise environmental policy. Singled out for blame in this platform was a group whose description might have baffled Pound and Storey—the "trial lawyers," who are described as "rich" and "powerful." At the start of the twentieth century, the phrase "trial lawyers" might have seemed redundant, like referring to "doctor physicians." But by 2004 all lawyers would have recognized it as a reference to the limited group of lawyers who actually conducted the decreasing proportion of civil trials. The Republican Platform used the term in an even narrower (and pejorative) way, to designate the plaintiffs' bar, at whose footsteps it laid much of the blame for increased costs and decreased availability of health care. To have described members of the plaintiffs' bar as either rich or powerful would likewise have astonished Storey and Pound. Neither of them much liked this group, but they disliked them in much the same way as other late Victorians viewed street urchins: a regrettable blot on the social fabric, but not serious threats to the republic.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

The distance that lies between these two worlds forms the topic of this book. Between Pound's and Storey's addresses and the presidential election of 2004, the world of civil litigation had transformed. The United States had more lawyers per capita filing more lawsuits per capita, heard by fewer judges per lawsuit than it had in the opening years of the 1900s. Some argued that this situation constituted "hyperlexis," a plague of lawsuits that would bring down the US economy.[6] Moreover, not just the number of civil suits had changed. So had their quality and significance in the broader society. Civil lawsuits had struck blows against legalized racial segregation. Some had come to see civil lawsuits as "the way to deal with every question,"[7] and at the end of the century a serious academic book could be written arguing that legislation was as important as litigation as a catalyst of change.[8]

The current study seeks to understand these changes. It seeks primarily to describe and explain rather than to recommend or prescribe. This stance is partly a matter of taste; I have some views about how things might work better (and will make a couple of suggestions), but I don't think these ideas are compelling enough to justify a book built around them. More importantly, my emphasis on description flows from the belief that many of the steps taken and many arguments made in the past century have resulted from deep misunderstandings of the way civil litigation works. In particular, we have often misunderstood the connection between civil litigation on one hand and economic organization and demography on the other. If we gain such an understanding, it may be possible to think more clearly about what we like and what we don't—and about the costs of change. Without that understanding, we can continue to blunder and pontificate, but the results will not be edifying. Finally, the descriptive stance reflects my belief that, as with war and generals, civil litigation and the legal system are too important to leave to the lawyers. Legislators, voters, and citizens need to understand how things actually work so we can all think sensibly about proposals to change them.

For all these reasons, this book does not assume that the reader has legal training. To convince those who do have such training that there is substance behind the descriptions and explanations, I've included note citations, found at the back of the book.

* * *

Perhaps the first step in contextualizing is to define the topic. Civil litigation is the generic term for civil lawsuits—claims invoking judicial

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

power in seeking some remedy, whose benefit will flow to the instigator of the claim, the plaintiff. We usually distinguish civil claims from criminal charges. One basis for this distinction is that the outcome of a criminal conviction is typically punishment for the accused, which may make the victim of the crime feel better but does not otherwise directly benefit him.[*] Another difference between criminal and civil cases in modern times is that the state, in the person of a professional prosecutor, controls the decision to bring charges. If I believe I have been the victim of a crime, I may complain to the police or prosecutor, but I cannot myself bring those charges to court. One hundred and fifty years ago, things were different. In both Britain and the United States, there was private criminal prosecution, in which the victim of a crime (or her surviving family, in the case of murder) could and did prosecute the majority of criminal charges. In such a world, civil and criminal charges might simply be alternate routes to the same result.[9] If a defendant had acted in a way that would provide the basis for both criminal and civil charges (as, for example, if he had intentionally or recklessly injured the plaintiff), the plaintiff could choose between civil and criminal charges. Because a private prosecutor controlled the case, she could abandon it if the defendant properly compensated her, just as a civil settlement results in the plaintiff's dismissing the charges. Today, by contrast, one difference between civil and criminal cases involves the abilities of the victim of the underlying legal wrong to control the litigation. In civil suits he can; in criminal cases he cannot.[†]

If state control of prosecution is one hallmark of modern criminal process—distinguishing it from civil cases—one might imagine that another would be the remedy. Standard wisdom, echoed above, says that punishment is the result of criminal conviction and that compensation is the goal of civil litigation. Standard wisdom is mostly accurate, but it requires an important caveat. Punitive damages are available for "outrageous" acts, typically intentional. In such cases they are allowed in addition to ordinary, compensatory damages—and in addition to possible criminal penalties. The older cases sometimes called them "exemplary

[*]In modern criminal cases, the convicted defendant is sometimes ordered to make restitution to the victim. Since, however, few such defendants have any assets with which to make restitution, the restitution order, though symbolically interesting, rarely affects the victim.

[†]An uncooperative complaining witness can make things difficult for prosecutors, who may decide to drop the case. But the large number of convictions of "victimless" crimes, many involving drugs, reminds us how far we are from a world in which private parties controlled most criminal prosecution.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

damages," the idea being that the defendant was being made an example, to discourage others from bad behavior. For example, if I intentionally harm another, I will have to pay not only her medical bills and lost wages, but, very likely, punitive damages, which will be measured not by the harm done to the plaintiff but by the amount appropriate to punish me and to deter others from such behavior. In some celebrated cases, punitive damage awards have run into multibillion-dollar figures, although the data suggest such cases are very rare.[10] For immediate purposes, the significance of punitive damages is that they make contemporary civil process resemble the private criminal prosecutions of an earlier era, putting an additional weapon in the hands of private parties and to that extent blurring the lines between civil and criminal litigation.

Another and again distinctive feature of American civil litigation results from its financing. In contemporary US civil litigation, each litigant pays his own legal bills, or, more carefully put, each litigant pays his own legal bills unless he can avail himself of a way to shift those expenses to or share them with others. Again, that distinguishes the US legal system from the rest of the world; in most other legal systems, the law provides, at least nominally, for the loser to pay the winner's expenses. The US system does not. Later parts of this study develop the significance of this feature, but it bears mention at the outset because it affects litigants' decisions to begin, settle, or continue with lawsuits.

The final framing characteristic of US civil litigation is its dispersion across multiple layers of government. The United States is a federal system, in which states and the federal government share power in complicated ways. The federal government has the final say on some matters, but on others—the great majority of others—the states have the last word. For litigation, this arrangement means that the vast majority (some 98%) of lawsuits occur in the courts of the fifty states, each of which operates its own system of courts.

Moreover, in practice, the power and responsibility, at least in the first instance, lie even further down the governmental food chain, with county governments. In the wake of Independence, the states organized their new governments around the units that had, before the Revolution, been the most democratic and the most independent of royal control—towns and counties. English practice had put a court of first instance—a trial court—in each county, though it relied on nationally assigned and appointed royal justices to conduct the most significant proceedings in those courts. Americans took English practice one step further, not just providing space for county courts to hold sessions but electing or appointing the

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

judges who conducted those proceedings from residents of those counties. No federal constitutional principle required the states to adopt this system, but they all did and have continued to do so. Most state trial judges are local officials. By contrast with most other industrial nations, authority in the US judiciary thus has intensely local roots. State trial judges do not belong to a national judiciary whose members are assigned to locales, as they do in Japan or Germany. They do not even, in most cases, belong to a statewide judiciary. Though they are often appointed by the governor, the pool for such appointments is usually not a statewide list of lawyers but the lawyers practicing in that county or perhaps a set of adjacent counties. It would be unthinkable to appoint a downstate Illinois lawyer to the Chicago trial bench or a Los Angeles practitioner to the San Francisco courts. This pattern shows slight signs of change, as quite a few states institute statewide training, standards, and, in some instances, budgetary responsibility for state trial courts. Over time, then, one can imagine state judiciaries assuming a less local and more statewide cast, but that development will be the work of the future; for now, one has to think of most US civil litigation as occurring in trial courts with substantial local affiliations.

Local power does not dictate parochialism, though one can certainly find examples of it. Not only federal power but state constitutions and statutes, together with the development of a national tradition of legal education, means that judges and lawyers at the end of the twentieth century belonged to a national profession. Moreover, in practice, many of the features of substantive law and procedure have converged over the past hundred years. But because this convergence is largely a matter of culture rather than compulsion, out-of-town lawyers can still feel as if they have been dropped into an entirely alien—and somewhat hostile—culture. And with multiple centers of power, at any given moment one or several states are "ahead of" or "behind" their neighbors in ways that invite litigants to exploit the differences. As a consequence, when one speaks of US litigation, one confronts multiple sources of authority that seem odd to lawyers from other developed societies, who deal with essentially unitary systems.

* * *

This study argues that developments outside and inside the legal system reshaped civil litigation over the course of the past century. Some, like car loans and mortgages and liability insurance, seem to have little to do with

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

litigation narrowly understood. Part of my argument is that to understand civil litigation, we must broaden our field of vision. Other changes, such as changes in procedural rules, obviously relate to litigation—except that it often turns out that the interaction between "inside" and "outside" factors is far greater than the changes would suggest. Between them, the internal and the external changes have moved civil litigation from the resolution of disputes by adjudication to the resolution of disputes by the purchase and sale of claims—by settlement. So to argue is *not* to condemn these developments, though some would. Indeed, there's a fairly strong case to be made that the current culture of settlements more accurately reflects a just outcome than did the judgments of a century ago—although nothing in this book depends on whether the reader is convinced by that argument.

This study starts by looking at some features of the US political and economic system that shape litigation, features such as the divided power of state and federal governments. From there, chapter 2 describes some facts that both sides in the litigation debate tend to ignore—just how much civil litigation there is and what it consists of. With that groundwork laid, chapter 3 looks at the economics of civil litigation and chapter 4 at some critical changes in procedural rules and in the legal profession that interacted with the economic developments. Chapter 5 describes the odd politics that surrounded this market in civil claims in the closing decades of the twentieth century and the opening ones of the twenty-first. The final chapter speculates about the directions in which the twenty-first century may take us and ventures some normative comments.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER ONE

Civil Lawsuits in a Market Economy in a Democratic Federal Republic

Like many law schools, mine admits foreign lawyers to study US law. They arrive knowing a good deal more about US law than I or my students know about the legal systems from which these lawyer-students come. Some of the things they "know" are entirely accurate: that the United States is almost unique in having civil jury trials; that litigation plays a greater role in the political life of the United States than it does in the political life of most foreign systems; that the United States has class actions, which are unknown in most other systems. Like many Americans (including some members of the American bar), they also "know" some things that aren't true—things about the amount of civil litigation and about the size of judgments, topics examined in this chapter.

When my foreign students evaluate the US legal system, some things surprise them and may strike them as odd or dysfunctional. One of these surprises comes from the wide fragmentation of power in the United States and the energy devoted to litigating which of the possible sources of power will have authority over a given case.

Much about US civil litigation has changed over the past century—sometimes to the point of unrecognizability. But this change has occurred within a framework fixed either by basic structural principles of government or by deeply embedded economic practices. Starting with these allows us to see what parts are bedrock and what are new, shallowly rooted landscaping.

The present regime, embodied in the US Constitution, divides governmental power between the states and the federal government and among the states. Whether and how this would happen have become part of his-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tory and of the national myth—the Articles of Confederation and their failures; the Continental Congress's call for a group of delegates to consider revision; the delegates' meetings, conducted in close secrecy, in the summer of 1787; the fateful decision to depart from their instructions and to draft an entirely new constitution; the debates over ratification; the ratification, closely followed by the adoption of the amendments constituting the Bill of Rights; and the Civil War, which followed half a century later and rewrote the social and political contract. The details of these events lie too far from the focus of this study to warrant rehearsal, but several of them established the uniquely American structure of civil litigation.[1]

The first, alluded to already, was the decision to establish multiple court systems. More precisely speaking, the framers of the US Constitution decided to leave in place the existing state court systems but to establish alongside them a federal Supreme Court and such lower courts as Congress might establish. Debates raged around who would appoint the members of the Supreme Court and whether it would be part of a "Council of Revision" empowered to reject unwise legislation. But there was never a serious discussion about creating a single, unified judicial system: such an idea, like the idea of an executive serving for life, might well have convinced the many who suspected that those favoring the new constitution were secret monarchists.*

The decision to leave each state with its own court system means that in a good number of cases there will be at least two state courts in which civil litigation may occur. To take an easy and everyday example, a traffic accident on the New Jersey Turnpike, a crowded road feeding into New York City, can easily involve both a resident of New York and a resident of New Jersey. If a lawsuit ensues, the plaintiff (let's suppose she is the New Jersey resident) may have a choice of suing either in New Jersey, where the accident occurred, or in New York, where the defendant (say, a New York trucking company) is located.[2] Under modern law, claims having plausible connections with multiple states—say, a commercial transaction involving a product with subcontractors located in several states—may properly be conducted in any one of those states. Moreover, federal and state jurisdictions can overlap. For example, to stay with our auto accident in New Jersey, if the damages exceed $75,000 (easy to imagine, given the cur-

*The level of suspicion, bordering on paranoia, was such that at one point rumors circulated in Philadelphia that the delegates were "negotiating with the second son of George III as a possible monarch for the United States."

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

rent prices of automobiles and medical care), a federal court can hear the claim, giving the plaintiff at least four different courts in which to bring a suit—state and federal courts in New York and New Jersey.[3]

For our purposes this jurisdictional multiplicity and redundancy gives US civil litigation a special cast: at its threshold often lie fierce battles about which jurisdiction may or must hear the case. These battles sometimes turn on homely facts: Had the plaintiff's deceased husband moved his high school yearbooks to his new home in Kansas?[4] Had the New York car dealership advertised in the national press? Behind these apparently trivial details lies the compromise struck in 1787, a compromise requiring the existence of state courts independent both of one another and, in most cases, of the federal judiciary as well. Federal judicial power trumps that of the states only when either a provision of the federal Constitution or a constitutionally enacted federal law displaces state law. Litigants on both sides exploit this jurisdictional multiplicity: they "shop," as lawyers put it, for favorable substantive law and favorable (or sometimes simply familiar) procedures and for a favorable judge or jury. This jockeying for a friendly (or at least not an unfriendly) forum is a familiar theme in international disputes: everyone wants home field advantage. What surprises my foreign students is that the constitutional structure of the United States makes this jockeying a feature of domestic litigation as well.

A second important constitutional choice—this one made in both state and federal constitutions—was to continue ("preserve," as the federal Constitution puts it) the use of juries in civil cases. Two aspects of the jury warrant special emphasis in this discussion. First, not all civil cases are triable by a jury. The federal Constitution (and its state siblings) froze into place an existing English-law division between cases triable by a jury and those triable by a judge sitting without a jury.[5] The difference turns on highly technical distinctions: for our purposes it's important only to note that the question is *not* "In what cases might a jury have the most to contribute?"[6] Second, not only must the case belong to the class of cases triable by a jury, but one of the parties must ask for a jury. Because of these threshold requirements, much jockeying about who will hear a case can occur before a shred of evidence is presented.

For generations there has been a robust debate about the merits of the civil jury, and this is not the place to repeat that argument. Instead, consider the profound effect of the jury on civil litigation. First, because juries are temporary (most will serve only for a single trial) and composed of lay

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

persons, they introduce an element of uncertainty into trials: professional training and folkways make the behavior of judges more predictable than that of jurors. Second, various rules of appellate review give jury decisions more insulation from reversal than equivalent decisions rendered by judges, so an outlier decision rendered by a jury may well withstand appellate review. Third, the presence of lay persons on juries exercises a continual check on the tendency of law to become complex, baroque, and ethereal. Systems administered entirely by professionals tend to become, over time, incomprehensible to outsiders. Law is no different. But because we assume jurors are ignorant of the law, we regularly have to explain it to them, formally in jury instructions delivered by the judge and informally in lawyers' arguments to the jury. Any body of law that becomes too complex to be understood by a group of lay persons will not be applied properly. Occasionally lawyers have argued that their area has become too difficult for jurors to understand and that such cases should therefore be exempt from jury trial. Such arguments have lost. Juries remain, and it is law, not the jury, that has to do the adapting. As a consequence, the texture of the substantive law has to remain simple enough for jurors to understand. If one believes that complexity and nuance produce a finely tuned legal regime, the jury's resistance to complexity counts as a drawback. If one believes that any legal system that becomes incomprehensible to its subjects is a system in trouble, juries' tendency to inhibit complexity in law stands as a virtue.

One can also see in the civil jury's fact-finding power a slight pressure away from "law" and toward "justice." It is easy to overstate this tendency. Virtually every study reports that jurors take their constrained roles seriously, try very hard to apply the law as it is given them, and in a very high proportion of cases reach verdicts that match what the judge would have done in the same case.[7] Unlike its criminal counterpart, a civil jury cannot reach a verdict that lacks factual support, but at the margins a jury may "read" facts in a way that favors one side over the other. As with the jury's tendency to resist legal complexity, this power to introduce community sentiment into verdicts can be a force of good or an evil to be resisted, depending on where one sits. Its virtues are obvious: "hard" law sometimes conflicts with our sense of "what's right," and a jury's power to uphold the latter over the former is the stuff of folklore that has some basis in fact. But community sentiment does not always represent the forces of light. Many believe, for example, that the US Supreme Court's generations'-long delay in deciding whether civil rights employ-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

ment discrimination cases must be tried by juries flowed from the justices' fears that in some regions of the country jurors would regularly—and unjustifiably—disfavor plaintiffs of minority groups. Again, this is not the place to decide whether the civil jury has been a hero or a villain, but to note its special place in the structural characteristics that shape civil litigation in the United States.

Finally, the jury shapes procedure even in cases where no jury will sit, either because there is no right to a jury in a particular case or because there is, but the parties have not asked for one. In theory, those who created procedural rules could have created different procedures for jury trials and for those in which only a judge sits. The English had done so. But the states and the federal government took a different course, using the same procedure for both kinds of cases. That choice mattered because it dictated several features of US procedure that strike my foreign students as unusual. For example, when a trial begins, the parties have to be prepared to present all their evidence in a fairly compressed time. They cannot, as sometimes happens in other legal systems, present part of their case, wait for the judge to rule, and then, depending on his ruling, go back to gather evidence bearing on other parts of the case that the judicial ruling has now made salient. This requirement of a compressed presentation has two effects. In some cases it pressures parties to prepare to present or defend against evidence that turns out to be unnecessary; to that extent it is wasteful. On the other hand, having had to prepare the entire case—including anticipations of what the other side may do—can cause the lawyers and their clients to understand the case as a whole, its strengths and its weaknesses. Confronted with that comprehensive view, they may have a greater propensity to settle rather than to face the uncertainties of trial, especially a trial by jury. We shall return later to this culture of settlement and its consequences for modern civil litigation.

Stepping back from these specifics, one can see in all these features of institutional design a common consequence for civil litigation in the United States: substantial threshold fighting over the location and identity of the tribunal, what lawyers call forum selection. What court in what place will hear the case? Will a jury hear the case? There are, of course, legal ground rules for these questions, but many of the ground rules allow room for argument, and some of the arguments depend on factual matters. Consequently, the outcomes of these questions can be uncertain and can consume litigant and court time and money, and it is easy to criticize them as inefficient if one sees the inexpensive processing of disputes as the primary function of civil litigation. From this standpoint, this characteris-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tic of US litigation—threshold disputes about the appropriate forum—represents either a quaint historical artifact or a major reproach to the system. But these issues also have continued political salience: a proposal to unify the court systems or to abolish (or universally extend) civil jury trials would fail, and the failure would be due not only to strategic lobbying by groups whose oxen would be gored but also to deep-seated constitutional understandings. So, as we observe such debates about forum recurring as a theme in twentieth-century civil litigation, we should bear in mind that these conflicts reflect a long constitutional history.

* * *

Constitutional choices created one form of dispersed authority in the United States. Choosing a market economy—a choice made in incremental and uneven steps over two-plus centuries—created another form of dispersion, with equally important consequences for civil litigation. Except perhaps for a brief period in the 1930s, when economic crisis caused a flirtation with more centralized control, the existence and primacy of markets as a form of economic organization has not been in doubt. Indeed, a significant goal of those delegated to consider changes in the Articles of Confederation was to create a government in which states could not "engage . . . in commercial discrimination against their neighbors."[8] Through a variety of constitutional provisions, the federal Constitution forbade such discrimination. Subsequent congressional action went further, to create a national market, though not without controversy. The largest political questions were over the extent to which the federal government should seek to foster and regulate a national market. In the first part of the nineteenth century, the off-and-on existence of the Bank of the United States marked the borders of federal power; in the second half, currency (hard or soft, gold or silver?) and the Sherman Act, which regulated monopolies, further defined the market conditions. As J. Willard Hurst, the pioneering legal historian, summed up, "Nineteenth-century lawmaking in the United States gave its energy more continuously and devotedly to building, extending, and implementing the market than to any other institution of society."[9] The twentieth century saw numerous efforts to regulate those markets, particularly the securities and financial markets, but at the start of the twenty-first century, many observers would still say that the US economy's principal trait was the relative freedom of participants to structure transactions.

To say that the United States has a market economy is to say that nu-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

merous decentralized transactions drive our economic life: sales of land and agricultural products, timber and livestock, minerals, manufactures (these gained importance in the second part of the nineteenth century), services, loans, mortgages, pledges, partnerships, stocks and bonds—deals of all sorts. When these deals have gone bad, as they regularly have done, a lawsuit often has resulted, a suit likely resting on the law of contract.

In a market economy, contract claims will dominate civil dockets. They have done so and still do. As we'll see in more detail in chapter 2, tort suits make headlines and the evening news teasers,* but contract cases dominate in numbers and significance.[10] Most civil claims in the United States rest on agreements. Many of those agreements are various credit arrangements—a loan, or an installment sale of goods or services, or, today, a credit card debt or unpaid check. The mix of these ingredients has differed over our history: the nineteenth century saw more suits involving land sales and various bills and notes; the latter part of the twentieth more credit card and installment sales. But in all periods these agreement-based claims have dominated. Can one say anything about their general characteristics? Because they are agreements, those who draft them have the opportunity to maneuver for advantage.

Those advantages fall roughly into three categories: first, the substantive terms of the deal, including price, interest rate, warranties, and the like; second, the number and kind of defenses the other party may assert; third, the forum in which a dispute must be aired. By and large, sellers and creditors will do the drafting, and thus they have the initial advantage in such terms. But the extent to which such efforts at gaining the upper hand will succeed varies by era and by jurisdiction: creditors and sellers may have had a greater advantage in the federal courts in the first half of the nineteenth century, while debtors and purchasers may have fared better in, say, California, in the latter part of the twentieth century. Though the tension in contract cases will be constant, the contested issues change over time and space. The defenses assertible on a bill of exchange (the ancestor of a check) were a contested issue in the early nineteenth century. In the early twenty-first century a similarly contested issue is the extent to which major credit-extenders can, by placing an arbitration clause in their standard agreements, take cases out of the court system—where

*Lawyers call torts "noncontractual legal claims," which isn't very helpful to a lay reader. Common examples of torts include injuries caused by negligent driving, products that are unreasonably dangerous, sexual assault, libel, and more.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

they might face a jury—and into private arbitration. Again, individual litigants care greatly about the resolution of these questions, but for our purposes the key point is their persistence, in various guises, in an economic system resting on contract and a legal system that largely defers to those contracts.

Contract has a second defining characteristic reflected in the caseload and in individual cases: a built-in tension between flexibility and certainty. Contemporary economic life, from the stock market to property ownership to credit cards, rests on ingenious contractually created fractionated interests in "ownership," interests that can be aggregated and disaggregated, securitized, and sold and bought, and also can change according to circumstance. All this has led to the web of credit and divided ownership that makes up modern economic life. But complexity creates both uncertainty and expense when a deal goes sour and ends in litigation. If it is difficult to foreclose on my mortgage when I stop paying, lenders will be reluctant to extend credit. If it is easy, there will be more lending and lower interest rates—but also more instances in which deserving buyers lose their homes to lenders. So pulling against the flexibility offered by contract is the impulse to simplify and to speed litigation, to collect debts quickly, to prevent contractual litigation that requires the development of complex facts. Neither of these impulses ever wins, because both have equally strong roots in economic life. But at any given moment in any given area of transactional life, the balance will change. Unlike bills of exchange in the nineteenth century, modern-day bounced checks admit few defenses: did I sign, did I pay? As a group creditors will push at the front end for imaginative (and complex) structures of credit and, at the back end, for simplified litigation. Debtors will push in the opposite directions.

In a market regime, transactions produce lawsuits. In the hundred-odd years under examination, the population of the United States more than tripled, from 76 million (1900) to 323 million (2016).[11] The economy, by contrast, grew, in constant dollars, twenty-four-fold—from a gross domestic product of $547 billion in 1900 to $13,248 billion in 2010 (both expressed in constant 2005 dollars).[12]

As figure 1 illustrates, in most decades in the twentieth and early twenty-first century, the domestic product grew faster than the population, and the difference between the two rates was often substantial. One result, of course, was a well-known increase in per capita income and standard of living, the former increasing in real terms from $4,310 in 1900 to $34,578 in 2000.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

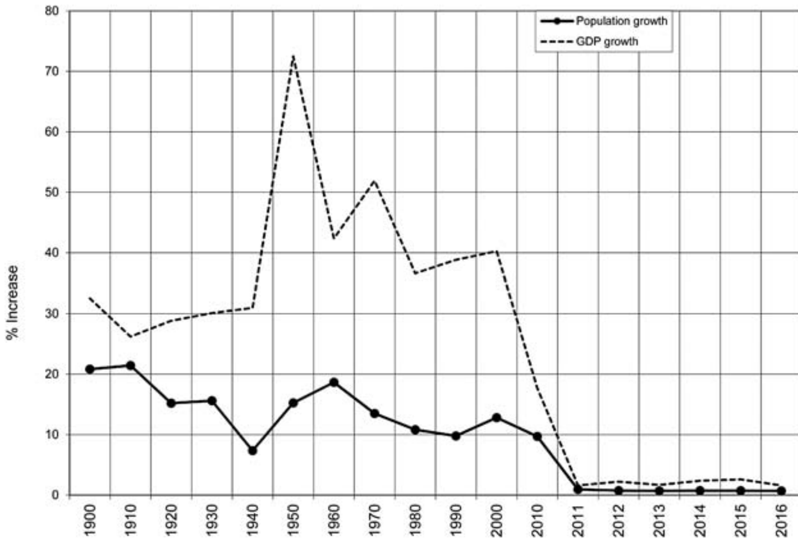

FIG. 1. Growth in US population & GDP

But these numbers have a special significance for civil litigation as well. Not only does the level of economic activity suggest reasons why civil litigation arising from that activity might grow as well. These data also provide a second reason for expecting growth in civil litigation. In a world in which litigants pay their own lawyers and in which money damages predominate as a remedy, few will sue an insolvent, or even a poor, defendant. The increasing real per capita wealth of the United States increased the pool of potentially attractive defendants. An injured or aggrieved party who might have "lumped it" in 1900 (because the defendant was not worth suing) may find it rational to bring a claim against the great-grandchild of that defendant, whose net worth is eight times greater, not just absolutely, but relatively. Moreover, a point we will return to, that late-twentieth-century defendant, with more at risk than his ancestor, might well carry one or more forms of liability insurance, further increasing his attractiveness as a defendant.

* * *

We return to the point with which this chapter began: there are two anchors that confine the extent to which civil litigation can drift. A con-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

stitutional and structural anchor creates several available adjudicatory mechanisms, as well as the likelihood of substantial litigant maneuvering for advantageous forums. An economic and social anchor—the choice to allow markets to form the primary system of economic life—brings with it collateral consequences for many social institutions, including the litigation system. Neither of the anchors is entirely unmovable. The Constitution has been amended twenty-seven times, and we could decide to create a single national government, or, failing that, a unified national system of courts. And it certainly lies in our power to subject our economic life to more state and less private control, more regulatory and less contractual control; indeed, in the middle part of the twentieth century, it looked as if we might go down that path. But we did not, and the situation does not seem likely to change in the near future. So long as it does not, US civil litigation exists within a frame, a set of constraints that affect its composition, its character, and its results.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER TWO

The Demography of Civil Litigation

Jimmy Carter may have started the debate. For the first two centuries of our nation's existence, neither the quantity nor the virtues of civil litigation formed part of political discourse. We debated the merits of particular civil lawsuits, and whether the court system was working efficiently, but not whether civil litigation itself was a "problem." Then in May 1978, then-president Jimmy Carter made a speech at a luncheon marking the one hundredth anniversary of the Los Angeles County Bar Association. In what might be described either as a courageous or a tactless move, President Carter used the occasion to denounce lawyers and litigation:

> We have the heaviest concentration of lawyers on Earth—1 for every 500 Americans; three times as many as are in England, four times as many as are in West Germany, twenty-one times as many as there are in Japan. We have more litigation, but I am not sure that we have more justice. No resources of talent and training in our own society, even including the medical care, [are] more wastefully or unfairly distributed than legal skills.
>
> Ninety percent of our lawyers serve 10 percent of our people. We are over-lawyered and under-represented. . . .
>
> The number of medical malpractice suits skyrockets. Mahatma Gandhi, who himself was a very successful lawyer, said of his profession, and I quote, "Lawyers will as a rule advance quarrels rather than repress them." We do not serve justice when we encourage disputes in our society, rather than resolving them. . . . .
>
> But as we make litigation more accessible, our fourth challenge is to make the adversary system less necessary for the daily lives of most Americans—and more efficient when it must be used. By resorting to litigation at the drop of a hat, by regarding the adversary system as an end in itself, we have made justice more cumbersome, more expensive, and less equal than it ought to be.[1]

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Rather little came of Carter's proposals, but they did open several decades in which civil litigation, not just particular lawsuits, became a topic of political debate. As we shall see in a later chapter, it was anomalous that Jimmy Carter, a Democrat, took the antilitigation position; its later proponents were uniformly Republicans. For present purposes I want to concentrate on President Carter's invocation of the *amount* of civil litigation, and his comparisons to that in other nations. That vein of his critique was to become a major theme in the ensuing litigation wars.

President Carter had some of his information right, but subsequent participants in the discussion felt less constrained by facts. In part their lack of factuality flowed from the absence of information.[2] Only in the past thirty years have we begun to gather some of this information. And though we still lack basic information about some of the system's most important aspects, what we now know gives ammunition to both sides in the continuing debate.

How much civil litigation is there? And how does that compare to the past? Those questions, basic to any sensible discussion of the matter, turn out to be quite difficult to answer. At the end of the twentieth century, many asserted that there was far too much civil litigation; the same debate and outcry existed at the start of the twentieth century. At the start of the twentieth century, most participants in the debate lacked even rudimentary knowledge about how much litigation was occurring in the United States. At the end of the century, their successors in the debate still lacked comprehensive statistics, but they had some reasonably valid estimates about the current situation; they lacked, however, any reliable way of comparing the present even to the very recent past, not to speak of 1900.

Civil litigation comes from human disagreements. Civil litigation in the United States is mostly about money—the control of resources and the fruits of labor.[*] Finally, civil litigation in the United States requires not only litigants and a dispute, but, usually, lawyers and judges. (A civil litigant can represent herself, but that's often asking for trouble and a bad outcome.) This chapter puts these ingredients together.

It tells a fairly simple story. Civil litigation in the United States has, over a century, increased at a rate higher than the corresponding increase in population. Civil litigation in the United States, as in a number of other developed economies, appears to track increases in economic activity more closely than it does population.[3] Consistent with this observa-

[*]The most important exception to this proposition occurs in child custody disputes, in which parents dispute the physical and legal custody of children and the terms of visitation.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tion, civil litigation has increased somewhat more slowly than economic growth, measured by Gross Domestic Product. Most significant civil litigation in the United States is conducted by lawyers, with judges playing a lesser role than in many other nations. The supply of lawyers in the United States has for more than a century exceeded the demand for lawyers' services, and in the last few decades of the twentieth century, it expanded greatly. But that increased supply of lawyers and increased number of civil lawsuits did not lead to an increased number of trials. Instead, the costs of litigation combined with the features of the procedural system to yield a declining rate of trials and a high rate of settlements—about whose terms we know little because there is no national registry of settlements. In those cases that do go to trial, the likely outcome differs among case types, with more contract than tort claimants winning at trial. When plaintiffs do win, the median judgments are, to readers of newspaper headlines, remarkably low, ranging from about $25,000 to about $45,000 depending on the type of case. Finally, the data just recited sit at the tip of an iceberg of ignorance about much of civil litigation. The sections that follow unpack this summary.

How Much Litigation?

For reasons that readers of the preceding chapter will appreciate, most lawsuits start and end in state trial courts. Federal courts have only limited jurisdiction, hearing only about 2 percent of the lawsuits in the United States. And most lawsuits will never go to trial, much less to appeal. Consequently, the figures one wants to know are how many lawsuits are filed now, and how many were filed in the past, in the state trial courts. Unfortunately, until very recently it has been impossible to know what these figures are. Understanding why we don't know more helps in comprehending what we do know.

In government it is axiomatic that he who pays, counts. Any government wants to know what is happening with its money and whether those to whom it is paid are performing their duties. Thus, even before 1900, one can find consistently collected, reliable statistics reporting the number of federal judges and the number of federal cases, often subdivided into whatever categories seemed currently important.[4] Congress, which paid the bills, wanted to know. And so we can draw a picture of the amount of federal civil litigation (see fig. 2).

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

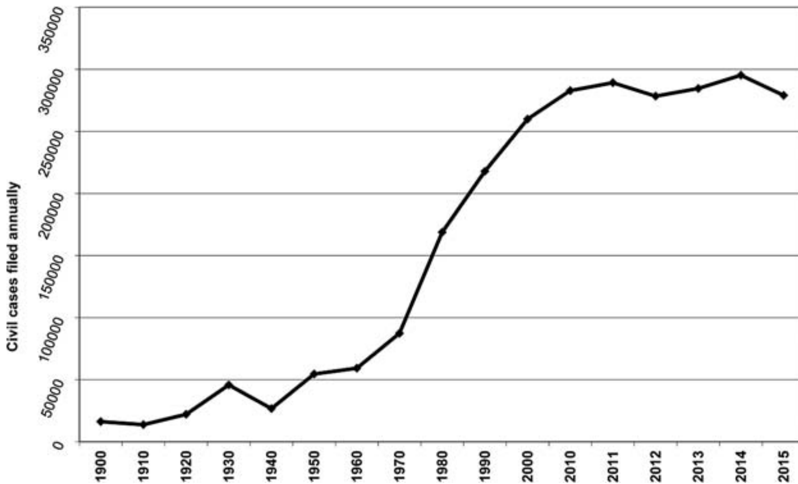

FIG. 2. Federal civil filings, 1900–2015

Before considering the implications of this picture, one must realize that it is radically incomplete in two ways. First, because it notoriously takes two to tango, there is a relation between population and civil litigation. And the population of the United States increased manifold over the same period. What one wants to know is how much litigation there is per capita—or, to use a more manageable ratio, per ten thousand people. That yields the picture seen in figure 3.

This chart teaches us that federal litigation not only has risen, but has risen faster than population. Thus far it looks as if data support those, like former President Carter, who argue that something is out of joint, that we have a litigation problem. Consider, however, the implications of a point made in chapter 1, that we have chosen to organize our economy on market lines, with private transactions as a major ordering principle. Studies of legal systems around the world suggest that in developed countries civil litigation most closely tracks not population but economic activity—Gross Domestic Product.

Might that finding also hold true in the United States? To test it one would want to see how civil litigation tracks changes in US GDP, adjusted for inflation. Figure 4 suggests a relationship at odds with the drowning-in-litigation picture; as the twentieth and early twenty-first centuries proceeded, the trend line was down: with a few anomalous years, we sued each other *less* in relationship to national wealth, though more in relation

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

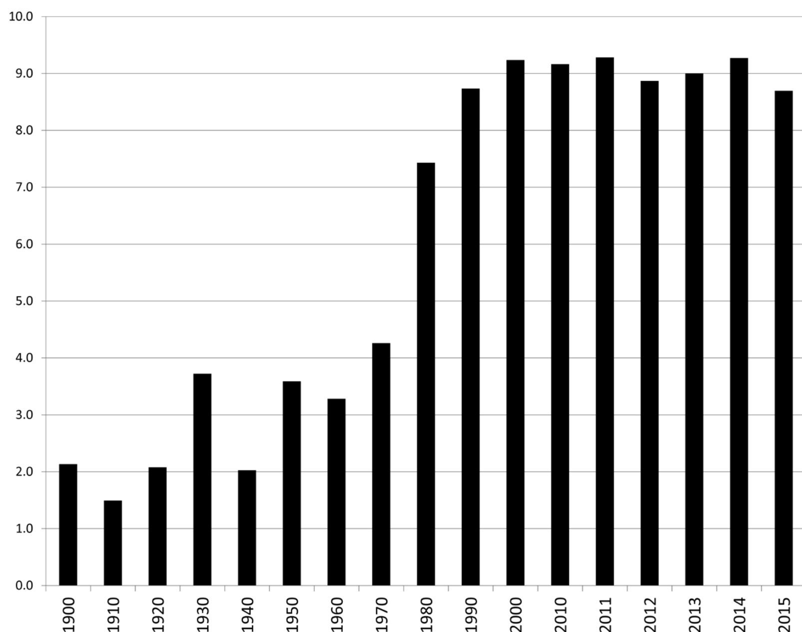

FIG. 3. Federal filings per 10,000 population, 1900–2015

to population. A strong note of caution is in order. Just as it would be premature to conclude from the first chart that we have a national crisis—though some have so concluded—it would be equally foolish to conclude from this one that there is no problem. For example, in a society that promises its people that they live under the rule of law and are entitled to due process, a rapidly plunging litigation rate might indicate that too many are shut out of access to the courts. I am not here so contending; I make the point only to suggest that we don't know enough at this point to reach either conclusion.

That point gets special emphasis if we recall that the data thus far presented relate only to litigation in federal courts. For reasons already indicated, we have good long-term data for these courts, but they hear only about 2 percent of all civil litigation. What about the state courts, where most of the action occurs?

For the states, we lack the most basic information for any period before 1985. Before seeking to overcome this lack, it may be profitable to reflect on the reasons behind it. The preceding chapter stresses the authority divided between state and federal governments and the result that

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

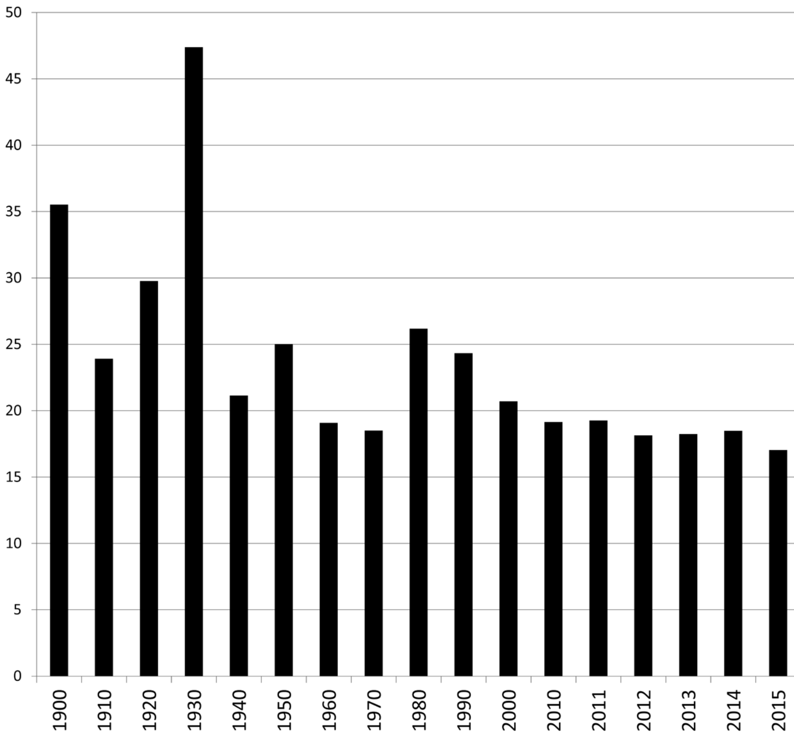

FIG. 4. Federal civil filings per $ billion GDP, 1900–2015

the responsibility for hearing civil cases overwhelmingly rests with state governments and, below them, with counties. In most states, throughout most of the twentieth century, those same counties also paid those judges. Many such county governing bodies, who paid the bills, demanded reports. These reports took widely different forms, varied over time, and were not, for the most part, collected at a statewide, much less a national, level until late in the twentieth century. As a consequence, the raw data from which a comprehensive picture of civil litigation might be constructed lies moldering—if it has not already been discarded—in the basements of thousands of county seats. Moreover, even if it could miraculously be collected in one place, the metrics used by different courts even in the same state often differed substantially, creating serious problems of comparability.

The situation began to change in the second half of the twentieth century, as two unrelated political movements coalesced. The first was a wave

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

of court reform spurred by the indefatigable Arthur Vanderbilt, the chief justice of the New Jersey Supreme Court. Vanderbilt confronted a New Jersey judiciary that was wildly and dysfunctionally fractionated. Over the course of a decade, he persuaded the legislature and the voters to "unify" the court system, creating just three tiers: trial courts, an intermediate appellate court, and the state supreme court. To persuade localities attached to "their" courts to accept this change, the state agreed to assume some responsibility for funding the courts. With state funding came reports to the state, which began to take a more unified format, allowing at least intrastate comparability. The American Bar Association supported Vanderbilt's unification program in other states, some of which adopted similar changes. To the extent that unification and state financing of trial courts occurred, it brought some degree of central reporting, as legislatures demanded to know what the counties were doing with their dollars.

Then, in the latter 1970s, a considerable number of states saw "taxpayer revolts," usually against the taxes on real property that traditionally provided most of county funding. In the wake of these movements, which shrank the county revenues on which courts depended, many states began to assume some responsibility for funding the courts. As with the unification movement, when state governments began to supply funding, they began to collect statistics to measure the performance of these courts, for which they were now paying. In theory, such statewide statistics would be collected and displayed in ways that were uniform within the state. In practice, parochialism proved very strong, as local clerks (responsible for most of the data collection) saw no reason to do things differently than they always had. As a result, one still finds state judicial agencies issuing plaintive requests to local courts to adhere to common guidelines in reporting litigation statistics.

Even when individual states achieved uniformity, though, they rarely did so in a way permitting comparison across state lines: they used different metrics and different criteria for similar cases. To take just one example from the criminal docket, some states count each charge against each defendant as a separate criminal case, while others count a multidefendant case with multiple charges as one case. But interstate coalitions and occasionally the federal Department of Justice began to collect and standardize the data. As a consequence, we have good state court data, collected, consolidated, and analyzed by the National Center for State Courts—but starting only in 1984.[5] The obvious worry about such a short time series is that temporary events can make it hard to see long-term

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

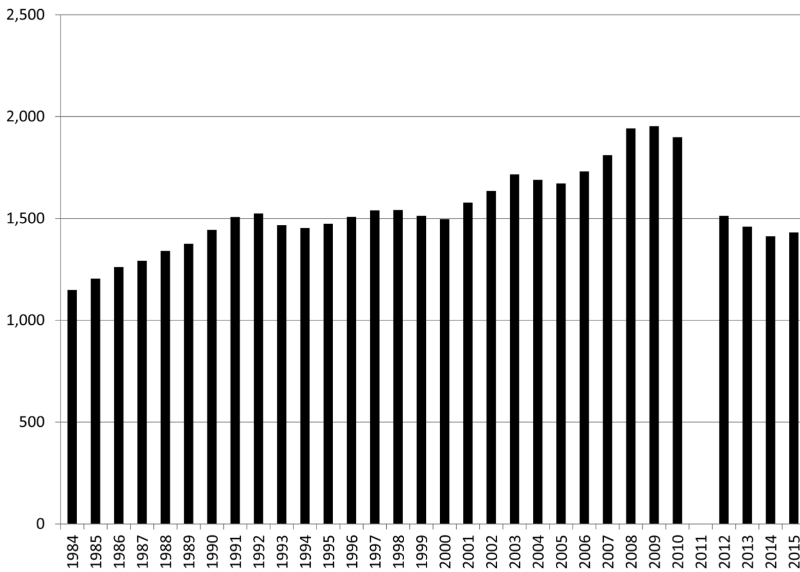

FIG. 5. State civil filings per 10,000 population, 1984–2015

trends. One would not want to draw many conclusions about the US economy by looking at the period between 1920 and 1950, a period that encompasses an unstable financial boom, the Great Depression, World War II, and a postwar period of high inflation. One should be similarly cautious about reaching broad conclusions about US litigation by looking only at the federal data or only at state data representing three decades at the end of the century.

With these cautions in mind, consider two charts (figs. 5 and 6) presenting for state litigation the same correlations we have examined for the longer-term federal data.*

Recalling that the state data covers not a century but just a few decades, the patterns look similar to those in the federal cases: civil litigation has grown faster than the population but has decreased in relation to the Gross Domestic Product. That is, civil litigation has grown slower than the economy as a whole has grown.

Observing this relationship takes us, however, only part of the way; it

*Readers will note an anomaly in both charts: missing data from 2011, when budget constraints at the National Center for State Courts precluded data collection.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

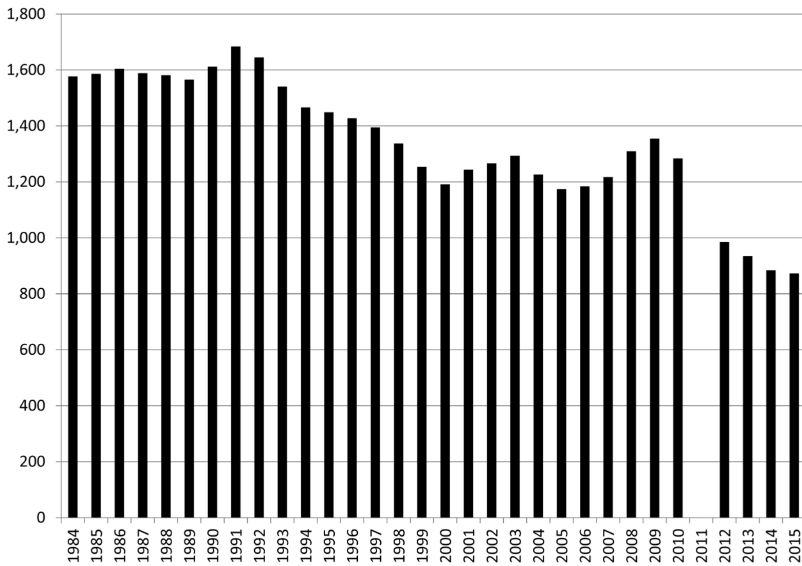

FIG. 6. State civil filings per $ billion GDP, 1984–2015

remains to understand what the relationship might mean. Let me suggest two preliminary foundations. First, it confirms the point that in a market economy substantially depending on private transactions, civil litigation will track economic activity—a subset of all human interactions—as well as population. In part this phenomenon is an artifact of the law itself: we have created a legal system that provides remedies for unpaid debts but not for dirty looks or broken social promises, as has been the case in some societies of the past. Having created that system, we should not be surprised when economic activity—which produces unpaid debts alongside paid ones—bears a relation to lawsuits. That observation, however, poses a mystery as it solves one: why does the rate of litigation *decline* in relation to GDP over time? Given that increased economic activity will produce more agreements and transactions, some of which will go sour and lead to lawsuits, why does civil litigation not keep pace with economic activity, instead growing more slowly than the economy expands?

Here I offer only tentative and speculative explanations. One is that the phenomenon we observe is not durable: is it an artifact of particular circumstances we will be able to discern only when they change? For example, take the division between civil and criminal caseloads. For several decades each has constituted about half of the total docket. But on the

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

basis of our very limited knowledge of the past, this is an anomaly: over the span of a couple of centuries, it appears that the civil docket has dominated and that the current level of criminal prosecutions is historically anomalous.[6] In the more recent past, observers fretted over whether we were about to be overwhelmed by a torts tsunami; but the long-term trend, in which contracts dominate the civil docket, has reasserted itself, reminding us how dangerous it is to assume that any given situation is the way things always have been and always will be.

A second explanation for the puzzle of the relationship between population, economic activity, and litigation rates might focus on the noncontractual part of the civil docket. While it is true that contracts dominate the civil caseload, they share the courts with other litigation that may not track economic activity so closely, or may even bear an inverse relation to economic growth. For example, the "civil" caseload includes divorce, which in the United States requires a court order, not simply agreement between the parties. (The parties may agree about division of assets but cannot by private agreement effect an official end to their marriage.) Bad economic times may increase stress on relationships and bring increased divorce rates; conversely, prosperity may allow marriages only marginally satisfactory to the partners to continue. There may be other forms of civil litigation that display the same relationship (bankruptcy, on the federal docket, for example).

To return to the issue with which we began this section, we can safely say that the data suggest patterns much more complex, interesting, and occasionally mysterious, than the "runaway lawsuits" story one sometimes encounters in the press. The United States does have a lot of lawsuits. It also has a lot of people and a very high rate of economic activity and growth, both of which produce high levels of civil litigation. Whether our level is optimal, whether there are better ways to regulate the economy and to compensate people injured in accidents of various sorts, is a serious question. It is a question that cannot, however, be answered simply by pointing out that we have lots of lawsuits and that the number is growing.

Conducted by Whom?

All developed nations in our contemporary world either allow or require specialists (lawyers) to handle civil disputes in state-sponsored forums

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

(the courts). Traditionally, comparative law scholars have classified legal systems according to who holds primary responsibility for developing the evidentiary and legal elements on which the case depends. In so-called inquisitorial systems ("investigative" or "judge-centered" might be better terms, given the special connotations historically attached to the inquisitorial system), a state official, the judge, holds primary responsibility. In so-called adversarial systems, the parties and their representatives hold that responsibility. The United States lies clearly on the adversarial side of this divide: civil litigation here is lawyer-centered rather than judge-centered. Lawyers gather and present both the facts and the law to the judge, who plays what is, from the standpoint of observers from European, Japanese, and Chinese legal systems, an extremely reserved and passive role.

In part this choice arises from constitutional structure. The US legal system is the only one that currently uses a jury for any significant fraction of civil cases, and it would be difficult to the point of impossibility for lay juries to conduct investigations. In part, however, the choice reflects a series of decisions whose collective result created a much larger supply of lawyers, whom the parties pay, than judges, whom the state pays. Even within the constraints of the Constitution and our legal traditions, we could have designed a system that allocated more responsibility to judges. That we have not is in part a choice to privatize the civil disputing system. And that choice was, in turn, dictated by still another choice—or perhaps circumstance would be a better word: having a relatively open, unregulated bar.

All commentators agree that the democratization of the Jacksonian era (which for these purposes extends from 1830 to just before the Civil War) swept away even modest barriers to entry to the bar in the United States. Free entry to economic opportunities, whether it was a corporate charter or a "learned" profession, made it possible to aspire to the provision of the Indiana constitution: "Every person of good moral character, being a voter, shall be entitled to admission to practice law in all courts of justice." In practice that meant that until well into the twentieth century, there were few regulatory barriers to becoming a lawyer—with the notable exception that women and racial minorities were not welcome. In the course of the twentieth century, the bar, probably seeking to prevent competition, managed to impose regulatory barriers, requiring the completion of college, attendance at a law school, and passage of a written examination as a prerequisite to admission. Richard

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

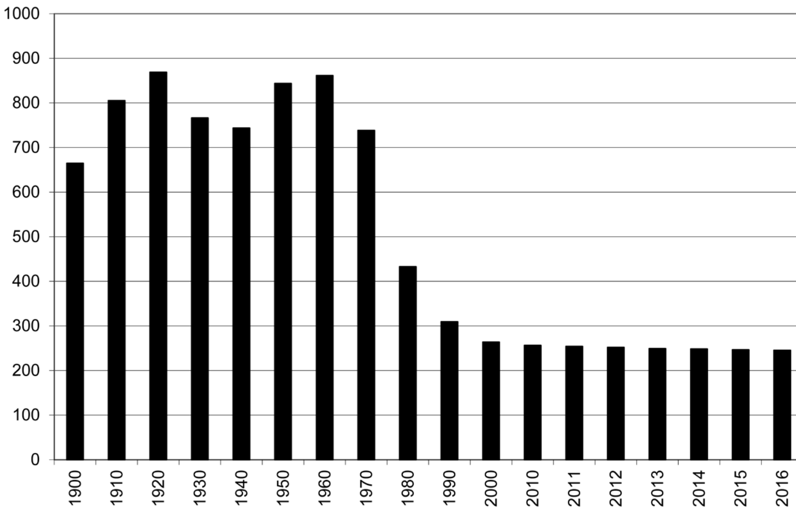

FIG. 7. US population per lawyer

Abel describes this "professional project" as an effort to increase both the social status and the economic well-being of lawyers—by creating a professional cartel. The evidence indicates that this effort has been spectacularly unsuccessful: since the Jacksonian period, there have always been more people licensed to practice law than have been able to earn a living from doing so—supply has consistently exceeded demand, at least as measured by willingness to pay for legal services. Consider the numbers, as in figure 7.[7]

If the first part of this chapter has things right, however, we shouldn't be comparing lawyers to population. We should instead be comparing lawyers to economic conditions. If one does that, a different picture emerges (fig. 8), showing a long-term *decline* in the number of lawyers per GDP dollar, or, putting it another way, an *increase* in the number of GDP dollars associated with each lawyer. This story, consistent with the picture of civil lawsuits as a function of economic growth in a market economy, suggests as well that lawyers at the start of the twenty-first century detracted less from or contributed more to the GDP than they had at the beginning of the twentieth.

The numbers tell part of the story. The other part, having to do with the organization of the bar and the financing of lawsuits, and changes in both during the second half of the twentieth century, provides the themes

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

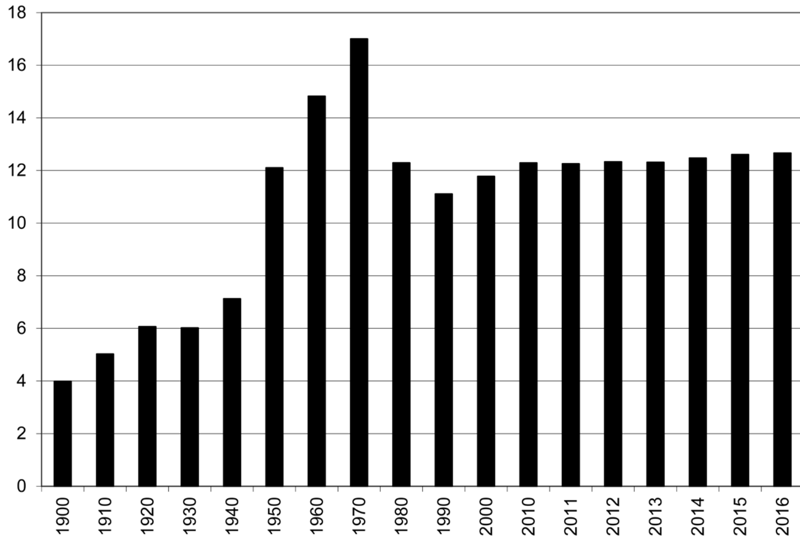

FIG. 8. Million GDP per lawyer

for chapters 3 and 4. Before exploring those developments, however, it's useful to know something more about the demographic outlines of civil litigation.

With What Outcome?

Most civil suits settle. They settle now, and they have settled far back into previous centuries and millennia. The best contemporary studies estimate that between two-thirds and four-fifths of all civil cases brought in state courts now end in settlement—about 12 million settlements annually.[8] We lack any reliable statistics concerning the terms on which these cases settle.[9] A few settlements contain confidentiality clauses that forbid disclosure, but these clauses are not the reason for our lack of knowledge. It is rather that settlements are private transactions, not judicial actions, and they are private transactions that, unlike the sales of houses or cars, need not be registered or recorded anywhere. So we can say only that these settlements occur. I will later argue that our ignorance about the terms of settlement constitutes a significant problem in our understanding civil litigation, a problem that has grown as the proportion of settlements (with

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

unknown terms) to trials (where the outcome is public information) has grown. For now it is enough to note that settlements are pervasive.

We know somewhat more—though less than one might suspect—about cases that conclude with a trial. The best study of civil trial outcomes is again a product of the federal Bureau of Justice Statistics (BJS), which carefully surveyed the outcomes of civil cases going to trial in the nation's seventy-five largest counties.[10] The largest salient categories were contract and tort. Both processes and outcomes differed for tort and contract. Recall that contract claims dominate the filings. But by the time trial has arrived, most of the contract cases have settled, so only about one-third of the cases tried flow from contract suits; torts make up most of the rest. When tort suits go to trial, it is usually a jury trial: otherwise put, 93% of the civil jury trials in the United States involve tort claims. But those juries do not greatly favor the tort plaintiffs: the plaintiff "win" rate for tort claims hovers at about 50%—53% in the BJS findings and just below 50% in other careful surveys. When the tort plaintiffs do prevail at trial, they win relatively modest amounts: in 2005, the most recent year for which we have good data, the median judgment (in the half of cases in which tort plaintiffs prevailed) was $28,000. Contract plaintiffs did better: they won more often (65% of the time), and when they prevailed the median judgment was higher ($35,000) than in the tort cases. Although one might infer otherwise from newspaper headlines, less than 10% of all judgments were for more than $250,000 and less than 4% for more than $1 million. Finally, there were punitive damage awards (where the judgment includes a sum designed not to compensate the plaintiff but to punish the defendant for outrageous or intentional harm) in 5% of the cases, but the median amount of punitive damages was relatively low—about $64,000.

Important as they are, these statistics deceive in one important respect. The damage judgments have what statisticians call a "long tail." That is, the median award of a successful tort plaintiff may be only $28,000, but a very small number of cases account for a very large proportion of all damages awarded. To use a specific example, in 2001 the largest judgment in the nation came from a business dispute among franchise store owners in Texas and Mexico, replete with charges of fraud and insider trading. A Dallas jury awarded the plaintiffs $90 million in compensatory and $364 million in punitive damages (the total award was reduced to $121 million on appeal). That single judgment thus accounted for a substantial part of the total of $4 billion in damages awarded in the entire year. For a plain-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tiffs' lawyer, the aspiration is to represent a client in a case like this one; for defendants (and particularly repeat defendants such as liability insurers), the goal is never to pay such a judgment and to minimize the number of smaller ones.

One can measure civil litigation on a third dimension as well—that of time. As with the damage awards, the medians are relatively short, but the curves have long tails. The median time from filing of the complaint (the act that starts a lawsuit) to termination was just over two years (24.2 months), with tort cases taking on average a bit longer (25.6 months; recall that more tort cases go to juries) and contract cases a bit less time.[11] But the occasional complex case—the sort mentioned in press accounts—drags on for years. Trials themselves display a similar pattern: the mean number of trial days was just under 4 (3.7 days), with tort cases taking, on average, a little longer than contract cases. Each category has its exceptions: among torts, asbestos liability cases took the longest (average trial lengths of 14 days); among contract cases, employment discrimination took the longest (just over 8 days). Again, there are outliers: fewer than 10 percent of the cases took more than three years to come to judgment, and a tiny sliver dragged on for five years or more. But, like gigantic damage awards, these never-ending cases are exceptions.

Finally, one can ask who is involved in the cases that go to trial. The data are heavily skewed: in more than 70% of cases that go to trial, the plaintiff is an individual, not a business or government entity.[12] While slightly less striking, the pattern holds even for contract cases, which one might think would be dominated by business/entity plaintiffs but are not. Only about two-fifths (44%) of contract plaintiffs are businesses or institutions. One can tell several stories about this dominance by individuals: a plausible one is that businesses and entities try to arrange their operations so they will be holding the stakes if something goes wrong—with the result that they will be defendants rather than plaintiffs. Another story is that these businesses and entities, because they are repeat players in the disputing game, are more likely to settle, even on less than optimal terms. This explanation gets mild support from the circumstance that even among defendants (which, given the dominance of individual plaintiffs, one might expect would be lopsidedly businesses/entities) the proportion falls only by a narrow margin on the business/entity side of the line. Among cases going to trial, 47% of the defendants were individuals, 53% businesses, government, or other entities. The lesson seems fairly clear: on both sides of a dispute, repeat players settle while individuals are more likely to go to trial.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Understanding the Numbers

The United States saw between five hundred thousand and a million civil lawsuits in 1900. In 2000 it saw 7 million big civil lawsuits (or about 14 million of all sizes)—a sevenfold increase. The population did not increase sevenfold in the century; a ratio of 170 persons per civil suit in 1900 had fallen to 30 persons per suit in 2000. But, if we remember that civil suits track dollars more closely than they track persons, a different picture appears: in 1900 it took about $750,000 of Gross Domestic Product to "produce" a civil lawsuit, a number derived from dividing state civil suits into the GDP. In 2000 it took more—in constant dollars—about $1 million. Viewed from the standpoint of economic activity, the country had become less, not more, litigious. Otherwise put, there would be substantially more civil litigation today if we had continued to litigate at the same per dollar rate as at the start of the twentieth century. For those who think civil litigation is a social disease, this is not good news: bad but not as bad as it might be. For those who see civil litigation as a necessary mechanism of a market economy, the picture is more mixed: a growing economy inevitably produces more situations requiring what Willard Hurst, a great American legal historian, understatedly called "adjustment." The increase in the per-case value suggests that some claims that would have been litigated at the start of the century are not being brought now—they have been priced out of the claims market. As we shall see, this result accords with intuition as well as with some developments analyzed in chapter 3.

If one looks at lawyers rather than lawsuits, the picture is similar. Those processing this litigation, the lawyers, remained relatively steady at about one per seven hundred persons for the first six decades of the century, then fell sharply to less than half that number by the end of the century. But because the same century saw such great economic growth, the number of lawyers at the century's end had still not "caught up" with the dollars. So one lawyer produced (or if you take a skeptical view of civil litigation, "impeded") about $2 billion in GDP in 1900. The value had risen to $14 billion per lawyer by 2015 (in constant dollars), in spite of the great increase in the number of lawyers per capita.

Understanding this background makes the next part of the story comprehensible. In the middle of the twentieth century, courts and legislatures in the United States made some subtle but fundamental changes in the way civil litigation operates—in what lawyers call civil procedure. Those changes privatized civil litigation, shifting from the courts to the lawyers

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

and from the public fisc to private purses the burden of investigating the facts underlying lawsuits. That shift was possible because in the United States the barriers to entering the bar were relatively low. Privatization, in turn, altered the character of civil litigation, making it more searching, more expensive, less theatrical, and probably somewhat slower. These changes combined with the increasing concentration of lawyers in the second half of the century to create the conditions for a new market in legal services and a new culture of civil litigation.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER THREE

The Economics of Civil Litigation

Students come to law school with various intuitions and assumptions about law and lawyers, only some of which are true. One of the things they "know" is that poor people cannot find good legal representation. That was true a hundred years ago. It's not true today for civil plaintiffs with strong cases who seek significant money damages, a category that includes many, but certainly not all, civil cases. It's not true for most civil defendants, with, again, some notable exceptions. The reasons it's no longer true lie deep in the story of the US economy as well as in its legal profession. The bar, particularly the plaintiffs' bar, has "refinanced" itself over the past five decades, and the refinancing has changed the way lawsuits are brought, defended, and settled.

A few years ago, I wanted to tell my students how much the average lawsuit cost (in lawyers' time and outlays for experts, depositions, and the like). There is no published data, so I began calling lawyers whom I knew and who had been very helpful about details of practice. All of them told me the same thing, "It all depends; I really can't say." At first I thought they were being uncharacteristically secretive, but they were right. Finding out why they were right took me several years. They were right for two reasons: because we have not one but a half dozen systems of financing civil litigation; and because the great variable in most civil litigation is the cost of discovery, which *does* depend on which facts matter and who has the information about those facts.

We can start, however, with some simple, basic, and important propositions. As we have seen, most civil lawsuits are contract claims. In those suits, it is easy to explain how the lawyers are paid: initially both plaintiff and defendant are directly paying their own lawyers, who are, most likely, billing on an hourly basis, or perhaps, for small debt collections, at

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

a bundled rate for a given number of cases. Sometimes the contract provides that the prevailing party will collect its legal fees from the loser. Given this system, plaintiffs will bring such claims if the amount at stake is large enough to justify the lawyer's fee—and if the defendant has the resources to pay the resulting judgment. Under such a regime, some plaintiffs with strong cases will forgo suit, either because a judgment would be uncollectible from an insolvent defendant or because the costs of bringing suit exceed the amounts at stake.

For their part, defendants will defend such claims if the amount at stake is significantly greater than the costs of defending the claim. As the amounts rise, the likelihood of lawyers' involvement rises; as the amounts at stake drop, the more likely it becomes that claims will be handed to bill collectors or other routine, nonlawyer processors. This description leaves out the nuances of such fee-for-service representation, but with that qualification, it is essentially accurate for the 60 percent of civil claims that flow from contractual agreements. The rest of this chapter tackles the remaining 40 percent, for which we have created, out of bits and scraps, a litigation finance system unique among the legal systems of the world. To understand it requires, first, a detour into developments that lie far from law or civil litigation. After completing that trip, this chapter will explain how the system as a whole operates.

A Child's Economic History of the United States in the Twentieth Century

In 2008 the nation and the world experienced an enormous economic shock. The aftermath of that shock called into question the adequacy of financial institutions and regulation. To understand the current litigation system, however, we need to go back a century before the shock of 2008—to see the institutions and assumptions that called forth the litigation system.

In 1910 most Americans lived on farms. In 2010 a vanishing few did. In 1910 only a handful of wealthy Americans had access to the banking and credit system, which was, even for those who could use it, primitive. In 2010 social reformers bewailed the circumstance that a few pockets of the poor still remained outside the banking and credit system, and the social security administration prepared to issue even to those "unbanked" persons ATM cards to allow them to withdraw funds from their monthly

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

checks. In 1910 most Americans lived outside cities. The places where they did live were linked by an inefficiently built network of railroads, many of them close to bankruptcy as a consequence of competitive overbuilding. Worse, some of that overbuilding had been subsidized by state and municipal bonds. Sold to lure the railroads to build their lines and, with the lines, to bring economic prosperity to farms and towns, the bonds went into default when the roads failed or when they were built but did not produce the hoped-for prosperity: not every town in the country could become an agricultural and commercial hub. If one turned from public to private finance, matters looked even worse. The banking system was a shambles. Lacking any effective regulation, and hobbled by charters that often made it impossible for banks to operate across state lines, these state-centered institutions could be brought down by the ordinary swings in the financial cycle or by disruptions in the local economy. When they collapsed, their depositors as well as their owners lost everything. As a result, the prudent often avoided the banking system, with the result that it was starved of the funds that might have enabled it to survive at least the smaller financial storms.

On the brighter side of things, the national transportation system combined with a growing population to create a large national market and to repay generously those who could serve its needs. Communications innovations—the telegraph and the telephone—created a parallel national communications network; radio lay just around the corner. The country had ample natural resources, which could be moved around to serve centers of industry and population. Those centers of industry were starting to produce and distribute goods for mass markets. An active if still regional press made it possible to advertise the goods widely, and the transport network made it possible to distribute the goods to national markets. Sears Roebuck and Montgomery Ward created mail-order catalogs that found their way into every household and outhouse in the country, both serving needs and stimulating demand for everything from the basics of life (tools, roofing) to borderline luxury goods (toys, dress clothing).[1] The automobile, still an eccentric oddity at the start of the century, was to transform both industry and society over the next hundred years.

The economic historian Douglas North has argued that another transformation was under way as well—a transformation in the nation's willingness to use governmental power to regulate economic life and to redistribute wealth.[2] Railroad regulation, antitrust legislation, labor legislation, food and drug and agricultural inspections, and workers' compensation

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

laws all "interfered" in the operation of the market. Closer to our topic, they made thinkable the wave of financial regulation that created the modern securities and credit markets in the decades before World War II. The first step was the creation of the Federal Reserve System in 1914, a step that enabled national (and political) control both over the banking system and, in years to come, over monetary policy.[3] A national banking system forms a cornerstone of sophisticated financial markets; although we have learned in recent years that such a banking system is not unshakably stable, it remains orders of magnitude stronger than it was in 1910. Sophisticated financial markets, together with predictable legal enforcement, enable the extension of long-term, fancy credit. And such credit arrangements lie at the root of much modern litigation, both because they create the conditions that give rise to litigation and because they enable its financing by the bar and by parties.

Between 1929 and 1932, the infant financial markets imploded, as they did again in 2008. Stocks famously crashed, banks failed, prices plunged, and home and farm foreclosures rose as unemployment crested.[4] Government flailed as it tried to respond, trying a bit of everything: public works, price supports, a flirtation with corporatism, deposit insurance, and market regulation. Three of these experiments proved especially important. Among them they created modern credit markets. Modern credit markets in turn reshaped the economy when it emerged from World War II. And this new economy reshaped civil litigation. For the purposes of this study, the big three Depression-era developments were deposit insurance, securities regulation, and the government-sponsored creation of a secondary mortgage market. Recent years have challenged the design and operation of each of these systems, but for our historical purposes these challenges do not undercut the importance of the changes.

The Federal Reserve regulated banks, but those banks at first did not insure deposits. So, when the Great Crash came in 1929, the banks that failed took their depositors' money down with them. In 1933 the Federal Deposit Insurance Corporation (FDIC) began to insure bank deposits, enabling depositors to have more confidence in the banking system.[5] Between 1911 and 1966, the Postal Savings System existed alongside banks; its deposits were secure, but relatively low caps on accounts meant that it would be useful only to very small savers. From 1933 on, the Federal Deposit Insurance Corporation insured deposits up to a statutory amount. At least in theory and often in fact, deposit insurance combined with regulation to create a new banking system. Banks were subject to

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

state and federal regulation designed to prevent them from doing dishonest or particularly risky things with depositors' money. One might have imagined that banks would be free to do whatever they liked, with the premium charged for deposit insurance rising along with the risks—in the same way that fire insurance premiums rise as the distance from the nearest hydrant increases. No one was prepared to go that far. Instead, the FDIC charged all banks a flat premium and relied on bank examiners and regulatory authority to prevent risky practices—and the result was that banks exploited regulatory failures, essentially gambling with public dollars. Yet even with these failures, deposit insurance provided a bedrock for consumer savings and for consumer credit.

Deposit insurance guaranteed against loss and aimed primarily at smaller, retail-level transactions (the caps on insurance meant it would not protect very large deposits). For larger transactions the New Deal took another approach, one that would be the hallmark of broader US financial markets: transparency. Unlike the bank regulatory system, the Securities Act of 1933 (regulating the initial issuance of securities)[6] and the Securities Exchange Act of 1934 (regulating the secondary market in such securities)[7] rely on a system of compelled disclosure. The premise is that investors, if they know all the relevant facts, will make sensible decisions. Unlike the regime for banking regulation, the securities regulation regime does not forbid risky or questionable practices. Instead it requires they be disclosed so markets can take account of them. An apparent exception in fact provides a prime example: the prohibition on "insider trading." This provision prevents those who possess material information not yet disclosed to the public from trading on this information. Neither the president nor the file clerk can buy stock before an announcement of a promising new product, nor sell it before public announcement of plunging profits. Once the announcement is public, everyone can act as he sees fit, with all having access to the same information. The animating assumption is that the market will price in any risk. This regime of transparency and disclosure has provided a template not only for the securities market but for the consumer credit market that developed after 1945.

Deposit insurance protected small savers. Securities regulation, in theory, provided all investors with all the relevant information and thus paved the way for a more trustworthy securities market. But most Americans had modest savings and until recently had no direct investments in the securities market. Whatever significant assets they had were likely to consist of the family home or farm. And once the age of homesteading

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

had passed, it was difficult to buy a home or a farm because credit was scarce. Mortgage lending was local, and small banks had limited capacity, particularly for loans that would not be repaid for many years.

This situation started to change in 1938 as the federal government continued to search for ways to bring the nation out of the Depression, in which it remained mired. One idea was to create a national agency that would purchase mortgages from local banks and package them into securities. Doing this would, it was thought, put money back into the hands of local lenders, thus enabling more loans and the economic activity that came with them. In addition, by pooling mortgages from all over the nation, these securities would reduce the default risk arising from regional economic slumps: if the Florida orange crop froze and defaults in that region accordingly rose, that crisis might be counterbalanced by prosperous Chicago-area manufacturing. To encourage the purchase of these mortgage-backed securities, the new agency—The Federal National Mortgage Association (now known as Fannie Mae)—guarantees repayment of the underlying mortgages. Unlike a number of New Deal schemes, this blending of public subsidy with private enterprise succeeded beyond its founders' wildest dreams. In the years after World War II, Congress increased incentives to build and to lend by creating the Veterans Housing Administration, which both subsidized rates and guaranteed repayment to qualifying veterans.[8]

The final foundation for the new economic order was, sadly, World War II. Rationing, scarcity, and diversion of consumer goods into the war effort produced a rate of compelled savings that the United States has not seen before or since—24 percent of household income. Wages earned by service members and home-front workers had very few places to go until peace came. When peace did come, the new credit markets combined with pent-up demand to create a consumer-based economy that lasted into the current century.

Around many US cities new suburbs sprouted. Many of them were surrounded by billboards announcing terms like "$99 down to Vets! Move in Now!" Many of these new homes were beyond existing public transport lines. To reach them the residents needed automobiles. The industry that had produced tanks, jeeps, and trucks in astonishing numbers during the war was happy to retool to produce large volumes of autos. Moreover, the automakers were also happy to extend credit to their buyers. Each of the major US automobile manufacturers created a finance arm designed to lend money to installment buyers. Combined, the new markets in

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

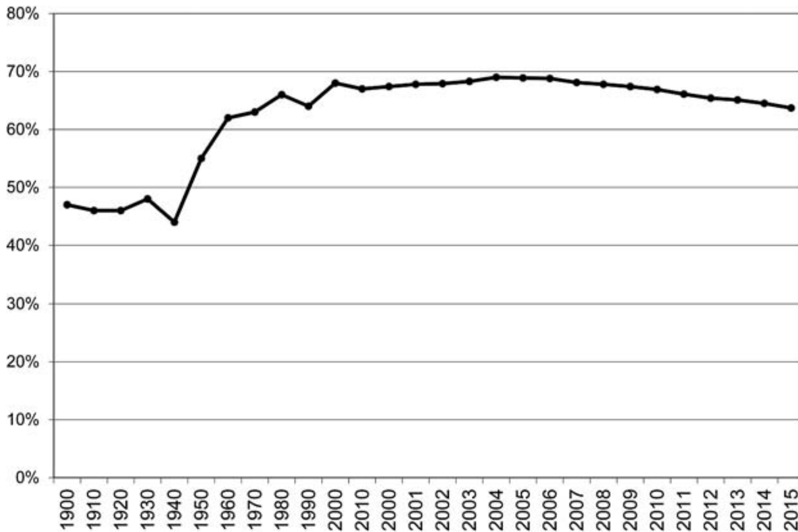

FIG. 9. US home ownership rates

housing and automobiles created a decades-long economic expansion led by housing and manufacturing (the new homes needed everything from refrigerators to birdbaths) (see figs. 9 and 10).

We are again in the midst of a period that has caused us to reassess some of the risks created by this credit-based economic expansion. We may reach individual and national decisions that more of our recent spending should have come from savings rather than credit, and that regulation did not keep up with the changing market. Whatever judgments are made, however, it is important to understand how these economic developments produced our present litigation system.

Ownership, Insurance, and Litigation Finance

Housing and automobiles deserve emphasis not only because they transformed daily life for Americans but because they play a special role in the financing of litigation. Lenders financing homes and autos wanted to protect their collateral: the house and the car. To do so, they required borrowers to insure their houses and vehicles. In theory, the lenders needed to require borrowers to insure only against loss—fire and similar hazards in the case of housing, collision and other damage in the case of cars. But

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

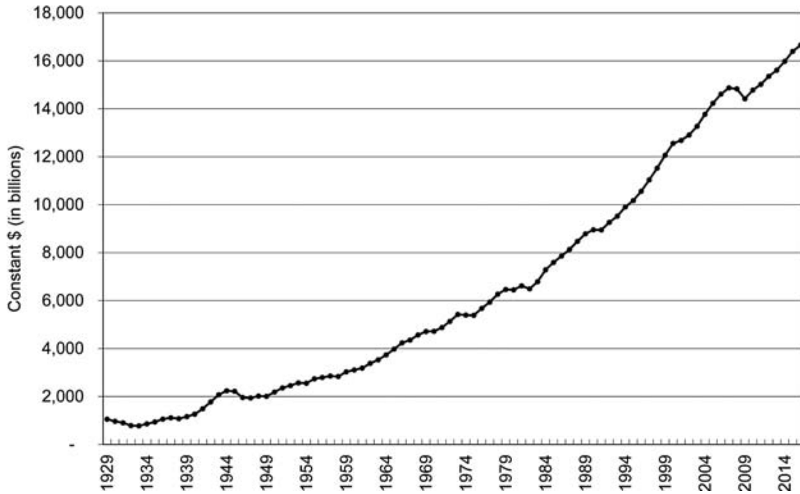

FIG. 10. US real GDP

for housing, state regulators established standard "homeowners'" policy packages that included liability insurance. As a consequence, every FHA or VA mortgage entailed a liability policy covering its owners when a guest or the postal carrier breaks a leg on a slippery walkway.

Even before the current wave of mandatory auto liability insurance legislation, the automobile finance companies performed a similar function for automobiles. The lenders were worried not only about the value of their collateral, but about the possibility that they might be held secondarily liable if they helped place a dangerous instrumentality (the automobile) on the streets (by financing the purchase) without assuring that the owner could respond in damages. As a consequence, every financed auto was also an insured auto. The expansion of consumer credit assured that most automobiles would be financed—and thus insured, even in those states without mandatory insurance laws.

Insurance plays a dual role in financing contemporary civil litigation. Most liability policies contain two promises by the insurer. The insurer promises to pay up to policy values if I, the owner of the house or the car, am successfully sued by someone I have injured. I have to that extent protected my noninsurance assets: I won't lose my house if the visitor trips on the walkway; I won't lose my car if I injure a pedestrian with it. The second promise, almost as important, is to provide me with a lawyer if I am sued for any insured event. Courts have been generous in interpreting

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

such coverage: in some cases they have interpreted a homeowner's policy as covering defenses against claims for sexually transmitted diseases—if the transmission occurred in a bed in the insured dwelling—and for a fistfight between two drivers that broke out after the auto accident! Thus, most homeowners and drivers have a form of legal insurance covering claims arising out of their most valuable assets.

Homeowners' and auto liability policies do not exhaust the field. Other common forms of liability insurance include commercial premises insurance (covering liability to the customer who injures himself in my business), professional malpractice insurance (carried by physicians, lawyers, accountants, engineers, and others), product liability insurance (in case my widgets unpredictably explode), and other, more exotic lines of coverage. What they have in common—and what makes them important for understanding civil litigation—is something they share with the more familiar kinds of insurance: they provide assets from which a judgment or a settlement can be collected; and they generally provide a defense lawyer for the insured. Insurers typically identify lawyers and firms whose experience and integrity they trust, who agree to defend cases sent to them by the insurer, usually at a discounted rate. When claims are filed, the insurer assigns one of these preselected lawyers to defend the case.

Beyond coverage and defense, insurance provides a group of claims-settling professionals who create a "market" in settlements.[9] Insurers would, of course, prefer to pay nothing on claims against their insureds. But as a second-best position, they would rather pay less than more, and less often means making an offer at a stage in litigation when the settlement value of the case is lower than it will be at the end of a trial. It can be lower because the claimant hasn't engaged a lawyer—a lawyer who may be able to increase the recovery, but whose bill will also increase the amount for which the plaintiff will settle. Or, after the plaintiff has hired a lawyer, the settlement value will often be lower before either side has invested much in litigation expenses than it will be after those expenses have been incurred. (Not always—investigation and discovery may reveal a claim weaker than the plaintiff thought at the outset.)

Insurance thus creates a group of claims settlers—adjusters, as they are called in the industry. One story about the declining rate of civil trials is the story of these "settlers," whose job it is to head off trials before they happen, and who often succeed in that task. That story gets added strength from a comparison. Contract cases as a group do not involve adjusters. Although other dynamics send contract cases to trial at a lower

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

rate than insurance-driven auto cases do, there is good evidence that those running the contract cases (lawyers and their clients) are worse at calculating settlement values than are the insurance adjusters: two-thirds of plaintiffs prevail in the tried contract cases, a much higher rate than one would statistically expect. And when the plaintiffs prevail, they recover larger damages than do their tort cousins. There may be several reasons for this anomaly, but one candidate is the absence of expert adjusters in the contract area, adjusters who run a market in claims.

Paying for the Plaintiffs

Insurance creates both a pool from which judgments can be satisfied and a defense for the insureds. But it doesn't otherwise help the plaintiff finance his lawsuit: indeed the assured defense makes it *harder* for the plaintiff to bring her suit in cases that have an insurance policy in the picture. For the first half of the twentieth century, insured defendants as a group had the upper hand: they had prepaid their defense costs (in the form of premiums), and their defenders (hired and paid by the insurers) had a deep pool of resources. The insurers could use this deep pool strategically, knowing that even if they lost in the end, the plaintiff could not recoup his legal fees: recall that in in the United States each party pays for his own lawyer and that fee-shifting is the exception.

But the United States by the start of the twentieth century permitted contingent fee litigation. In a contingent fee system, the plaintiff's lawyer agrees that he will take his fee—typically a percentage of the recovery—only from a settlement or collected judgment: if there is no settlement or judgment, the lawyer forgoes any fee. This arrangement creates "free" representation for cases that will produce a money recovery. The term properly sits between quotation marks, because the representation is not free. Instead, the costs of the plaintiff's lawyer are spread among the lawyer's other clients who prevail in their claims—just as the cost of defending and paying auto accident suits is spread among all the insurers' policyholders. Contingent fee representation is, thus, a form of after-the-fact legal insurance in which the risk pool consists of all the clients of that lawyer. In practice, almost all personal-injury and similar representation takes this form.[10] Even when explicitly given the choice of a fee-for-service alternative,[11] most individuals decide on contingent representation regardless of their ability to pay. There are sensible reasons for this choice.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Lawyers are better evaluators of the strength of cases than their clients. If a lawyer is prepared to make her own investment—in the form of time and expenses—in a case, it's a reliable signal that she believes it has merit. Moreover, the contingent fee appears to solve the problem of monitoring the lawyer's dedication and diligence: it's her money as well as the client's on the line. (In fact, there are some subtle conflicts of interest in this situation, but no more than with the fee-for-service arrangement.)

This sketch ignores a critical issue: litigation investment. In 1900 most litigation did not require great investment beyond the lawyers' own time. By 2000 there were cases in which the cost of lawyers' time was dwarfed by other expenses: experts, depositions, analyses of documents and similar evidence, travel, and the like. A contingent fee system works effectively under such circumstances only if the lawyer has access to working capital that will enable him to invest in the lawsuit.[12] If he does not, the contingent fee arrangement will not be of great use to the client: she will have a lawyer, but that lawyer will not be able to maximize the potential recovery from the case because he will not be able to invest sufficient funds in it. Roughly speaking, contingent fee lawyers were in just such circumstances in 1950. As a group, they lacked the capital or borrowing capacity to finance their cases adequately. As a result, the defense bar, funded by the insurance industry, could often prevail not on the merits of the case but by reason of asymmetrical financing. Jerome Carlin, a pioneering sociologist of the legal profession, chronicles the unhappy story in a 1962 study, *Lawyers on Their Own*. Carlin tells of marginal lawyers with few resources, scrambling to pay the rent and, as a result, only occasionally achieving an excellent outcome for their clients, who were not paying much but also not getting much in return.[13]

By 2016 the playing field had leveled; indeed, some defense-side representatives asserted that it had tipped in plaintiffs' favor. That assertion was probably an overstatement, but that it could be plausibly made demonstrates the magnitude of change. A few years ago I asked a well-known member of the plaintiffs' bar to come to one of my classes to price a hypothetical lawsuit involving a boy who had been bitten by guard dogs when he tried to retrieve a baseball that had gone through a hole in a factory fence. Glancing at the imaginary facts, which occupied less than a page, the lawyer rattled off a series of experts he would need to engage—surgical, psychological, plant security, accounting, and some more—rapidly did a mental calculation, and said "$250,000," an amount he would need to invest in pretrial expenses *exclusive* of lawyers' time. He did so with-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

out batting an eye and with the certainty that his practice group could advance the funds needed. As this episode illustrates, the plaintiffs' bar—considered as a group (there will always be exceptions)—had recapitalized itself. With access to adequate funding, these new-model plaintiffs' lawyers can mount cases an order of magnitude different from those of their predecessors, whose hard times and meager resources Carlin described. Indeed, when, for a second edition of his book, Carlin went back to his sources (or their successors), he found that they were complaining that a new group of lawyers, like the one I have just described, were taking their best cases away, diminishing their already meager incomes.[14]

Several phenomena combined to create this change, and it is difficult to assign primacy to any single one. First, the spread of liability insurance on homes and autos guaranteed that there would be assets from which a judgment could be collected, facilitating the creation of practices that handled substantial numbers of similar cases. As the plaintiffs' bar developed a robust business model, the profits from some cases could create working capital that could in turn finance other cases. Second, and more slowly, banks and similar lenders began to perceive the plaintiffs' bar as yet another small business from which profits could be made. A successful plaintiffs' practice would generate a stream of settlements and could thus be the basis of a working-capital loan with good prospects of repayment. Gradually, some banks began to develop departments that specialized in lending to lawyers.[15] Even more recently, specialty lenders have emerged that will advance funds directly on the prospect of particular lawsuits, whose estimated results they evaluate as part of the loan underwriting. Finally, for some suits requiring extraordinary investment—mass torts, pharmaceutical liability suits—groups of well-capitalized plaintiffs' firms have formed temporary joint ventures, pooling resources (and sharing any resulting profits) for these lawsuits.

One can see the success of the plaintiffs' bar refinancing in the tobacco litigation that occurred late in the twentieth century. At the time the press noted, with either astonishment or outrage, the size of the settlements—$206 billion. For those tracing the evolution of the bar, the litigation and the settlements marked a different milestone. These suits, though brought in the name of the states (alleging damage to their citizens' health, and thus their own health care costs, from the sale of tobacco), had been brought *and financed* by a consortium of plaintiffs' lawyers, hired by the states on a contingent fee basis to prosecute these claims.[16] This arrangement was almost certainly a good move for the states: the offices of the

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

states' attorneys general, who typically handle criminal appeals and routine regulatory and litigation matters, were not equipped to handle civil litigation on this scale and of this complexity. Moreover, the litigation was both risky and costly; by shifting the cost and the risk to the lawyers, the states saved themselves the out-of-pocket costs, which, one imagines, many legislatures would have been reluctant to fund.

More fundamentally, however, the news was not the size of the settlement but that forty-six states reached the conclusion that the plaintiffs' bar was better equipped than the states' attorneys general to handle such litigation—better equipped both financially and professionally. This was not your grandmother's plaintiffs' bar. Whether one applauds the result as a long-delayed moment of accountability for a predatory industry or as a retroactive tax unjustly imposed on an agricultural product enjoyed for millennia by much of the world's population, the fact that the states would turn to the once-despised, economically marginal plaintiffs' bar tells us about the transformation that has occurred.

By any standards, the tobacco litigation was extraordinary. Most ordinary litigation will attract neither the resources nor the controversy of those lawsuits. For such ordinary litigation, however, meritorious money-damage claims above a certain threshold will attract legal representation more or less matching the controversy. The market works here. For some kinds of lawsuits, Congress and state legislatures have gone further, creating a peculiarly American version of a practice known as fee-shifting.[17] The financing issues described above do not occur in most legal systems outside the United States. Those systems routinely require the losing party to pay the fees of the winner. So the winner collects damages plus his legal fees (or a portion of them: in practice, many systems do not award the actual cost of such fees, but instead award a "reasonable" fee, leaving the parties to pay the difference).

For a variety of reasons, such a regime has never taken hold in the United States. But its second cousin has. For more than a century, Congress has attached to certain claims a provision that a winning plaintiff (not a winning *party*) is entitled not only to damages but to her attorneys' fees. It started with federal statutes regulating major areas of economic activity: antitrust and securities regulation. Such laws get enforced in two ways: through direct government criminal and administrative action and through private civil suits by persons harmed by violations of the statutes. So the Department of Justice or the Federal Trade Commission can bring a public antitrust action, and so can a competitor harmed by price-fixing.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

As an added bit of encouragement to such private actions, Congress provided that successful plaintiffs could recover their attorneys' fees from the defendant. By treating fees in this way, Congress, the theory goes, encourages private citizens to supplement public enforcement actions, thus cutting the cost of government-supported enforcement. (Defendants in such actions note with some bitterness that the fee provisions also place added pressure on defendants to settle, since they risk not only an eventual damage award or injunction but the additional imposition of the other side's fees, which mount as the action progresses.) In the years following the enactment of national civil rights statutes, Congress has attached similar attorneys' fee provisions to many statutory claims with significant public policy implications. Most laws barring discrimination in various contexts have such provisions. And the states have followed suit, attaching fee-shifting provisions to environmental, consumer protection, and other statutes. These statutes have special importance in claims in which the plaintiff is seeking not damages but injunctive relief: the cessation of a discriminatory practice or environmental pollution. The contingent fee won't work for such cases because, even if successful, they will not produce a damage award from which the lawyer can be paid. A fee-shifting statute will.

How Litigation Finance Shapes Civil Litigation

We need now to gather the threads of litigation finance to see how they shape contemporary civil litigation. Those threads dictate what cases will be brought, what cases won't be brought, and sometimes the outcomes of those cases.

Strong Cases That Won't Be Brought

Most civil litigation in the United States seeks money damages as the remedy. For contract claims—a term I use here to include claims arising out of commercial or business relations, even if the legal theory behind the claim isn't explicitly contractual—the parties will likely hire lawyers and pay their hourly fees as the suit progresses. Businesses build the cost of such suits into normal operating expenses and budget for them; most individuals do not. Notice the implications of this proposition: some claims will be strong on their legal and factual merits but will cost too

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

much to prove—and so will not be brought. Take, for example, a one-thousand-dollar claim against a home contractor who has done defective work: unless the defect is glaringly obvious, the cost of hiring a lawyer to press it will be greater than the amount to be collected. That proposition will hold true regardless of the wealth of the plaintiff: no economically rational party will bring a suit costing more than the prospective recovery. The median hourly fee of US lawyers in 2000 was about one hundred dollars—and that median is well below the fees of even inexpensive lawyers in urban areas, the areas that generate most economic activity and therefore most of the contract litigation. So, given the US system of litigation finance, this defective-work suit will not be brought. Notice that it would be brought in one of the legal systems of the world that provide for symmetrical fee shifting: in such a system, the successful plaintiff (recall that the plaintiff's case was strong on the merits) would collect both the damages and his fee from the loser. Moreover, many would add, the likelihood of this outcome might lead our defendant home contractor to settle the suit quickly, lest the fees be added to the damage bill.

It is important to understand that it is not the absolute amount of damages at stake here that will preclude representation. It is rather the amount at stake *in relation to the factual complexity of the case*. Unless the bad workmanship is obvious—a giant hole in the new roof—it will require factual investigation, battles of experts, and so on, all of which take the claim beyond the realm of rational investment. The point emerges clearly if we imagine a second claim, still for one thousand dollars, but this time for a bounced check. That claim will attract representation because the law says there is very little that matters in resolving such a claim: did the defendant sign the check, and did the bank honor it when presented? In most cases there will be no dispute about these facts, or, if there is a dispute, it can be quickly resolved. That makes the claim, though for the same amount, one that can be brought. (Moreover, many states create a form of fee-shifting in bad check cases by doubling or tripling the amount of the bounced check.) It is this relational aspect of representation that explains why I could not get my lawyer-informants to go beyond "it all depends" in telling me what litigation costs.

Risky Cases That Can Be Brought

Consider now a suit at the opposite pole of civil litigation—the suit underlying the movie *Erin Brockovich*, which was released in 2000 to great

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

acclaim and box office success.[18] The plot in real life was almost as dramatic as that of the movie. A public utility company operated a generating plant in a remote part of California's Central Valley. As a by-product of its activities, the utility had been storing hexavalent chromium, a chemical known to be toxic when inhaled. Substantial amounts of that chemical leached into the community's water supply, a fact known to the utility but not to the townspeople.[19] The title character stumbles over the situation and brings it to a lawyer. This was a suit requiring massive investment to prosecute: first to prove that the chromium is toxic when ingested in water; then to show that the levels of chromium found in the water supply have that toxic effect; then to show that the chromium levels were traceable to the utility's actions; and finally to show that the company responsible knew about the danger and concealed it. In advance, the plaintiff's law firm had only suspicions. And it knew that it faced a well-financed opponent that would defend vigorously—as it did. This is exactly the sort of lawsuit that will not be brought in a legal system that routinely shifts legal fees in both directions: even a small chance that the defendant would prevail would make bringing suit unthinkable. But because the plaintiffs do not bear that risk in the US legal system, the financing possibilities described above come into play.

In the actual case, a plaintiffs' firm initially took the case on a contingent fee basis, then found that initial estimates of the expenses were wrong; the resources required exceeded the firm's working capital. At that point the firm contacted other firms, whose joint resources were adequate to finance the lawsuit—in return for a portion of the judgment. The plaintiff's lawyers were able to match the financial resources even of a very well-heeled defendant, making the outcome of the case turn on the merits rather than on the question of who had the largest litigation bankroll. The case settled for $333 million.[20]

The point of the recitation is not that justice triumphed: there continues to be a significant scientific debate about safe levels of waterborne hexavalent chromium, so maybe the plaintiff did not have an overwhelmingly strong case on the merits. Rather, the point is that the system for financing civil litigation has evolved to the point where a very small plaintiffs' firm can assemble the financial and intellectual capital to prosecute a very expensive and complex case against a major and well-financed corporation. Because the plaintiffs' bar can do so, such suits will either be litigated to judgment or will settle on a basis reflecting the merits of the claim and the risks of continued litigation—not the size of the parties' bank accounts or lines of credit.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

The Tort-Contract Financing Divide and Why It Matters

Between these two claims—the hypothetical unbrought suit against the home contractor and the very large suit against Pacific Gas & Electric (the real-life *Brockovich* defendant)—lies most civil litigation. As we have seen, the median judgment for a successful plaintiff (about thirty-three thousand dollars—lower for tort victors, higher for contract plaintiffs) lies closer to the unbringable hypothetical claim against the home contractor than to Erin Brockovich's settlement against PG&E. Tort claims that have prospective damages sufficient to justify the cost of bringing them will usually be able to find a lawyer with sufficient knowledge and capital to maximize the value of that claim. Many defendants on the other end of those claims will have insurance, which, on one hand, may produce the lawsuit by assuring the plaintiff that there will be assets from which he can collect a judgment, but which will also provide a defense and a cadre of settlement specialists.

Contract disputes follow a different pattern. Insurance does not cover most such lawsuits: the fringes of general liability policies may cover some claims at the edge of contract (for example, employment discrimination suits), but one cannot insure against a claim that one has failed to pay bills. So, unlike an auto-accident claim, a contract claim does not automatically have a system devoted to processing such claims. Moreover, the plaintiff will have to decide whether to hire a lawyer to prosecute his claim, with the risk that he will incur legal fees but realize no recovery. And the defendant, if she resists the claim, will similarly have to hire a lawyer to defend. But for the many such claims that involve businesses on both sides of the dispute, the parties will have experience with such matters and, if they are of substantial size, a lawyer to whom they routinely refer matters.

There are, of course, in-between cases: tort claims that arise out of employment relations, some of which will be covered by insurance, others not; business tort claims by large business entities (such as trademark or patent infringement, antitrust, unfair competition, and the like); and more. The parties will sometimes use hybrid financing mechanisms for such claims. A plaintiff may ask a firm to take a large copyright infringement claim with a guarantee of a lower-than-usual hourly rate plus a share of any recovery. Or a large employer may arrange for a flat annual payment for defense of all employment-related claims. But if one wants to understand the driving forces behind the great majority of civil suits, the two basic models for tort and contract cover most of the waterfront.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Moreover, these dual financing mechanisms—contingent fee and insurance defense for torts, fee-for-service for contract claims—go part of the way in explaining what happens with these cases. Start with contract claims, in which both sides will be paying their lawyers, likely on an hourly basis. If their lawyers are diligent, each month the clients will be confronted with a new bill, and at fairly regular intervals they will be presented with the question of whether everyone might be better off settling than investing another ten thousand dollars in a round of depositions. The data tell us that most contract parties at some point say yes to this proposition: contract cases dominate the filings, but only one-third of such cases reach trial. When litigation involves regular, out-of-pocket expenses, most parties decide settlement looks better than possible, eventual—but expensive—vindication at trial.

The remaining contract cases, those that do not settle, present a puzzle to which I have only a speculative solution. Plaintiffs prevail in two-thirds of the contract cases that go to trial. In the world of friction-free theory, this shouldn't happen. Investing their own money and counseled by their lawyers, defendants should, theory tells us, settle more of these cases—arriving at the same fifty-fifty equilibrium as their tort counterparts. As things stand, they are throwing good money after bad, incurring the costs of defense as well as the ultimate judgment. Why is this happening? The answer lies, I think, in the confluence of contract demography and financing. You may recall from chapter 2 that most of the contract cases that *go to trial* involve individual plaintiffs, and many of them also involve individual (rather than entity) defendants. Such parties are least likely to be repeat players and more likely to find themselves consumed by the need to find vindication at trial. And because they are paying their lawyers on an hourly basis, they will not encounter resistance from a lawyer who sees his client burning the lawyers' resources in a vain effort. For the hourly paid lawyer, even time in a bad cause pays the rent. More experienced contract parties may have the perspective to get out earlier, leaving the less experienced, perhaps less rational, individual plaintiffs to fight out their grudge matches in court.

Tort litigation looks different because its financing comes from different sources. Recall that both sides in such litigation are repeat players—the plaintiffs' firms and the insurance defenders—even when their clients are not. Even a small plaintiffs' firm is likely to have multiple cases proceeding simultaneously, and an insurer will have hundreds. Neither plaintiff nor defendant will be getting a bill for legal fees from his lawyer.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Under those circumstances, those whose money is on the line are likely to play for averages. Plaintiffs' lawyers want to win small amounts with some regularity (recall that the average tort judgment in the cases in which the plaintiff prevails is about thirty-three thousand dollars) and, perhaps very occasionally, to find themselves in the heady atmosphere of the right-hand tail of the curve—the tiny percentage of multimillion-dollar verdicts. Insurers have the opposite goals: to stay at all costs out of multimillion-dollar territory and to minimize the number of median verdicts. Insurers minimize the number of such verdicts in two ways. They can prevail at trial—but recall that for an insurer, prevailing after an expensive trial is at best a bittersweet victory. Next best is a settlement at an amount substantially lower than the possible verdict at trial.

The data tell us that these experienced parties operate this system well, or at least rationally. The national win rate for plaintiffs at tort trials is as close to fifty-fifty as one gets in the real world. Both sides are settling strong cases early, the defendants avoiding the futility of an expensive but failed defense and the plaintiffs getting an early settlement that, for the lawyer, avoids the cost of funding later stages of litigation (whether such settlements also benefit plaintiffs depends on how much they need the money now as opposed to later, and how averse they are to the risks of trial). The cases that survive to trial are closely balanced on the merits, as reflected in the win rate, and thus are probably good candidates to send to adjudication.

Who's Left Out in the Cold?

Who's left out in the cold by this system of litigation finance? The apparently obvious answer, poor people, is mostly wrong. It's important to understand why it's mostly wrong as well as the kernel of truth it contains. It's wrong for reasons the preceding sketch makes obvious. A poor person with a viable claim for substantial money damages can almost certainly find a lawyer who has the competence and resources to pursue that claim, with no out-of-pocket expenses. What about a contract claim? Though most contract claims are pursued by hourly-fee lawyers, most lawyers who represent individuals operate on a contingent fee basis, and it is very likely that such a lawyer would be willing to finance a contract claim on such a basis. Some "contractlike" claims, such as employment discrimination, also carry with them fee-shifting statutes that would further attract lawyers to these cases.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

A contingent fee, however, takes care only of those who might recover damages as plaintiffs, and, in fact, only the subset of those plaintiffs whose eventual recoveries would justify whatever investment was necessary to pursue the claim. That will leave out some plaintiffs—whether rich or poor—whose claims do not justify the expenses of litigation. Those plaintiffs simply lump it, treating the irremediable wrong as a cost of living.

What about poor defendants? Here we encounter a brutal truth of a market economy: the poor possess a dreadful protection against most such suits: a rational plaintiff will not knowingly sue a poor defendant, for she has no assets from which a judgment could be collected. Perhaps for this reason, state and federal courts alike have declined invitations to do for civil defendants what they did in 1963 for criminal defendants—to rule that they are entitled to lawyers at public expense. Though no case explicitly says so, these courts may well think that, unlike those charged with crimes, poor persons do not regularly find themselves as civil defendants.

There are two important exceptions to this proposition. Insolvent people get sued in two circumstances—when only a court can grant what the plaintiff wants and when, however poor in cash, the defendant has some valuable asset. Divorce and child custody claims encompass the first situation; holdover tenants the second. Between them, these two categories account for most of the scarce resources devoted to legal aid for civil claims in the United States.

The state asserts a monopoly over marriage and custody. Spouses can agree to separate, but they cannot divorce themselves: they need a judicial decree and thus must go to court. Child custody is similar: the parties cannot bindingly settle custody arrangements without a judicial decree. Thus, even when divorce is consensual, it requires a lawsuit; and if it is not consensual, it may entail a fight bitterer than the worst failed business agreement. Moreover, most legal aid organizations, even if they had vastly greater budgets, could not meet the need: lawyers (including lawyers in the same firm or legal aid organization) cannot represent parties on opposite sides of the same lawsuit. So whichever impoverished spouse first seeks the help of a legal aid office automatically renders the lawyers of that office unable to represent the other spouse. As things stand, neither spouse is likely to find representation. Divorce and custody cases overwhelm most legal assistance offices, which accordingly usually offer only self-representation workshops, coupled with the unhelpful caution that these matters are complicated and their clients should get a lawyer if they can!

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Poverty often precedes divorce; even more frequently it produces eviction for nonpayment of rent. Here a competent defense lawyer can often prevent or delay eviction. Poor people often live in bad housing, and sometimes the landlord has neglected maintenance. Modern housing law gives a tenant, even a tenant who has not paid the rent, some defenses against the landlord's eviction action under these conditions. But they are defenses that require both factual investigation (pictures of the broken toilet, copies of letters to the landlord informing him of the conditions) and some legal expertise (how bad does the hot water supply have to be to amount to constructive eviction?). Most tenants cannot effectively present such defenses, and most eviction cases thus go undefended. How often eviction occurs in the face of meritorious defenses is impossible to calculate, but it is surely a nontrivial frequency. Critics of contemporary litigation finance can point to these cases, as well as divorces, as instances in which provisions for legal assistance fall far short of need.

* * *

In the United States civil litigation occurs because someone can pay for it. It often settles because the pretrial process has uncovered a good deal of relevant information, in light of which the parties can more realistically assess their prospects at trial. To a remarkable extent, we have devised mechanisms, such as insurance and the contingent fee, that spread the cost of litigation among similarly situated parties. This spreading has broadened access. The spreading was also necessary because the procedural reforms that started toward the middle of the twentieth century privatized the costs of civil litigation even as those of the criminal process were being socialized. The next chapter describes that movement.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER FOUR

Privatizing Procedure, Restructuring the Bar

Against the background thus far sketched, one can understand the importance of two related, more technical, developments, one in procedural rules, the other in the structure of the bar. Briefly speaking, procedural rules changed in ways that made it possible—and necessary—to uncover the facts of lawsuits before trial, at a stage lawyers call "discovery," rather than at trial. Equally briefly speaking, the bar, particularly the plaintiffs' bar, created a new business model for itself, a model that allowed it to exploit the possibilities of discovery. This new business model was both flexible and robust, so robust that plaintiffs at the end of the twentieth century began to be able to undertake—and prevail in—litigation that would have been unthinkable fifty years earlier. This chapter seeks to draw together those two strands, procedural change and bar structure, and to show how they interacted with broad economic and social changes to create our current market in lawsuits.

In the world of venture capitalism, dealmakers speak of "taking a company private." The phrase describes a process of reorganization under which a publicly traded company—which, because it is publicly traded, is subject to various forms of public regulation—is taken off the public securities market. It becomes private, subject primarily to whatever agreements the new owners have arrived at, agreements enforced by the laws of contract and fraud. In the middle of the twentieth century, rule-makers and legislators effectively took civil litigation private.[1] That is, they moved much of the salient activity out of the courtroom and into lawyers' offices and conference rooms. In the process they lightened the public fiscal burden of civil litigation. This move also increased the powers wielded

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

by lawyers and their opportunities for creativity—and perhaps chicanery. These changes inevitably shifted more of the costs of litigation from the publicly funded courts to privately funded litigants. The record does not tell us clearly whether those who made the changes intended this effect or, if not, whether it occurred as a result of changes that they did intend. Nor do their intentions matter for our purposes, for, regardless of their intent, we live with the consequences of the privatization reforms.[2]

The preceding chapters spoke of lawyers in relation to population and in relation to economic activity. Those statistics matter because litigants need lawyers. They need them for two reasons. The first reason we share with the legal systems of all developed nations: the legal system has enough complexity that it requires someone with technical expertise to navigate it. The second reason marks the singularity of the US system: more than most of our sister cultures, we depend on lawyers to uncover and present the facts on which a lawsuit turns. The major legal reform of the twentieth century made this function of the lawyer even more important than it was in 1900. Briefly put, the United States has privatized civil litigation where other nations have socialized it.

That choice matters, and much of modern civil litigation radiates from this basic choice. We can see how much it matters if we compare the rules of civil litigation with those of criminal law, where we made the opposite choice—to socialize the process. Just before we took civil litigation private, we took criminal litigation "public." In 1900 criminal law was far more private than it is today, relying significantly on private prosecution; in the days before there were large government offices devoted to prosecuting crime, the victims of crime, or their families, would hire a lawyer to prosecute the accused. That circumstance meant civil and criminal cases resembled each other far more than they do today: in both, privately paid lawyers brought cases against those accused of violating either civil or criminal norms. Moreover, because the private litigants, rather than public officials, controlled the process, a case could end at any point at which the parties decided to compromise their differences.[3] Because of the prevalence of trial, supervised by judges, both systems had a substantial public component. But already by 1900, professionalized public policing in larger cities had put criminal procedure on the path that led to the present. Public police led to public prosecutors, who replaced private prosecution, a development that in turn led to public defenders. The state now runs (and mostly pays for) both sides of the criminal process.[4] Civil litigation took a different path: public subsidy to civil lawsuits has declined while

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

public subsidy of criminal process has increased. Procedural change in the middle of the twentieth century opened the way to the deeply privatized system of civil litigation we now see.

Rules of procedure don't tell people how to behave in forming contracts, driving cars, or buying houses. Instead, the rules of procedure tell the parties and their lawyers how to invoke the legal system when disputes arise out of these activities. For most disputes the parties will disagree less about law than about facts. Consider two very common examples: unpaid debts and traffic accidents. Between them these two kinds of claims account for the majority of civil litigation in the United States. Occasionally the parties will disagree about what the terms of the loan or contract mean—but only occasionally; in the great majority of claims, the only issue will be factual: did the borrower pay? did the product perform as promised? Similarly for traffic accidents: occasionally the parties will dispute the meaning of traffic regulations or the kind of damages that can be sought under tort law. Far more often the fight will be about whether the defendant was reckless when she tried to pass several cars on a two-lane road, or whether the plaintiff caused the accident by speeding. To resolve this dispute, someone will have to gather evidence and present it to a judge and jury. If the parties have all the evidence ready at hand, rules of procedure won't make much difference: they will present what they have and argue about its significance. But what if they don't? In particular, what if one party suspects that the other has relevant evidence—but doesn't want to disclose it because it won't favor his side of the dispute?

In 1900 the only way to force unwilling witnesses to testify (and the only way to acquire documents or similar physical evidence) in civil cases was to go to trial. At trial, the parties could subpoena witnesses and documents. Trial thus sometimes provided parties with their only opportunity to enlist the state's aid in compelling testimony, and in some cases parties went to trial because it was the only route to uncovering such evidence. Because it was trial, however, compelling such evidence involved a double public subsidy of civil litigation: the party seeking the subpoena got it (thus getting governmental assistance in uncovering evidence), and the trial involved a judge and ancillary court personnel, thus increasing the public role and subsidy. In return, the state got something—the assurance that the outcome of the case would be more or less according to law: either the plaintiff would prevail and be awarded damages according to the law; or the defendant would prevail and the plaintiff would take nothing. Either outcome involved both official regularity and public subsidy.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Both the subsidy and the regularity have diminished as procedural rules have reallocated authority, giving the parties powers once enjoyed only by the court.

From Trial to Discovery

Recall the complaint of Roscoe Pound with which we began this study: the excessive number of new trials.[5] Pound, with some accuracy, believed that this ill was caused by an excessively technical set of procedural rules. Over the first forty years of the twentieth century, a succession of procedural reformers created a new model—a set of self-consciously flexible procedural rules that, above all, aimed at uncovering relevant facts in advance of trial. No longer, vowed these reformers, would lawsuits turn on lawyers' tricks and theatrical trial performances. Instead, the new procedure put into the hands of lawyers various devices enabling them to require their adversaries to produce in advance of trial all manner of information. Lawyers now call this phase of litigation "discovery"; it's a phase that scarcely existed before the Federal Rules of Civil Procedure called it into life in 1938.[6] States essentially followed with varying degrees of alacrity, so by about 1960 every state had adopted some version of this new model of litigation.[7] Describing the discovery portions of the rules untechnically, one can say that they allow oral and written questions, requests for admissions ("Does Defendant admit that it is a corporation organized under the laws of Delaware?"), the production of documents (defined broadly to cover almost any record containing information, including digitized information), inspection of land and physical objects, and compelled physical or mental examination of parties. Foreign lawyers and litigants sometimes react as if they have stepped through the looking-glass when they realize the breadth and depth of American civil discovery.[8] US lawyers note both its power to unearth virtually every relevant fact and its simultaneous potential for abuse and wasteful effort. As a result, civil trials—unlike their criminal counterparts—rarely yield surprises to the litigants; the outcome may be uncertain, but the factual contentions will be familiar to both sides.

One can see how thoroughly the no-surprises assumption permeates civil litigation in *Klonoski v. Mahlab*, an otherwise unremarkable civil case. The plaintiff was a surviving husband suing an obstetrician and alleging medical malpractice resulting in his wife's death after childbirth.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

The husband claimed damages for "loss of consortium," an ugly lawyers' phrase describing the affections and intimacy of a marriage. For such a claim to stand—or at least to warrant substantial damages—the plaintiff must present evidence of the quality of the relationship. For example, if all the couple's friends testified that they considered this an ideal marriage, deprivation of that relationship would increase the value of the claim. By contrast, if the neighbors testified that the couples' fights were notorious, it would reduce the value of the claim. Mrs. Klonoski had a sister in Poland, to whom she regularly wrote. The appellate opinion tells us, "As is usual in a well-prepared medical malpractice case, both sides engaged in extensive pretrial discovery and, as is also usual, the parties squabbled about what information should or should not be disclosed. More than a year prior to trial, the plaintiff disclosed, as part of the discovery process, the address in Poland where Mrs. Klonoski's father and sister lived, the address to which her letters (the evidence in dispute) were sent."[9]

Matters stood there when the case went to trial, where the husband testified that, though the marriage had experienced an earlier period of stress during his professional training, things were at the time of the death "tremendously" better. This testimony was, of course, important in enabling the jury to assess damages attributable to the lost emotional tie if it decided the defendant's negligence had caused the death.

But the defendant doctor had dramatic testimony up his sleeve. His lawyers had tracked down the sister in Poland and had obtained from her letters written by the deceased wife during the period in which the husband had testified that things were going well in the marriage. Those letters complained of her husband, recounted screaming episodes, and suggested a divorce lay in the future: "Despite the fact that I want to save this marriage very much, I cannot stand being treated as a moron, but that's how Richard likes to behave" and "As you can see, I think we should get a divorce because we are tormenting each other and no good will come between us. I only pity the yet to be born child because it will never see love between its parents." Perhaps not surprisingly, the jury returned a no-liability verdict.[10]

The plaintiff protested that he had not known of the letters before the trial. The Court of Appeal agreed with the plaintiff, ruling that the defendant's surprise production of the letters constituted "trial by ambush." At first blush this is an astonishing result. No one argued that the information was irrelevant: it strongly suggested that the plaintiff was giving at best a one-sided and at worst a perjured picture of a critical part of the case.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Moreover, the plaintiff had the sister's address and could have located the letters had he wished to do so.

So why did the court reverse? The opinion is probably on sound ground technically, but the tone of outrage in the opinion tells us much about the culture of civil discovery. Such a last-minute introduction of letters supporting a criminal defendant would pass without notice: surprise witnesses are the stuff both of drama and of real criminal trials. In modern civil litigation, however, the premise is that everyone knows everything before trial, and violation of this principle of etiquette warrants reversal. Surprise becomes ambush, a cowardly lying-in-wait. Although this principle does not yield satisfying drama in most civil trials, it has an internal logic. In a world in which most civil trials settle, information like this, which would have a clear effect on the case's settlement value, should be known to the parties before they take the momentous step to trial. In a world in which Richard Klonoski and his lawyers knew of these letters before trial, they might well have accepted the defendant's offer to settle. By holding the information back, the defendant prevented the plaintiff from making a rational decision about settlement, a decision shaped by all the available information.

Unimportant in itself, the *Klonoski* case serves as an icon. Modern discovery does three things. It broadens and deepens the amount of information the parties can compel one another to disclose in advance of trial. It lessens the importance of the rules of evidence, which come into play chiefly at trial. And it reduces the proportion of trials. The first consequence was certainly in the minds of the reformers. The second two may not have been. All three affect contemporary civil litigation.

One other feature of discovery connects it to earlier portions of this study: it can be expensive, and the expense generally has to be borne by the parties themselves. In a world before discovery, one could initiate a case ("plead it," in legal jargon), gather whatever evidence was easily available, and wait for trial. No more. Both sides must invest what can be very substantial sums in pretrial discovery. It's worth investing those sums if one knows that a payoff awaits a successful plaintiff; the rise of liability insurance meant that many plaintiffs could be fairly certain that a payoff did in fact lie ahead if they succeeded. An otherwise esoteric aspect of the discovery rules points to the importance of insurance: a party whose ultimate liability bill may be paid by insurance must disclose the existence and the amount of the insurance.[11] As a logical matter, that requirement makes no sense: insurance is irrelevant to whether the defendant is liable.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

But insurance is critical to parties planning to bring or defend a lawsuit. It is irrational to spend $50,000 on discovery in a case where the insurance limit is $25,000 (putting to one side the relatively rare situation in which the defendant has substantial noninsurance assets). Change the insurance coverage to $500,000, and the $50,000 investment becomes eminently rational.

But for the plaintiffs' lawyer to be able to invest that $50,000, she must have either a bank account or a line of credit that makes such an investment possible. And recall that the lawyer making that investment must often wait many months before trial or a settlement comes. In 1950 few plaintiffs'-side lawyers could imagine such an investment; in 2016 almost any competent one can. How that change came about forms the next part of our exploration.

Reshaping—and Refinancing—the Bar

Structure

In 1900 and for at least the next fifty years, the average US lawyer was a solo practitioner. Although no reliable data allow certainty, most estimates suggest that not until the 1960s did solos begin to make up less than half the profession. Meanwhile, in several large cities, the law firm emerged, a specialized form of legal services aimed at the corporate business client.[12] As corporations expanded, so did the law firms that served them. The expansion was both in size and in geographical scope. At the end of the twentieth century, one source listed a hundred law firms described as "international." Such firms typically had more than ten offices in several countries and a thousand or more lawyers, licensed to practice in multiple countries. These firms were in many respects mimicking the size and scope of their corporate clients, which in the last half of the twentieth century often became multinational. And their profits, distributed to those who, however designated (partner, equity partner, shareholder, etc.), were entitled to share those profits, regularly exceeded $1 million per partner. Not surprisingly, accounts of such firms' fees and profits have entered the professional folklore.

At the other end of the scale stood the remaining solo practitioners. Theirs was a different and sadder story. Undercapitalized and sometimes marginally competent, they operated out of storefronts and low-rent quarters. Their business model might best be described as "file and hope." As

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

one account by a lawyer sympathetic to the plaintiffs' bar described his marginal predecessors, "There was, however, an even lower rung to this ladder: the plaintiff's lawyer who took on such cases with no capability of ever bringing them to trial, but in the hopes of promoting a small nuisance settlement (often no more than twenty-five or fifty dollars). They would start the lawsuit by typing up a very short standardized form of complaint, and would then attempt to settle the case, often as part of a wholesale batch of claims. If no settlement was forthcoming they would drop the case even if it had merit."[13]

Between 1940 and 1980 the plaintiffs' bar reshaped itself. The reshaping had two components. First, the isolated solo practitioners began to form partnerships. Just as important as the emergence of the megafirm is the change in the typical practice group from one to two or three or four lawyers. In 2006 the California State Bar (the state bar with the largest membership in the United States) conducted a survey of its members.[14] Only 13 percent of them practiced in groups larger than seventy-five lawyers. By contrast, of those who were not solos, most practiced in groups of between two and twenty colleagues. Undramatic, those numbers nevertheless mark a fundamental change. Most lawyers are no longer alone.

Having even a few colleagues transforms a lawyer's practice. First, it allows some diversification and specialization in professional competencies and in case types. However competent, a solo practitioner can at any given moment find an uncomfortably large part of his time (and income) riding on a single case. With a partner or two, the situation changes. The group can decide to seek a mix of cases, and many do, taking mostly small-potential but relatively certain suits and balancing them with one or two high-risk, high-reward cases. The resulting mix can provide financial security for the firm while enabling it to make deep investments in cases that may take several years to resolve. As the firm's bankers will see it, the firm now has a more secure business plan, a diversified portfolio of cases enabling it to secure a line of credit should it need one. As a banker who lends to the plaintiffs' bar explained to a journalist, "If a lawyer tells you, 'I'm going to invest $1 million in this case and it's the only one I have and I'm sure I'll get paid on June 30,' we know that's not how it always works. We are more inclined to lend money to someone who says, 'I have seven cases and a business plan that includes a worst-case scenario of what may happen to them.'"[15]

As a consequence, today's plaintiffs' bar does not, for the most part, behave like its predecessors who would "file and settle" or "file and drop"

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

if no settlement were forthcoming. The modern plaintiffs' bar has the resources to take a case as deep into litigation, including to trial, as the merits warrant.

Increased intellectual capital is as important as better financial capitalization. Two heads are better than one, not just in proverbs but in practice. An obvious advantage flows from a colleague who knows the answer to the exotic question of law that has just surfaced: two minutes of conversation can save a morning of research. Even more important than knowledge are perspective and judgment. Twenty minutes of conversation with a colleague can immeasurably improve one's approach to a problem, and the availability of such conversations makes the practice of such a group likely superior to that of a solo practitioner, even if we hold constant the education and experience of the lawyers in question. Combined, the increase in financial stability and intellectual capital made the move from solo to small-firm practice enormously important. Statistically, a practice group that moved from one to three lawyers has made a bigger jump than one that moved from five hundred to a thousand. Anecdotal evidence also suggests that lawyers experience the solo-to-group transformation as just as significant as the move from big group to very big group.

Finance

As an earlier section noted, discovery is an investment. With a slightly larger firm size and a slightly more diversified business, plaintiffs' firms could begin to make the investment required by modern discovery. They needed to make that investment because discovery entailed significant costs. They were able to make that investment because a wealthier and better insured nation meant the investment would more likely pay off. But one additional change was necessary for a robust business model to emerge: deregulation.

Historically, lawyers, like physicians, were forbidden to advertise; it was thought both undignified and likely to result in a race to the bottom. There was also a significant dollop of class bias involved: the same lawyers who took business clients to lunch at the country club and gently pitched for new business steadily opposed forms of activity that might reach non-business clients—print and other forms of advertising, for example. Moreover, lawyers were traditionally forbidden to take any compensation for referring a client to a colleague who could better handle the case. Combined, these two professional prohibitions prevented lawyers represent-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

ing individual clients from reaching a broad base of prospects (most individuals will need a lawyer only once or twice in their lives and so haven't any idea where to turn) and further discouraged the lawyer into whose office they wandered from putting the case into the most capable hands.

Both prohibitions have largely disappeared. In a series of cases growing, somewhat oddly, out of the civil rights movement,[16] the US Supreme Court largely eliminated the ban on truthful advertising by lawyers—with results that one can see on the backs of buses in cities and on daytime television. The consequences are not always edifying, but prospective clients have at least one number to call. When they call that number, the second dropped restriction—on referral fees—comes into play. Either by formal rule change or by lax enforcement, most states now permit a lawyer who refers a case to accept some form of payment for it.

The resulting business model works reasonably well. The individual client, typically clueless about what to look for in a lawyer, finds himself in the office of a lawyer who once represented a friend in an unrelated matter. That lawyer, who, let us suppose, typically handles only wills and marital property, faces a personal injury case. Having never dealt with such a case herself, she finds it in her best economic and professional interest to locate a colleague who specializes in such cases, knowing that if the colleague is successful, she will receive a portion of the fee. And, though she has never handled such a case herself, she is in a much better position than her client to know how to evaluate the credentials of those who have. Moreover, the lawyer to whom she refers the case has—if he is reasonably skillful—a good chance of receiving a series of such referrals. As a consequence, he can think of his practice not just as an occasional case, but as an inventory of cases—some low-risk, low-return—others higher risk and higher return. If that lawyer operates in the context of a group practice, he can distribute those cases among colleagues with varying skill and experience levels, achieving both a predictable income and a set of relatively satisfied clients. He and his colleagues will screen the cases on two axes—strength of the merits and the amount at stake in relation to the costs of prosecution—rejecting those that lie at the left-hand side of the distribution curve on either axis and prosecuting the remainder. Because of the prevalence of insurance, the lawyer thus operating has a high probability of being paid either in a settlement or in that small subset of tried cases in the 50 percent of those reaching a plaintiffs' verdict. If all goes well, that is a robust business model.

It also has some ethical pitfalls. There is evidence for the existence of

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"settlement mills," in which lawyers in a high-volume practice settle cases without regard for their merits, thus breaching their duties of zealous representation.[17] And in situations in which the same lawyer deals repeatedly with the same insurance company—surely a common practice, given the concentration of insurers—there are stories in which the lawyer and the adjuster "trade" cases—agreeing to a higher-than-deserved settlement in a weak case in return for a lower-than-justified settlement in a strong case. Given the prevalence of unsophisticated clients and the relative laxity of bar disciplinary standards, it is unlikely that either legal malpractice suits or bar discipline will catch any but the most egregious cases. But—as compared to 1950—it leaves the plaintiffs' and defendants' camps in relatively more equal positions.

A brief account of a California case from the 1980s will illustrate.[18] A wheel of Mr. Sneed's van flew off and crashed through Mrs. Smith's windshield, blinding her when the shattered glass struck her eyes. She sued Sneed (who had minimal insurance coverage), Abbot Ford, the dealer from whom Sneed had purchased the van, the Ford Motor Company, and Sears Auto, which had done some maintenance work on the van. Smith's theory of liability against Abbot, Ford, and Sears involved the wheel that had come off. Her lawyers contended that although Ford had warned dealers not to attach after-market wheels to its vans (for fear they would not stay on the hub), Abbot had nevertheless done so, to render the vehicles flashier. Ford she blamed for failing to follow up on its warning, Sears for having failed to detect a loose wheel during a routine maintenance. Contacting the law firm representing the plaintiff confirmed the picture of an emerging new plaintiffs' bar. The firm was formed by a group of former prosecutors, who initially financed it on their credit cards but who quickly became successful enough—likely because they could credibly threaten to go to trial—that they were able to pursue a case like *Abbot Ford*, against multiple well-heeled defendants. The case also illustrates the value of intellectual capital. The plaintiff's initial theory of the case was that there was a design defect in the wheel. The plaintiff's law firm hired a member of the UCLA engineering faculty to conduct various tests, which essentially involved subjecting the wheel of a similar van to ever greater stresses to see when it would come off. That approach was getting nowhere, when the UCLA engineer reported to the plaintiff's lawyer a discussion with an engineering school classmate, who had gone to work for Ford and had recently retired. That retiree reported his frustration that he could not convince his employer to insert an inexpensive, thin film of

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

plastic laminate between two layers of windshield—a laminate that would have prevented the shield from shattering and blinding Mrs. Smith! Consider the devastating effect of calling that Ford engineer to the stand and having him testify that a twenty-five-cent-per-vehicle investment would have prevented this and many other crippling injuries. In an instant, the plaintiffs' theory of the case shifted and led to a multimillion-dollar settlement, whose shape will be described in a subsequent chapter. For now the point is that this small firm (fewer than a half dozen lawyers at the time) had both the expertise and the capital to undertake a fairly ambitious lawsuit, to locate and pay reputable expert witnesses, and then to recognize when one such witness's intellectual network suggested a fundamental shift in the strategy of the case. That model, in a nutshell, captures the modern plaintiffs' bar. Given the growth in the capacity of this bar, it would be surprising if the defense bar had not sought to counter this trend; it did, with some interesting results.

Challenges to the New Equilibrium

In 1971 Lewis Powell, an experienced corporate lawyer, former president of the American Bar Association, and a moderating force in integrating the Richmond, Virginia, public schools, wrote a memo to a friend who was then the director of the US Chamber of Commerce. In that memo Powell decried what he perceived as a widespread attack on "The American Free Enterprise System." Much of what Powell saw as this attack dealt with such matters as the political sympathies of the American professoriate, voices from the pulpit, the media, and more. The plaintiffs' bar as described here did not warrant even a brief mention, though Powell did condemn such players as the American Civil Liberties Union and Ralph Nader, the crusading consumer attorney. And when Powell identified possible remedies to what he saw as a widespread threat, much of his text was devoted to establishing think tanks, what we would now call public intellectuals, and the like. But Powell also thought the courts were one venue that those who agreed with him might employ:

> American business and the enterprise system have been affected as much by the courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change. . . .

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

> This is a vast area of opportunity for the Chamber, if it is willing to undertake the role of spokesman for American business and if, in turn, business is willing to provide the funds.
>
> As with respect to scholars and speakers, the Chamber would need a highly competent staff of lawyers. In special situations it should be authorized to engage, to appear as counsel amicus in the Supreme Court, lawyers of national standing and reputation. The greatest care should be exercised in selecting the cases in which to participate, or the suits to institute. But the opportunity merits the necessary effort.[19]

The Chamber of Commerce and its constituents eventually came around to Powell's views, and in recent decades they have mounted a counterattack that has drawn some blood. Since the turn of the twenty-first century, several decisions by the US Supreme Court have, some think, again reshaped the balance of power between the plaintiffs' and the defense bars. Three areas of law have given rise to this assessment: the treatment of arbitration clauses; class action decisions; and changes in pleading requirements. Narrowly seen, each of them is a win for the defense bar. Seen broadly, each is another move that will likely draw countermoves, the combined effect of which will play out over the next few decades.

Arbitration has an ancient and respectable pedigree. For thousands of years, communities—often merchants—have agreed on dispute-resolving mechanisms in which trusted neutral figures would sort out competing claims and issue decisions that the parties had promised in advance to respect. That practice continues; it is especially robust in international commerce, where it offers a solution to many nations' reluctance to enforce each other's judgments. In the United States arbitration has recently come to play a different role—as a way of enabling business defendants to escape from the litigation system and, in particular, from class actions. Institutional defendants (both businesses and large nonprofits like health maintenance organizations) have sought to have employees and customers "agree" to use arbitration for any dispute arising out of the transaction. Readers who have downloaded software, bought a cell phone, or become an employee of a large corporation will likely discover that an arbitration clause lurks somewhere in the documentation of the transaction.

For the institutions drafting these arbitration clauses, they have several advantages—if they are enforceable. Foremost is that arbitration substitutes for a jury trial, with its expense and uncertainty. Second, though arbitrators typically have discretion to order some discovery, it is likely

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

to be far more limited than would be available in a typical civil lawsuit. Third, the judgments ("awards," they are called in the trade jargon) are likely to be more predictable than those of litigation—in part, some say, because arbitrators are reluctant to enter large awards against institutions that might decide not to employ them in future cases.[20] Fourth, arbitrations are not open to the public as trials are, so in the subset of cases in which the institutional defendant might be concerned about publicity, that risk disappears. Fifth—and this can be either an advantage or a disadvantage, depending on how the case comes out—arbitrators' awards are not generally appealable. Finally—and this point has come into great prominence in recent cases—the arbitration agreement can prevent the aggregation of similar cases into class actions.

For the plaintiffs' bar, each of these features is usually seen as a disadvantage. From plaintiffs' lawyers' standpoint, the removal of the jury—a democratizing and leveling institution—is undesirable in two ways. First, plaintiffs' lawyers think juries are more likely to sympathize with their clients than with large institutional defendants. Second, to the extent that information relevant to a claim is asymmetrically available—as will often be the case in claims against large institutions—curtailed discovery harms plaintiffs. Third, institutional defendants will have far more information about potential arbitrators and will use that information to eliminate any who might be unsympathetic. (In one common form of arbitration, each party chooses an arbitrator and the two thus designated choose a third.) The elimination of the class action is extremely undesirable from the standpoint of the plaintiffs' bar. By their nature, institutions tend to replicate patterns: the terms of sale of a given cell phone will be identical over thousands or hundreds of thousands of transactions. If a feature of that transaction is unlawful, and if the amount at stake in a single transaction is small, it will not be economically rational to pursue the claim on behalf of an individual. But if the same cell phone was sold to one hundred thousand persons, and if they can sue as a class, the lawsuit is not only economically viable, but—because of the now-enormous stakes—may be one in which the plaintiff has powerful leverage.

To the extent that both the class action ban and other features of arbitration tend to reduce the amount of damages recoverable in a given claim, arbitration strikes at the business model of the plaintiffs' bar. No sane lawyer will take on an individual arbitration in which the amount at stake for an individual cell phone customer is $30.22 (as it was in a recent Supreme Court case), but if that lawyer can represent thousands of simi-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

larly situated purchasers, the case looks quite different. In its individual form, the case will not attract legal representation by a competent lawyer; in its aggregated form, it will. The stakes are thus large both for the institutional defendants and for the plaintiffs' bar. An enforceable arbitration clause that bars aggregate litigation destroys the financing of such a case.

Because of these dynamics, the plaintiffs' bar has strenuously resisted the enforcement of arbitration clauses on several grounds. The technical details aside, the plaintiffs' bar has argued that these clauses are unfair—and therefore unenforceable—for various reasons. Over the course of several decades, however, the US Supreme Court has substantially expanded their scope, upholding their use in a number of circumstances where their enforceability was either uncertain or flatly prohibited fifty years ago. In 2011 the US Supreme Court decided that an arbitration clause forbidding classwide remedies, a clause contained in the boilerplate of a cell phone contract, was valid and that the purchaser's only remedy was to seek arbitration of an individual claim on the terms indicated in the agreement.[21] The reader who has followed this exposition thus far will understand how the expanded enforceability of arbitration clauses alters the business model of the plaintiffs' bar and thus affects the balance of power between individual plaintiffs and institutional defendants.

The same point holds for the class action. The modern class action dates from 1966, when the revised Federal Rule of Civil Procedure 23 created both new opportunities for the plaintiffs' bar and new threats to institutional defendants. As interpreted, the new rule allowed a lawyer to represent tens or hundreds of thousands of persons who had experienced similar treatment by the defendant. The plaintiff class could be students of color in a segregated school system, inmates at a state institution, customers of a software company, or buyers of a product or service for which they had been allegedly overcharged. The class members need not have sought out the lawyer: so long as their circumstances were sufficiently similar, and so long as their situation violated the relevant law, the lawyer for the plaintiff class could file suit on their behalf. To be sure, for some class actions, the members of the class had to be notified and given an opportunity to "opt out" of the lawsuit, but for many classes there was no rational reason to do so: it wouldn't be worth my while to bring an individual action for, say, nine dollars, but if a lawyer were willing to pursue that claim on my behalf—and on behalf of the million other similarly situated customers, I would have no objection to her doing so—I might recover something, and even if the suit failed, I would not suffer any out-of-pocket loss.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Thus to describe the class action also explains why defendants and their lawyers tended to froth at the mouth when the device came under discussion. The class action had the potential to transform claims otherwise too small to be pursued into defendant-destroying behemoths; one defense-side lawyer hyperbolically described it as "legalized blackmail."[22] In the case of my hypothetical case, the nine-dollar claim pursued on behalf of a million customers becomes a $9 million claim. The power of the class action flowed less from its ability to aggregate claims than from its alchemical properties: it turned claims that would never be brought into very threatening claims indeed. Without the class action, defendants in many circumstances enjoyed practical immunity from suit: the sum at stake would not lead any rational plaintiff—or plaintiff's lawyer—to take on such litigation. But with the class action available, suits became not just economically viable for plaintiffs' lawyers, but potentially very lucrative, given the rule that the lawyer could recover a fee from any money recovered on behalf of the class.

These fees also presented, the defendants' lawyers urged, an enormous ethical temptation to the plaintiffs' bar. That temptation arises because the lawyer in a class action doesn't have a client who can make decisions about settlement terms. In ordinary litigation, clients decide whether to sue and whether to accept a settlement offer. But because most classes lack the kind of organization that would allow one or two persons to make such decisions on their behalf, the plaintiffs' lawyer assumes that role. To be sure, any settlement must be approved by the judge, but if there is a settlement, both the defendant's and the plaintiffs' lawyer will be arguing in favor of it, and it is a brave judge who will decline to approve it. These circumstances present both defendant and plaintiff with a scenario that tempts the plaintiffs' lawyer to profit by selling out his clients.[23] The defendant proposes terms of settlement that do little for the class but a great deal for the lawyer. In one widely criticized (and now outlawed) form of settlement, the defendant offers the members of the class coupons that can be redeemed only if members of the class purchase more of the defendant's product—software in one case, SUVs in others—but proposes millions of dollars in fees to the class lawyers for "vindicating" the class's interests. Such a settlement, class action skeptics argue, enriches the plaintiff's lawyers without either providing a remedy for plaintiffs or seriously discouraging defendants from continuing to behave in the same or similar ways.

The defenders of the class action have a two-part response to such a critique. First, while condemning lawyers who sell the class's birthright

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

for a mess of attorneys' fees, they argue that such instances are far less common than the class action's detractors claim. Second, they point out that the class action solves a fundamental problem of a mass economy. Any mass marketer, whether of goods or services, faces a temptation to set prices or terms of sale that will disadvantage purchasers just a little—not enough to make it rational for any single purchaser to sue but enough to produce, in aggregate, large profits for the marketer. Successfully deployed, such behavior skims large profits by unlawfully harming each individual by a small amount. A classic example drawn from an old case involved stockbrokers who allegedly conspired in violation of antitrust laws to charge a premium for "odd lot" sales (fewer than a hundred shares) of stock. If the allegations of the complaint were true, the defendant brokers' behavior harmed millions of customers—but harmed none of them enough to warrant an individual lawsuit: the amount by which they were overcharged would not cover even the fee to file the lawsuit, much less the expenses and fees of bringing suit.[24] The class action thus potentially solves the problem of the irremediable wrong in a mass society. The possibility of sweetheart settlements, the class action's defenders argue, is not too high a price to pay for a procedure that addresses a fundamental problem inherent in contemporary economic life.

Without seeking to resolve the contentions underlying the controversy over the class action, one can understand its significance in the balance of power between institutional defendants and the plaintiffs' bar. In 2011 the US Supreme Court decided a case involving a massive sex discrimination class—1.5 million female employees of Walmart stores—holding that the members of the class had too little in common to justify a suit seeking damages for employment discrimination.[25] Although it was not necessary to the holding of the case, the Court's majority also made a number of statements about the form evidence in such cases must take, statements that will make it substantially more difficult to bring large class action suits in the future. To the extent that this holding penetrates beyond employment discrimination cases (nothing in the decision limited its reach to this area), it will hinder the deployment of class actions and to that extent shift the balance of power between plaintiffs and defendants.

The final bit of evidence that the tide has turned against plaintiffs in civil litigation—at least in the US Supreme Court—comes from the realm of pleading. Pleading, in lawyers' jargon, involves the initial statement of a plaintiff's case in a document called the complaint. During the millennium in which the common law dominated Anglo-American legal proceedings,

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

the requirements of a complaint became very stylized, to the point where the words of the document might reveal almost nothing about the underlying dispute, and disputes of whatever origins had to be shoehorned into the words of medieval pleadings. Two great waves of procedural reform—in the mid-nineteenth and mid-twentieth centuries—greatly reduced the technicality of pleadings. One widely used current formulation states that a complaint need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief."[26]

For the last half of the twentieth century, courts regularly insisted that such brief and simple pleadings sufficed. An often-quoted example involves a complaint simply stating that "defendant negligently drove a motor vehicle against plaintiff who was then crossing the highway." When defendants lamented that such brevity made it difficult to plan a defense—for example, what act or omission constituted the negligence alleged in the complaint just quoted?—courts responded that details would emerge in the next stage of the case, discovery, which would yield as much detail as anyone wanted. This pleading regime was sometimes called "notice pleading," with the idea that the complaint simply gave the defendant a general notice that he was being sued and an equally brief and general idea of the event that gave rise to the claim, leaving elaboration to later stages of litigation. Looking back on centuries of what in retrospect appeared an obsession with arcane and technical pleadings, courts regularly insisted that the facts of a case, not lawyers' manipulation of esoteric phrases, should determine litigation outcomes.

Defendants pointed out that conducting discovery was expensive, particularly for institutional defendants—the same ones who often feared the class action. Searching massive digital databases (or looking through paper files) for references to the topic of the litigation entailed hundreds or thousands of hours of lawyer time—typically billed at hundreds of dollars per hour. Engaging and preparing expert witnesses and conducting depositions, both standard practices in modern litigation, was equally expensive. And, defendants argued, under the American practice in which each side bears its own legal fees in most cases, that expense could not be recouped from the plaintiff if the case turned out to be meritless. The plaintiffs' bar had two responses to this critique. First, those lawyers pointed out that both sides had to bear the expenses of discovery and that no lawyer operating on a contingent fee is interested in pursuing a case without merit. Second, they argued that in a world filled with large institutions, information was frequently asymmetric: critical facts were often

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

unknown to the plaintiff because only the defendant knew, for example, what safety decisions were made in designing the automobile. Costs involved in the occasional pursuit of a weak claim, plaintiffs argued, were necessary if civil litigation was to serve its regulatory function—visiting the costs of unlawful behavior on those who behaved badly. Only low pleading barriers would permit the access to discovery that could ascertain such facts.

For seventy years the courts put aside defendants' critique, holding the pleading barrier low and permitting relatively easy access to discovery. Then, near the end of the first decade of the twenty-first century, the US Supreme Court seemed to change its mind. In a pair of cases—*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, from 2007 and 2009, respectively—the Court reinterpreted the "short, plain statement" phrase to require substantially greater detail. Without going into technical matters, it's possible to say several things. First, in both cases the Court evinced concern about the expense or the intrusiveness of discovery. And both cases held that potential: one was an antitrust claim against all the local telephone carriers in the United States; and the other was a civil rights suit brought by a Pakistani detained in the immediate wake of the 2001 World Trade Center destruction, alleging that the director of the FBI and the attorney general of the United States had personally approved indefinite detention on the basis of race and ethnicity. Antitrust discovery is notoriously expensive and time-consuming, and the prospect of disrupting the course of government by deposing the nation's two highest law enforcement officers obviously troubled the Court. Second, however, the two cases reinterpreted the relevant rule in a way that applies to all cases—not just to cases that pose especially difficult problems of management. Third, the Court reinterpreted the pleading standards in terms ("plausible in light of judicial experience and common sense") that permit individual judges substantial latitude and invite a judge to apply those terms in what could be surprising ways. Fourth, in reaching its conclusion about the proper interpretation of the pleading rule, the Court ignored a body of empirical literature suggesting that, in the great majority of cases, discovery was not disproportionately expensive or time-consuming.[27]

Taken at face value, *Twombly* and *Iqbal* have the potential to shift the balance of power in civil litigation in federal courts. In some cases they will make no difference at all: enough of the critical facts will be known that the plaintiffs, forewarned by these cases, can simply include more detail in their complaints. *Twombly* and *Iqbal* will matter when critical

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

facts lie only in the hands of the defendants; those cases will often, but by no means always, involve institutional defendants—business corporations and large public agencies. In such cases plaintiffs will be faced with a paradox: to supply the new detail required in a pleading, they need access to information held by the defendant. But the most obvious way to gain that information would be through discovery—which is available only once they have filed a pleading that passes muster. Put more briefly, plaintiffs need discovery to uncover the details that would allow specific pleading, but they can get to discovery only if they supply those details in a complaint.

One can predict three effects from the principles announced in these cases—assuming that lower courts routinely apply those principles to all cases. First, the amount and cost of informal prepleading investigation (private detectives, surveillance, and bribes to employees) will increase, as plaintiffs try to find substitutes for discovery. Second, some difficult-to-determine proportion of complaints that would be meritorious will fail at the pleading stage and be dismissed. Third, an equally difficult-to-determine proportion of complaints that now fail only after both sides have spent time and money on discovery will instead be dismissed at the pleading stage, representing a savings in total resources. Whether the proportion of cases falling into the second category is larger than those falling into the first category is anyone's guess. The Supreme Court made its guess, and we will have to wait to see what the new equilibrium looks like.

One important feature of the Supreme Court's rulings in each of these three areas should be noted. Its arbitration decisions will affect all litigation—both in state and in federal courts—but the other two decisions, on class actions and on pleading standards, will affect only federal litigation, which constitutes only about 2 percent of all litigation. This feature flows from the differing scope of the statutes and rules that the Court was interpreting. The federal arbitration statute commands all courts—state and federal—to enforce agreements to arbitrate matters involving "commerce"; given the expansive meaning given to that term by the courts, virtually all agreements to arbitrate fall within the reach of the federal statute. By contrast, the class action and pleading decisions involved interpretations of rules that apply only in federal courts. These two decisions thus leave the state courts free to follow other standards. Supreme Court decisions interpreting federal rules can, however, prove persuasive: some states may decide to adopt these interpretations into their own law, although they are not bound to do so. Consequently, while the effect of

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

the arbitration decisions will be nationwide, the other two may prove to have limited effect.

* * *

Some would say that these recent changes bear the stamp of a changed political climate for civil litigation—that they represent the reorientation of public discourse that Lewis Powell hoped for in 1971. What Powell likely did not dream was that civil litigation would for several decades become itself the topic of partisan politics at the highest level. How and why that happened is the topic next explored.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER FIVE

The Politics of Civil Litigation

As the changes chronicled in the preceding chapters occurred, in the closing decades of the twentieth century and the opening decades of the twenty-first, the nation witnessed an interesting political phenomenon: civil litigation had emerged as a topic of partisan political debate. For most of the nation's history, civil litigation simply did not figure as a political topic. Then, in the late 1970s, the desirability of civil litigation became a political issue.

Republican officeholders and candidates attacked civil litigation as a deadweight loss, a stick in the wheels of commerce, and a source of national shame. Democratic officeholders and candidates defended civil litigation as a vindicator of rights, a way of speaking truth to power, and a guarantor of democratic values and freedoms. And the controversy found echoes in other venues, as the plaintiffs' and defense bars and their surrogates squared off. This chapter seeks to account for the emergence of the debate, its terms, the odd alignments of the major political parties, and the sudden, though perhaps temporary, cessation of the controversy.

Civil Litigation as the Solution to Political Problems

To appreciate the strangeness of this phenomenon, consider first that from 1789 to the late 1970s, no president or presidential candidate breathed a word about civil litigation.[1] Of course presidents and candidates praised or attacked particular decisions—usually of the US Supreme Court—but they did so on the basis that those individual decisions advanced or set back a political party's vision of the right path for the nation, not because litigation itself was a boon or a blight. Things began to change in the late

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

1970s. As previously noted, Jimmy Carter, a Democrat who was out of step with most of his party, chose a somewhat tactless moment—a speech before the Los Angeles County Bar Association's celebration of its one-hundredth anniversary—to launch a spectacularly unsuccessful attack on what he described as the nation's excessive dependence on lawyers and litigation: "We have more litigation, but I am not sure that we have more justice. . . . Ninety percent of our lawyers serve 10 percent of our people. We are over-lawyered and under-represented."[2] Carter's solutions were technocratic—alternative dispute resolution (chiefly arbitration and mediation), no-fault insurance and divorce regimes—and they went nowhere as his presidency collapsed in the miasma of the Arab oil boycott, rising inflation, and the Iranian hostage crisis. His successor, Ronald Reagan, picked up the cause, which became a basic ingredient of Republican policy for decades. As Reagan articulated the problem, it wasn't that litigation was inefficient, but rather that it was all too effective in hobbling the economy: "We must stop draining off resources from our economy through product liability judgments that have gotten out of hand. We will propose legislative measures to reduce the costly product liability insurance spiral affecting the production costs of U.S. goods while still providing the necessary protections for consumer health and safety."[3] For Reagan and his successors, the two items mentioned in these sentences became key aspects of future platforms. In the Republican worldview, one could explain the decline of US manufacturing as the result of civil litigation. Liability judgments forced manufacturers out of business or raised their costs so high that their prices were no longer competitive. The GOP also suggested that the rapid run-up in the costs of medical care had similar roots: malpractice suits were increasing the fees charged by health care providers and further escalating costs as these providers practiced defensive medicine to ward off the bogeymen of malpractice.

In pointing to the manufacturing decline—especially in the older metal-bending industries mostly located in the Midwest, the Republicans were identifying a real issue. As developing nations with wage rates dramatically lower than those in the United States began to develop manufacturing capability, as US tariff barriers dropped and transport improved, and as technology displaced semiskilled workers, many US industries, from textiles to metals to home appliances to automobiles, encountered changes that in some cases led to the closing of entire sectors of the economy, with attendant dislocation of large numbers of predominantly blue-collar jobs.[4] The political rhetoric of the Republicans dwelt not on

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

technological change and international economic movements, however; they concentrated instead on product liability suits as the cause of the malaise that afflicted US manufacturing industries.

This Republican story gained strength from the circumstance that there was at least one instance in which one could point at civil litigation for the collapse of an industry: asbestos. Vast amounts of asbestos had been used for decades in applications from auto brake shoes to shipbuilding to home insulation. At some point in midcentury, asbestos manufacturers learned that asbestos particles have serious—and sometimes fatal—effects on health. The manufacturers went to great lengths to conceal these effects from those who used the product. When the effects, and the concealment, came to light, tens of thousands of lawsuits were filed—suits that eventually put most significant asbestos manufacturers into bankruptcy.[5] So there was a significant instance in which litigation had stopped an industry. It was, however, almost certainly inaccurate to claim that American cars, washing machines, hosiery, and appliance manufacturers were suffering for the same reason—product liability suits—but the example of asbestos kept such claims from being laughable.

One can see similar dynamics at work for medical care. As modern medicine emerged in the twentieth century, it became possible to successfully treat far more conditions than in 1900. It also became far more expensive, with the costs of medical care outpacing the rest of the consumer price index for most of the century. Yet, after some abortive efforts following World War II, the United States became the only developed nation to lack a comprehensive, universal health care regime. Under such conditions, people began to ask candidates and parties what they intended to do about this situation. For the Republicans, the answer was to attack medical malpractice litigation, which they blamed for rising costs and rising insurance premiums. As with manufacturing, the claim was almost certainly inaccurate. No serious student of medical costs believes that malpractice litigation—even when one includes defensive medicine—amounts to more than about 2 percent of the cost of medical care.[6] But, again as with manufacturing, the charge concerning litigation had surface plausibility. In some medical specialties—obstetrics and anesthesiology, for example—a bad medical decision can lead to an outcome so dreadful that the patient will require intensive and expensive lifetime care. A lawsuit over such a case could render a physician uninsurable and drive up malpractice insurance premiums for others in that specialty. So, in both instances the Republican candidates and platforms had identified a villain,

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

civil litigation, under circumstances in which one could not simply dismiss the claim as laughable.

As this issue ripened in the heat of political debate, the claim became broader: that it was not just particular lawsuits, but the lawyers who pursued them on behalf of the plaintiffs, that were the real villains. As George H. W. Bush put it in one of his campaign speeches—contrasting himself with his opponent:

> These trial lawyers are backing Governor Clinton right up to the hilt. The lead trial lawyer in Arkansas said, "Don't worry. Bill [Clinton] won't go against us on tort reform." Look, we've got Little League coaches that are afraid to coach; we've got doctors that are afraid to bring babies into the world because of a lawsuit; we've got people that are afraid to help people along the highway because they're afraid to be sued. We've got to put an end to these crazy lawsuits. And we're going to do it. Whatever your politics, you should have an interest in that one. And we've got to sue each other less and care for each other more in this country.[7]

And in another speech: "My opponent doesn't think this [civil litigation] is a problem. Listen to the president of the Arkansas Trial Lawyers Association, and I quote, 'I can never remember an occasion where Governor Clinton failed to do the right thing where we trial lawyers were concerned.' While Governor Clinton's in the corner sponging the trial lawyer's brow, I want to get in the ring and strike a blow against all those crazy lawsuits."[8] Directing rancor toward lawyers was in many ways an excellent political strategy. Well before Shakespeare wrote, "First thing we do, let's kill all the lawyers" as a line delivered by a lowborn revolutionary, lawyers were stock figures of unpopularity, and they have remained so. In the end-of-century political context, trashing lawyers deflected attention from the circumstance that identifying civil litigation as the root of two of the nation's important and difficult problems was aiming at the wrong target. But it was certainly much easier for Republican candidates and officeholders than undoing a half century of dedication to freer trade and relatively loose labor regulations—which had opened US manufacturers to foreign competition and technological change and thereby hastened the demise of some sectors of the economy. So to note is not to condemn the free trade policy or employment rules warily embraced by both political parties. Their benefits made cheaper products available to many and arguably kept the US economy more flexible than some of its

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

counterparts in other parts of the world. But it is difficult to explain this to a family whose breadwinner has been laid off when the washing machine plant that had anchored the town for fifty years has been closed so that production can move to China, or to the textile worker replaced by robotic weaving machines. It's much easier to blame the trial lawyers. So the Republicans did.

A similar tactic dictated the medical malpractice strategy. The United States until the very recent past lacked a comprehensive medical care infrastructure. That lack flowed from various causes, but one of them was the staunch resistance of the Republican Party, which denounced such plans as socialism whenever they were proposed. Again, it is difficult to explain to a family that cannot afford care for an asthmatic child that it is, in the long run, better for the country if we remain unentangled in a web of socialism, even if the child suffers in consequence. It is far easier to blame the predatory trial lawyers. And the Republicans did.

The Democrats were just as interested in telling their own less-than-complete narratives, although those narratives pointed in a different direction. For the Democrats the political problem was less specific. On a range of issues from workplace safety to medical care to consumer protection to financial regulation to racial discrimination, the New Deal and the Great Society movements of the 1930s and 1960s had produced a regulatory framework. But to function well, that regulatory framework needed to be well funded and occasionally revised. Those who are regulated rarely like either the process or the results, and they push back politically. So, to use one example, the Securities and Exchange Commission, created in the New Deal, exercises potentially great supervisory power over financial markets. Those who operate financial markets are not fond of being scrutinized or sued by the SEC. The financial industry has not succeeded in getting the regulatory laws repealed. Almost as effective as repeal or amendment, however, is reduced funding of the SEC, which deprives it of the personnel to conduct probing investigations or to prosecute wrongdoing.[9] The Democrats were unable—and, perhaps (because some of their contributors came from the financial industry)—unwilling to strengthen the regulatory structure, but they acquiesced in reducing its funding. An underfunded SEC did not aggressively police the securities industry. Another example comes from the realm of workplace safety. The Occupational Safety & Health Administration (OSHA) requires workplaces to adhere to various sometimes expensive safety practices. Thoroughgoing enforcement of this regulatory scheme would be expensive, requiring

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

regular inspections of hundreds of thousands of workplaces, something that has never occurred because the agency has never been well funded.[10]

A person noting the gap between regulatory ambition and actual practices might accuse the Democrats, who sponsored most such legislation, either of hypocrisy or of ineffectiveness. During the period under examination, the Democrats decided that civil litigation would rescue them from such charges without requiring them to enact legislation or budgets that would prove politically difficult. Consider a Democratic senator, Howard Metzenbaum of Ohio, testifying against legislation amending the securities laws: "Let me spell out the damage that the Supreme Court's bizarre legal reasoning will cause. It gives clearly, clearly, I'm not talking about arguable, I'm talking about clearly fraudulent behavior the green light. It says you can't be sued, you can't be held accountable. It immunizes those who have clearly helped others to commit securities fraud. It says to those [giving examples] who have caused innocent investors to lose hundreds of millions of dollars, go home. You're protected from liability. Sorry to have bothered you. Feel free to do this again."[11] For Democrats, private civil litigation, substituting for weakly funded regulatory systems, provided a solution. The Democrats didn't have to act because the plaintiffs' bar would do the job. As one nonprofit generally allied with Democratic causes explained things: "When private corporations and the government fail to keep the public safe from food poisoning, the civil justice system can step in. Lawsuits can provide an additional layer of accountability and help shed light on issues and information that private companies and government are complicit in hiding from the public. Lawsuits have also allowed the public to gain information integral to public safety that consumers can then use to make informed market decisions. In addition they provide much needed compensation to the injured."[12] The most spectacular example of the Democrats use of civil litigation as a substitute for a legislative program came in the mid-1990s. During the first Bill Clinton presidential term, the administration proposed an ambitious program of comprehensive health care. That program was just as comprehensively defeated. As a fig leaf to cover this major legislative defeat, Clinton proposed a bill that would have allowed patients to sue their health maintenance organizations for denial of treatment, a claim otherwise barred by pension and tax laws. For President Clinton, civil litigation became the solution, allowing private plaintiffs to "regulate" this corner of health care:

> A real Patients' Bill of Rights holds health care plans accountable for the harm patients face if they are denied critical care. . . . Let me ask you this: How would

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

> you react if I gave a speech tomorrow that said, "My fellow Americans, I love the Bill of Rights. I love the freedom of speech, the freedom of assembly, the freedom of religion, the right to travel. I love all those . . . Rights. But I don't like all these lawsuits. We got too many of them in America. Therefore, I have proposed to amend the Constitution so that no one can ever sue to enforce the right to free speech, free assembly, free practice of religion, or any other of the rights that have kept our country strong for 220 years.[13]

This is rhetorically brilliant: having failed entirely to create a broad single-payer health plan like those of several developed countries, the president was proposing a small change in a small sector of health care (most Americans who had health insurance at the time were not members of the HMOs to which the legislation was directed). But in his speech, this relatively minor legislation—which was not enacted—is draped in the mantle of fundamental constitutional provisions. And he proposes to turn the actual regulation over to lawsuits brought by individual patients.

One could replicate this pattern many times over during presidential campaigns, congressional hearings, and more. Republicans sought to limit civil litigation on the grounds that lawyers and litigation were ruining the country—or at least important swaths of the economy—while Democrats defended litigation and proposed more of it as a solution to one or more problems. The stances of the respective parties went deeper than the occasional campaign speech. One scholar looking at the 104th Congress (1995–97) found that "party affiliation had an enormous impact on voting [on bills involving civil litigation]. Democrats voted for the pro-litigation side on an average of 67 percent of the votes, Republicans 17 percent."[14]

Nor was the fighting confined to Congress and the presidency. Both sides had allies, who wrote op-ed pieces and issued public statements decrying or defending lawyers and lawsuits. An op-ed piece by the antilitigation camp exemplifies one side's views, expressed in the course of an attack on patent litigation: "But that's the rationale used to justify all litigation ginned up by contingency-fee lawyers. The issue isn't whether intellectual property rights should be enforced, it's whether we have a reliable process for working out who really supplied the intellect. We don't. A system that issues and upholds junk patents will devalue intellectual property much faster than one that scrutinizes patents more carefully and enforces only the good ones."[15] The prolitigation lobby was just as forthright in its stance: "Justice belongs to us all. That's why we work hard to make sure any person who is injured by the misconduct and negligence of others can get justice in the courtroom, even when taking on the most

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

powerful interests. The Fight for Justice Campaign is AAJ's winning campaign to make our case to the public and tell the real story about the civil justice system—that trial attorneys' unwavering commitment to justice ensures that every person is on a level playing field in the courtroom and able to hold wrongdoers accountable."[16]

Misaligned Interests?

The reader may have noticed an oddity in the stances of the two parties. By and large, the Republicans in recent decades have tended to favor private, decentralized solutions to problems, letting markets function to sort out social and economic issues. By and large, the Democrats have tended to distrust markets and to favor regulatory mechanisms that operate under political control.

Were the parties to adhere perfectly to these stances, it would be the Republicans who favored litigation as the decentralized, private alternative to bureaucratic control. In a world of perfect ideological coherence, the Republicans would propose the repeal of various regulatory bureaucracies, replacing them with the results of litigation. And in fact, there is a very small—and entirely marginal—group that takes such a position; consider the remarks of a person who described himself as a "member of a pretty small group . . . a politically conservative [plaintiff's] lawyer":

> I'd like to take about two minutes and explain why [being a politically conservative trial lawyer is] not an oxymoron. The basic premise underlying what most conservatives believe about government is that government doesn't work very well. The less we have of it, as Jefferson said, the better off we are. . . . But conservatives also share with most Americans the view that . . . every citizen, regardless of his station in life, has access to justice, to equal treatment at the hands of the law. . . .
>
> We require in this country by our social contract to address this imbalance [between individual citizens and large corporations] in some way, and there are two ways to do it. . . . The first way . . . we make governments bigger, more regulations, more red tape, more bureaucrats, more oversight from Washington. Now, this idea is repugnant to conservatives. . . .
>
> . . . Is there an alternative? Yes. There's one alternative that's grown up that doesn't require a clumsy ham fisted hand of big government. It's the judicial system. It's been around for two-hundred years with a body of common law that protects the major corporations and the little guys just alike.[17]

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

This vision has both strong attractions and learned proponents, and it could be the mantra of the Republican Party. But it's not.

For their part, the Democrats could extend the vision inherent in the New Deal and the Great Society—a rational regulatory state, in which expert, nonpartisan civil servants implement policies set by the political branches—all without the messiness, expense, delay, and unpredictability of civil litigation. That world would bring the Democrats closer to the social democracies of Western Europe, a vision that has some attractions for parts of the Democratic Party. But it's not their vision. Aside from the momentary and spectacularly unsuccessful suggestion by President Jimmy Carter that we sweep away litigation and replace it with more orderly processes, no Democrat in modern times has endorsed what might be called a low-litigation society. History has created strange political bedfellows, with the Democrats endorsing civil litigation as the solution to a number of ills and the Republicans attacking it as the source of many of those ills.

The Unspoken Truths

Readers of earlier chapters in this study will have noticed strange silences in this debate, silences about persistent characteristics of US civil litigation that would undermine the two sides' competing narratives. To these unspoken truths we now turn. Those seeking change in civil litigation spoke of "trial lawyers," "junk and frivolous lawsuits," and "tort reform." Those defending civil litigation spoke of "justice," "holding wrongdoers accountable," and "taking on the most powerful interests." All these terms merit some probing, for none of them reveals the underlying dynamics, and none describes civil litigation as it actually exists in the twenty-first century. Even more pertinent to our present inquiry, all these terms avoid speaking a truth the speaker would rather not express.

The reference to "trial lawyers" would have been difficult for a lawyer in 1900 to understand. After all, that lawyer would think, a trial is where disputes that do not settle get resolved, and almost all lawyers go to trial at some point. In the late nineteenth century, "trial lawyer" would have been a redundant term, like "lawyer lawyer." That characterization was emphatically not true a century later. By 2000 only a small minority of practicing lawyers would, in the course of their careers, conduct even part of a civil trial. The reasons for the change are many and debated, but the result is clear. Plaintiffs' and defense lawyers tend to belong to different

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

professional organizations, but one such group atypically draws its membership from both the defense and the plaintiffs' bar: the American Board of Trial Advocates (ABOTA).[18] To become an advocate, a lawyer must have taken fifty civil jury verdicts. A recurrent discussion among ABOTA members is the desirability of reducing these requirements lest they result in the death of the organization—because the number of lawyers in the United States who can meet such a requirement is inexorably declining.

So why should the antilitigation camp attack this vanishing species, "trial lawyers," as opposed, say, to "litigators," or "plaintiffs' lawyers"? One might think that the least expensive and most effective strategy would be to let the species gradually become extinct. The answer lies in the role of the civil jury: Only in a trial will a jury enter the picture. The civil jury is an almost uniquely US institution. England, which had widely used civil juries for eight hundred years, essentially eliminated them in the early twentieth century.[19] But the US civil jury sits embedded in the Seventh Amendment to the US Constitution and in numerous state constitutions and statutes. According to most historical accounts, the institution of civil jury trials reflected distrust of judges and lawyers; and at the time the US Constitution was framed, it reflected a more specific antipathy toward the coastal, urban creditor classes who used the courts to collect their debts from farmers and small tradespeople.[20] The jury, it was thought, might stand between such debtors and their creditors.

Changes in legal procedure have made that particular scenario less likely today, but the civil jury often stands behind substantial verdicts, verdicts that can threaten defendants' enterprises and can be difficult to predict. It is those verdicts that stir the defendants' blood, open their pocketbooks, and mobilize the attacks on civil litigation. Yet only a reckless or desperate political candidate would attack the jury as an institution, for jurors are, after all, us. Most of us disagree with occasional individual verdicts, far fewer with the system of jury adjudication as a whole. By contrast, most of us hold no special affection for lawyers as a group. So in these political narratives, "trial lawyer" becomes a proxy for the unspoken target: the jury trial.

Just as it is easier for the antilitigation camp to attack "trial lawyers" than juries, so it was apparently easier for the real trial lawyers to call themselves something different. The former Association of Trial Lawyers of America is now the American Association for Justice. In part that name change reflects a success of the antilitigation campaign. Some polling data suggest that in recent decades Americans have taken a dimmer view of

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"trial lawyers." In part the name change also reflects a realignment of the debate. To describe oneself as a trial lawyer is to accept an identity within a subset of a relatively unesteemed profession. To describe oneself as a champion of justice is not only nobler but also comports with the chosen stance of the plaintiffs' bar: in the eyes of those lawyers, or at least in their public utterances, plaintiffs' lawyers vindicate rights, insist on redress for the injured, and hold powerful entities publicly accountable. Who wouldn't rather describe herself in such terms?

Such noble statements understandably omit references to large changes in the business model of the plaintiffs' bar. These lawyers now manage much better the business side of their practices. They are far better capitalized than their predecessors. As a consequence, the best study of the comparative incomes of contingent fee lawyers found that their effective hourly rates just slightly *exceeded* the rates of the insurance defense lawyers who most frequently represented their adversaries.[21] As with its opponents, the plaintiffs' bar rather selectively describes the nature of its professional activities. And, as with its opponents, the selectivity has its roots in circumstances that the plaintiffs' bar would prefer not to have as part of its public image or the public debate.

Like "trial lawyers," "junk and frivolous lawsuits" refers to safe targets of political attack. Some claims, of course, lack merit, and no one in principle favors meritless claims. The press understandably delights in bringing us examples of claims that run the gamut from the barely tenable to the outrageous. In the real world, almost no such suits succeed, and no lawyer working on a contingent fee wants to bring such a suit. Moreover, the legislative proposals recommended by those attacking "frivolous litigation" would do nothing to hasten the demise of truly frivolous claims, since the proposals aim at far bigger game. The changes typically recommended by those speaking of "junk lawsuits" raise interesting and serious questions, all of which deal not with frivolous but with meritorious lawsuits. These proposals involve capping some or all noneconomic recoveries, reducing the extent of joint and several liability, eliminating or reducing punitive damages, changing the allocation of attorneys' fees, and substituting arbitration for jury trials. Each of these proposals has something serious to be said for it, as well as some equally serious opposing arguments. Referring instead to junk lawsuits eliminates the need to engage those arguments, by substituting a reference to whatever silliness dominates the week's news.

For its part, the plaintiffs' bar displays a similarly revealing ambiva-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

lence in defending against the junk lawsuit charge. On one hand, no one wants to favor frivolous litigation. But the business model developed by the new plaintiffs' bar involves what one might call litigation entrepreneurship, lawsuits that test the viability of claims at the edge—or just beyond the edge—of existing law. A well-managed investment portfolio relies primarily on the Standard & Poor's 500 or similarly diversified holdings, but it also contains some highly speculative, high-risk, high-return investments. So the plaintiffs' bar regularly puts part of its investment in claims that test the boundaries of civil liability. These are its version of high-risk, high-return investments. And just as one person's speculative investment is another's junk stock, so one's edge-testing claim is another's junk lawsuit. The plaintiffs' bar doesn't want to defend itself in those terms, because to do so would be to acknowledge its dual identity: not only as selfless defenders of rights but also as entrepreneurial businesspeople. "Hey, we're entrepreneurs too!" doesn't have the same ring as "holding wrongdoers accountable."

The antilitigation camp has its own unspoken secret: it doesn't want to acknowledge that in attacking civil litigation, it is waging war on a successful group of small businesses. To put the attack in such terms would entail acknowledging a quite different characterization of the conflict: it's not entrepreneurial job creators of America confronting the jackals of predation; instead it's one business model pitted against another.

A second reason for the defendants' reference to junk lawsuits involves the actual target. The big game hunted under the name of the junk lawsuit is not the frivolous suit but the *meritorious* lawsuit with very high damages. Fewer than 10 percent of civil judgments award amounts in excess of $1 million, and even within this rarefied group, an even smaller proportion of cases make the headlines. One careful study of every jury verdict in California during two sample years found a very high concentration of damage awards in a very small number of cases.[22] In one year more than 60 percent of the damages were awarded in 5 percent of the cases; in another, 5 percent of the verdicts contributed almost 80 percent of the damages awarded. Just as the antilitigation camp does not want to talk about the cases that are not junk, so the prolitigation camp would prefer not to dwell on the cases that allow a few plaintiffs' lawyers to buy California vineyards and palatial spreads in Jackson Hole. "Holding wrongdoers accountable" by "taking on the most powerful interests" is surely a higher calling than hoping for a jury verdict at the far right-hand side of the curve of awards from a defendant with enough assets to satisfy the judgment.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"Tort reform," the third of the phrases used in the antilitigation campaign, shares with the others the quality of revealing while concealing. From the rhetoric employed by both sides in the litigation debate, no one would guess that most civil litigation in the United States concerns contracts, not torts. The National Center for State Courts, the leading nonprofit, nonpartisan agency compiling litigation statistics, recently reported: "When tort and contract caseloads are examined side by side, contracts dominate in every jurisdiction . . . with the overall and median proportion of contracts in the [sampled] states above 90 percent."[23] Bluntly put, most civil litigation involves business disputes and debt collection.

That's not surprising in a market economy resting on credit, but, surprising or not, it's awkward for both sides in the rhetorical battle. It's awkward for the opponents of civil litigation because it reveals that only a very small portion of civil litigation could possibly involve the parade of horribles that supply grist for the antilitigation mill. Moreover, it focuses unwelcome attention on the principal role of civil litigation—settling business disputes and collecting debts, often debts owed to those who otherwise sponsor the tort reform movement. The prolitigation movement has its own reasons for remaining very quiet about the relatively small proportion of tort cases in the system. The plaintiffs' bar portrays itself as the champion of the little man, as the speaker of truth to power, and as the vindicator of rights of the otherwise oppressed. That stance becomes more difficult to maintain if the principal occupation of the civil courts (and of the lawyers who inhabit them) is settling disputes between businesses and collecting unpaid loans. As a consequence, neither side in this duel wants to say how peripheral the "junk lawsuits," "trial lawyers," and even "torts" are to the civil litigation system.

Finally, we should contemplate some circumstances that both sides want to ignore, circumstances flowing from the emergence of the plaintiffs' bar as a successful small business model. Most regular defendants in the kind of suits that give rise to the debate will be large institutions, either governmental or private. In opposing the plaintiffs' bar, the Republicans were, in effect, championing large businesses over small businesses, which Republicans otherwise lionized in their political rhetoric. For the Democrats a different awkwardness arises: by associating themselves with the plaintiffs' bar, they were championing an almost entirely nonunion business, whose adversaries employ most of the remaining private- and public-sector union members in the United States. No one wanted to tell that part of the story.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Why Did It Stop?

As suddenly as the shooting started, it ceased. The 2012 presidential campaign was the first in decades in which the topic of civil litigation appeared neither in party platforms nor in the candidates' stump speeches. Why might that be? Some have suggested that it stopped because the antilitigation camp won, as a result of developments noted in chapter 6; for reasons explained there, that view seems plausible but short-sighted. Another possible and perhaps correct answer is that a platform emphasizing civil litigation might seem trivial in light of the domestic and foreign problems facing the nation in 2012. However, I want to consider a third possibility, implicit in the preceding account—that during its political career, civil litigation served as a convenient proxy for other issues, issues the parties lacked either the will or the capacity to address directly. Consequently, when the need for proxies disappeared, so did the political controversy over civil litigation.

Two such issues lurked in the background of the litigation wars. One was the transformation of economic life. As tariff barriers fell, as transportation and technology improved, and as much of the world emerged from the destruction and chaos wrought by World War II, the old US economy based on manufacturing began to suffer. Some jobs drifted overseas as service industries (including medical care) and niche manufacturing came into economic prominence. Others vanished as technological advances replaced scores of workers with a few machines operated by workers with special skills. One branch of the litigation wars represented an indirect response to that phenomenon. The Republican Party traditionally favored lower tariff barriers and more trade and disfavored "handouts" to displaced workers. It would have been very difficult politically to reverse that course. Attacking product liability litigation as the root cause of the decline was a much easier strategy. The Democrats were unable to muster the votes to create robust support for those displaced workers or intrusive and expensive regulations for workplace, food, and consumer safety and the financial markets. Defending the plaintiffs' bar was a cheap second-best strategy, one that allowed Democrats to claim to be protecting consumers and patients without doing anything very difficult politically.

The other proxy war involved health care. Since World War II, the United States had been struggling over how to create a sustainable infrastructure for health care. Modern medicine has far greater ambitions than it

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

once had, and many of those ambitions entail great expense. As health care costs and insurance premiums rose, both parties felt pressure to respond. But the Republicans were unwilling and the Democrats unable, until the second decade of the twenty-first century, to enact major change. The Republicans under George W. Bush enacted a modest—though expensive—plan extending prescription drug coverage. The Democrats under Clinton had much bigger ambitions—and failed to enact anything. For both parties litigation became the short-term political answer, with Republicans blaming malpractice suits for rising medical costs and Democrats proposing legislation that would have allowed members of health maintenance organizations to sue for denial of care. No responsible observer thought either proposal significantly changed the US health care picture, but both focused on litigation, either as the enemy or as the champion.

Both as to economic life and as to health care, the parties' strategies were symmetrical. The Republicans were saying, "We didn't do it; the lawyers did" and that if we could control civil lawsuits, economic life and health care would improve. The Democrats responded, "We don't have to do it; the lawyers will" and that, left unimpeded civil lawsuits would improve economic life and health care.

If this proxy war account coheres, it may help explain why civil litigation has at least temporarily vanished from the political scene. We are in the midst of a grand national debate about health care. The Democrats can at least temporarily declare that they have solved a persistent national problem; the Republicans can denounce "Obamacare" as the last nail in our socialist coffin. Next to these grand themes, the medical malpractice story is so peripheral that the Democrats were willing to throw into the legislation a provision promising to fund studies about the role of malpractice litigation in health costs—a sign that no one was any longer interested in the issue. The same story can be told about the economy. With worldwide recession and trillion-dollar bailouts of several industries in the news, not even the most unmoored politician or commentator can claim that civil litigation caused—or can cure—our current economic challenges. Civil litigation has accordingly ceased to be part of our political conversation.

We should recognize, however, that none of the dynamics that produced the unedifying dispute has fundamentally altered. So, given the right mix of intractable political problems and a situation in which civil litigation could, with bare plausibility, be blamed for creating it or be prescribed as a remedy, litigation wars could once more come our way.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

CHAPTER SIX

Where We Are and Where We're Going (and a Bit about Where We *Should* Go)

If we step back both from the political fray and from the evolving story of civil litigation, it may be appropriate to end this inquiry with two questions and a normative coda. The questions are, Where do things stand? and Where might one predict they are going? The normative question is whether all this is a good or a bad thing.

A way of framing the topics of this chapter is to imagine two lawsuits, a century or so apart. Not far from where I write these words lies the intersection of Wilshire Boulevard and Veteran Avenue in Los Angeles. It's an intersection claimed to be one of the busiest in the United States, in terms of the number of automobiles passing through each day. Imagine two accidents at that intersection, one in 1920, the other in 2016; if you want a bit more specificity, assume that both accidents occur during a left turn and that both create substantial injuries.

In 1920 our plaintiff sought a lawyer engaged in solo practice; indeed he would have had difficulty in finding any lawyer not engaged in such a practice. More significantly, that lawyer, who took the case on a contingency basis, was thinly capitalized, with only very modest resources to invest in the case. The complaint drafted by our 1920 lawyer named the other driver as the sole defendant and sought damages for lost wages, medical care, pain and suffering, and likely damage to the plaintiff's car. If we suppose that the defendant was insured—insurance was not mandatory, but there was a nascent liability insurance market in 1920—he tendered the defense to his carrier, who likely had various lawyers on retainer

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

in the Los Angeles area. Those lawyers likely had understandings with the insurer regarding hourly rates but otherwise operated relatively free of constraints in regard to litigation strategy. The insurer controlled settlement decisions, but if the case did not settle, it would go to trial, as about 20 percent of filed cases did in that era. If it went to trial, there might be expert testimony on the extent and likely duration of the plaintiff's injuries, but not much else. As a consequence, the variables that could affect trial outcome were relatively modest: how credible were the witnesses—particularly the parties—and how serious were the injuries? Damages, if they were awarded, would be limited to compensation; the only real wild card would be the amount a jury might award for pain and suffering.

Let us move almost a century forward, to 2016, and imagine approximately the same accident (of course air bags and seat belts might eliminate or minimize injuries, but for the sake of comparison, we'll suppose significant injuries). To begin with, our plaintiff will have an easier time finding a lawyer. Indeed, if she is still conscious after the accident, as she awaits the ambulance, she can find the names of several lawyers just by observing the ads on the backs of passing buses. Even if the lawyers doing such saturation marketing are low in skill, they will have easy access to networks of more skilled and better capitalized lawyers, thus putting our plaintiff in the hands of a lawyer who can afford to take her case as deep into litigation as the amount at stake warrants. That itself is a significant change.

Compared with the 1920 case, the amounts at stake are likely to be determined by the extent of injuries and by the merits of the claims, not simply by the size of the defendant's insurance policy. In many such cases, one can posit several secondary defendants—the manufacturers of both vehicles, the City of Los Angeles (the designer and maintainer of the intersection and employer of the ambulance drivers), the manufacturers of the street and traffic lights, and UCLA's hospital (supposing this to be the nearest emergency room). Under California law (and that of most other states), each of these possible defendants may be jointly and severally liable for the economic damages to the plaintiff. Thus even a very modest degree of fault may render a secondary defendant liable for the entire damage amount. Moreover, spurred by knowledge of these liability rules, one or more of these secondary defendants may seek to settle early in the suit, thus supplying financing for the suit against the remaining defendants. In contrast to the 1920 case, this one, we can be reasonably certain, will not go to trial. Good studies suggest that, barring an unlikely grudge match between insurance carriers or among municipal and other

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

defendants, something like economic rationality will prevail. For the defendants, the primary job will be avoiding a very small chance of a catastrophically high verdict. For the plaintiff, the job is the converse: to minimize the chance of no recovery and maximize the chance of a large settlement or verdict.

The distance between these two cases lets us understand where the world of litigation now stands.

Where We Are: An Imperfect Market in Civil Claims

The oldest and the newest sign of litigant control over lawsuits appears if we look at how disputes end. Since before history, and certainly since before modern legal systems, humans have settled most disputes by agreement. Sometimes such settlements amount to nothing more than a weaker party's decision not to pursue any redress. But many settlements reflect more substantial give and take. And recent decades have seen the flowering of settlements so creative that they look like high-end corporate transactions.

The starting point is that, with rare exceptions, settlements of civil lawsuits require no judicial approval. Injured in an auto accident or economically harmed by breach of contract, I can settle with the other side without filing suit or invoking the legal process in any formal way. Even if I file suit, I can settle afterward without telling a judge, much less seeking his approval. Probably the great majority of disputes settle long before anyone contemplates, much less undertakes, litigation. Insurers employ squadrons of specialists—claims adjusters—to effect such settlements.[1] They evaluate claims and seek to settle them without the filing of a lawsuit. They do so in part because filing a lawsuit will likely increase the value of a claim: if nothing else, the lawyer has to demonstrate to the client that she has earned her keep. More optimistically, a lawyer may be able to do a better job of presenting, if only to the insurance adjuster, the evidence supporting a claim. In fact, for most lawyers with active torts practices, the most frequent audience hearing evidence will be an adjuster. Those who have studied this practice report that both sides respond more to information than to shouted demands. The plaintiff's lawyer understands that if she can present a convincing set of medical and wage bills to the adjuster, the adjuster will have something he can present to a supervisor to support a settlement offer higher than the previous one.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

The same principle holds true for litigation not involving insurance companies. Consider a pair of businesses at loggerheads over an allegedly unfulfilled contract. After some skirmishing over discovery, a point is likely to come when one counsel suggests discussing whether the matter can be settled without trial. That conversation is likely to consist less of posturing and fist-slamming than of the presentation of evidence. Indeed, in high-stakes cases, the parties may resort to a child of privatized litigation—the minitrial. This invention of lawyers involves, in spite of the name, no judges. There may be a person who presides and moderates, but she will, by definition, have no power to render a verdict. There may be a "jury," who will tell the parties how they view the case—but will have no power to decide it. The parties will present their cases in summary form (relying on lawyers' summaries rather than live witnesses or documents), and afterward the "judge" or "jury" may render a verdict. The point of this exercise in private justice is to have the parties hear their own and each other's case. The underlying idea is that each party will perceive weaknesses in his own case and some perhaps unsuspected strengths in that of his adversary's—and that the process will bring them to settlement.

Insurance adjustment practice and the minitrial share several characteristics: they aim at settlement rather than adjudication. They are private rather than public. And they rely on evidence—on the parties' presentation of information supporting their respective cases. These practices all reflect and embody a sense of litigation as a private activity. That stance has drawn criticism from those who regret the loss of public values found in adjudication. I do not intend to argue here the respective values of public and private disputing. Rather, I want to point descriptively to the widespread privatization of litigation.

Undoubtedly, the most common settlement agreement consists of a promise not to sue (or to abandon an existing suit) in return for a specified payment. The plaintiff signs a release, giving up all claims arising out of the underlying episode in return for a stated amount of compensation. Such a settlement ends the suit and bars any new lawsuit on the same facts. In recent decades lawyers have gone far beyond such simple exchanges. Consider, for example, the sliding-scale settlement. As already noted, in much modern litigation there is more than one plausible defendant. Suppose a traffic accident involving three cars, in which the occupant of one is seriously injured. The injured plaintiff sues the other two drivers, one of whom offers to settle. That defendant is willing to settle for a flat payment—or for a much higher payment *if* the plaintiff agrees to return all

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

or part of that payment in the event she recovers at least that much from the *other* defendant. Such a defendant might say, "I'll offer you $1 million with no strings attached, or $3.5 million with a sliding scale agreement."

An example taken from a California case already discussed—Smith v. Abbot Ford—will illustrate.[2] The reader may recall that Mrs. Smith was blinded when a wheel of Mr. Sneed's van flew off and crashed through her windshield. She sued Sneed (who had minimal insurance coverage); Abbot Ford, the dealer from whom Sneed had purchased the van; the Ford Motor Company; and Sears Auto, which had done some work on the van. Smith's initial theory of liability involved the wheel that came off, but as the case proceeded, her lawyers shifted to a different theory: that Ford had declined to install a windshield laminate that would have protected passengers and drivers from shattered glass. Partway through the case, Abbot's insurer (conducting the defense under its umbrella liability policy) offered to settle for $3.5 million—on a sliding scale. If Smith's suit against the other defendants failed entirely, she would keep all of Abbot's payment. If, however, she recovered against the others, then she would return Abbot's payment to the extent of her recovery. Thus, if she collected more than $3.5 million from the other defendants, Abbot would recoup its entire settlement. If she recovered from the other defendants something less than $3.5 million, she would keep the difference between her recovery and the $3.5 million, returning the balance. For example, if Mrs. Smith recovered $2 million from Ford and the other defendants, she would return $2 million to Abbot's insurers, leaving her with a total of $3.5 million—$2 million from the other defendants and $1.5 million from Abbot (the residual amount from the original $3.5 million). For Mrs. Smith (and her lawyers) the offer was attractive. It guaranteed her some recovery, even if her suit against the remaining defendants failed entirely. It also helped to finance what was ultimately a successful suit against Ford. Although a few states have rendered such agreements unlawful, they are widely used. They offer both plaintiffs and the settling defendant flexibility: the plaintiff gets a guarantee, thus eliminating the risk of a no-recovery outcome; the settling defendant gets a chance that its outlay will be reduced. The nonsettling defendants in such cases are understandably less enthusiastic, and they complain that the existence of such agreements creates almost irresistible pressure to settle, even when the merits favor them. Again, this is not the place to argue the desirability of such agreements, just to note they are further evidence of the flexibility created by the privatization of litigation. Both sides control risk and both sides avoid the potential catastrophe of an all-or-nothing verdict.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Another unusual form of settlement—the high-low agreement—extends this theme of risk avoidance, with the twist that it guarantees continued litigation rather than preventing it.[3] Consider a case in which liability is uncertain but damages, if they exist, are high: the plaintiff, who may have been misusing a product, is severely burned when it explodes. The defendant argues that the product met all reasonable safety standards; the plaintiff argues that the defendant should have anticipated the use to which the plaintiff put the product. For the plaintiff, trial risks a defense verdict. For the defendant, trial risks a very large plaintiff's verdict. A high-low agreement hedges against both risks: it binds the defendant to pay a minimum amount (the low) even if there is a defense verdict, while the plaintiff agrees to accept a capped payment (the high) even if the verdict is many times greater. Both sides trade a less-than-optimal outcome for a guarantee against disaster. The result will not be a trial avoided but a trial guaranteed, a trial, however, in which both sides have insured against the worst.

Still other, even more creative, forms of settlements have emerged—some perhaps involving violations of professional ethics. One more example will illustrate. Merck Pharmaceutical marketed Vioxx, a widely used painkiller, which also may have increased the likelihood of heart attacks in some of those using it. Lawsuits ensued, eventually numbering about fifty thousand. The defending corporation wanted a settlement that would guarantee that all the existing suits would be resolved at once. But the suits had been brought by individuals and were for various reasons not good candidates for consolidation as class actions. Moreover, the plaintiffs' pharmaceutical bar is relatively small and close-knit, so Merck knew that each settlement would be likely to establish a floor for the next one and that the suits would keep coming indefinitely, for the drug had been widely marketed. Merck had brought several of the individual cases to trial and had prevailed in most of those, lowering the settlement amounts expectable. At that point it approached the plaintiffs' lawyers and offered to establish a $5 billion fund that would compensate all the plaintiffs. But that fund would come into being only if 85 percent of the plaintiffs agreed to the terms of the settlement. One of the settlement's terms was that the plaintiffs' lawyers—recall that we are talking about a relatively small group of lawyers who have the expertise and capacity to bring such suits—would recommend the settlement to their clients and would further agree not to represent these clients if they chose not to accept the settlement and instead to pursue litigation. More than a few specialists in legal ethics thought the latter two terms of the settlement agreement

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

(which was later amended) violated professional ethics for the plaintiffs' lawyers who had signed it. First, it bound them to recommend the settlement to all clients, thus violating their duty of loyalty to the client, said these critics. Second, it bound them to refuse to pursue the representation of clients whom they had previously agreed to represent—another arguable violation of professional responsibilities. For present purposes we need not resolve the question of professional ethics. The Vioxx settlement instead illustrates the range of settlement possibilities, a range that has broadened during the privatization of litigation.[4]

These examples hardly exhaust the range of settlement forms, but they serve to illustrate one thesis of this chapter: that at the start of the twenty-first century, one can conceive of civil litigation as a market, in which plaintiffs sell and defendants buy claims. The prices of the claims are set by the parties, and the terms of the sales often manifest great creativity—the same creativity that characterizes other parts of the market. As we have learned in recent years, the market can have great perils, and to describe contemporary civil litigation as a market is not to imply praise.

Indeed, in one respect the market for settlement lies open to criticism because it lacks an essential element found in most other markets: transparency. In the opening decades of the twenty-first century, the going price of most goods is readily available. Digital information, spread on the Internet, makes it possible for me to get the price of a two-bedroom house in a good neighborhood of Omaha, the average price of a used Ford, and much more. My ability to know these prices doesn't guarantee that I won't be taken in or that my great need to buy or to sell won't lead me to agree to a transaction substantially outside the norm. But it makes it likely that most transactions will occur within a normally shaped bell curve, with prices clustered around the median point.

Not so for civil settlements. In the vast majority of civil settlements, the settlement price is unknown to anyone but the parties. This opacity flows not from any positive law or agreement requiring confidentiality (though some settlements contain confidentiality clauses). Instead, the opacity results from the conditions described above—private ordering without any required official approval or registration. Consider a recurrent, common claim for injuries suffered in a traffic accident. Suppose, further, that there's some doubt about liability (common in left-turn collisions at intersections without traffic lights) and that the plaintiff has substantial medical bills and lost wages. The medical bills and wages can easily be documented. But in most states the plaintiff can also make a claim for

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

"pain and suffering," damages awarded in compensation for noneconomic damages. Those damages can run the gamut from literal pain—suffered in the course of physical therapy for a crushed and reconstructed knee—to more ephemeral matters. Suppose that the plaintiff, a young unmarried adult, suffers permanent facial scarring, rendering her or him less attractive as that term is generally understood. The law recognizes that such a change in condition is compensable—but at what rate? Or suppose the plaintiff suffers an injury that makes him or her unable to have sexual relations or to have children. Again, most would agree that such a condition represents a diminution in overall welfare, and, again, the law recognizes such an injury as compensable. But at what rate?

In theory, we could answer these questions from two sources of information. If we knew the awards made by judges and juries in the small group of such cases that go to adjudication, we would have one point of measurement. If we knew the settlements reached by the parties in the much larger group of similar cases, we would have another source of information. But we don't know either—or, more precisely, we lack systematic knowledge. Judgments and verdicts are matters of public record. But there are no state or national registries of such judgments. Private verdict reporters exist in many large states, but, though they aspire to (and advertise) comprehensiveness, follow-up studies indicate that they miss substantial numbers of verdicts and judgments.[5] Even if they were comprehensive, we would lack information about the great majority of claims, because they settle before adjudication, many before a lawsuit is filed. As to these settlements, we almost entirely lack information. When a claims adjuster and I arrive at a settlement, she sends me a release and, when I return a signed copy, a check. The insurer and I know the amount involved, but no one else has access to that information—not because I have promised to keep it secret, but simply because there is no public place in which it is recorded. Insurers keep such records, but they share them neither with their competitors nor with the public. None of this opacity results from conscious efforts to create secrecy; it flows rather from the extent to which we have privatized the litigation process.

Whatever its sources, our lack of information about the pattern of settlements has one important consequence: settling parties cannot be confident that the amount they have agreed to pay or receive is characteristic for claims of their sort. That circumstance makes settlements an increasingly anomalous market in the twenty-first century developed world. We have access to comprehensive information about the price of virtually

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

all significant real estate, goods, and services and, via various digital platforms, of most insignificant goods and services as well. We rely on litigation to regulate substantial parts of our economy, and we rely on settlements to end most civil litigation. Yet under current circumstances, the market in settlement lacks the pricing transparency we take increasingly for granted in other significant markets. Nor do expert estimates make up for the lack of pricing information. In theory an experienced lawyer (or insurance adjuster) might be able to draw on information gathered in the course of a career to price a reasonable settlement offer. But every study that has looked at the question has concluded that experience doesn't lead to reliable estimates of the settlement value of a lawsuit. Judges, lawyers, and insurance adjusters all failed at predicting the value of cases; even more surprising and discouraging, those with greater experience seemed especially likely to make poor predictions! I have elsewhere argued that the cure for this problem is a national registry of settlements, which later litigants could consult. There are some nontrivial issues both of conception (how would one create useful information while protecting litigant privacy?) and of implementation (who would pay for and maintain the data base?) in such a proposal. Nevertheless, the increasing disparity between widely available information about other markets and this one will create irresistible pressure for such data about civil settlements.

Contemporary civil litigation thus creates a market in which most claims are bought and sold, not adjudicated. That circumstance flows from the structure of the bar and the rules of procedure and thus seems unlikely to change in the near term. It's an increasingly sophisticated market, as lawyers seek to hedge and control the risks of litigation. But it's also a very imperfect market, imperfect because, unlike most other markets, the participants lack knowledge of prevailing prices. With settlement's growth, the absence of good information about going prices is likely to produce more outlier settlements—both too large and too small—and a growing sense of dissatisfaction in the system's users.[6]

Given the present state of civil litigation in the United States, what might we expect the near-term future to look like? And if we cannot answer that question with certainty, are there problems that need addressing in the present? This concluding chapter tries to respond to those two questions. It is different from what has preceded it in two ways. First, since looking into the future is uncertain, it is more speculative. Second, in identifying "problems," I am departing from the descriptive mode of the rest of this study; to call something a problem is to take a normative stance.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

I've tried to do so explicitly and to state what may be opposing views, but it's only fair to warn the reader of this shift in tone.

Intractable Problems?

However the balance of power between the plaintiffs' and the defendants' bars may shift as a result of the developments described in the preceding chapters, it will leave unchanged problems that are built into the structure of US litigation. As noted in chapter 5, the system fails to provide legal representation to two categories of potential clients: plaintiffs with meritorious claims too small to warrant competent representation and indigent defendants who are nevertheless sued because the plaintiff can get the desired remedy only from a court. The second problem could, in theory, be solved with a substantial investment of public or philanthropic funds; the first problem is baked into the crust of our legal system.

Why, though, is it fair to describe these as problems rather than simply as features? So to label them implies a normative stance that requires at least some defense. I call them problems because in a polity designed like ours, access to the courts—to justice, however imperfectly administered—seems to be a baseline requirement of equal citizenship. Were our system designed differently, with governmental agencies carrying more of the burden of organizing life and settling inevitable disagreements, access to courts would seem less important, as it is in many European nations. But because we have asked courts to do much that in other societies would be handled by a different agency, it becomes important that citizens have access to those courts, access that, again given the design of our system, will often entail the services of a lawyer.

Let us begin with the problem that is more susceptible of solution, however unlikely the solution is politically. As already noted, most poor people have a grim sort of built-in insurance against lawsuits: no one will sue them for damages because they have no assets with which to pay a judgment. However hard the rest of their lives, they need not worry about being sued. In two instances, however, this protection fails—because the plaintiff has to go to court to get what he wants. That describes suits to evict a tenant from a dwelling and suits seeking divorce or child custody. In the first instance, the tenant likely has no liquid assets—which is why she has failed to pay the rent—but she is in the apartment, and the law forbids the landlord from forcibly throwing her out of the apartment. So

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

the landlord files a civil action, hoping at the end of the proceeding to get a judgment that authorizes a marshal or sheriff to evict the tenant. Many such tenants have no viable defense against eviction: they have failed to pay the rent because they lost a job or suffered an illness or injury. But some do have such a defense, yet it is unlikely that they will be able to assert it without legal assistance. In theory, legal aid could supply such representation, but the magnitude of the demand dwarfs the assistance available, and most such organizations offer only a pamphlet or a short workshop aimed at helping tenant-defendants to represent themselves. No one thinks this is an adequate response, but it is the only one presently available.

Divorces present a similar profile. In the United States, one cannot get a divorce without a judicial judgment. Even amicable divorces require the parties to go to court and go through at least a brief hearing. When the custody of children is in question, the hearing can be much more prolonged. The incidence of divorce hovers around 40 percent, but the incidence tends to be higher among poor people, whose lives are filled with stresses that come from living at the edge of subsistence. Again, many such people would benefit from competent representation at the time of divorce, but demand swamps supply, and in all but the most egregious or complex cases, legal aid agencies offer only a pamphlet describing the steps people need to follow to represent themselves, often containing the not-very-helpful information that it's a good idea to have a lawyer in such circumstances!

In both divorce and eviction cases, representation could, in theory, be supplied, but doing so would require a very large additional investment in legal assistance. In the contemporary political climate, such appropriations seem extremely unlikely, however theoretically possible.

The other problem, that of the too-small claim, and its twin, the too-small defense, is much harder—and, given the current structure of representation, theoretically impossible—to solve. We have constructed our legal system around the principle that in most cases each party will bear its own legal fees. In a good part of the rest of the world, the principle is that the loser reimburses the winner for at least some of his legal expenses. In the US system, there will always be some claims and defenses that are inherently not large enough to justify hiring a lawyer to pursue or defend them—at least not for rational actors (I leave to one side the occasional irrational grudge match). That will hold true no matter what assets the parties hold. Neither rich nor poor will pursue cases in which even

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

a favorable outcome will yield less than the outlay required to bring or defend the case. And it is wildly unlikely that a polity that chooses not to finance representation for indigent tenants and divorcing couples will decide to do so for economically irrational claims.

The legal system's response for such claims is small claims courts, in which formal legal representation is forbidden. The parties fill out the appropriate forms and present whatever testimony they think will be helpful to them. To the extent that these tribunals are available and effective, they constitute an answer for the too-small case. But several problems plague these tribunals. First, they have an inevitable bias toward better-educated (and thus, likely, wealthier) parties. Such people are more likely to be able to comprehend the necessary forms and to make articulate and thus convincing evidentiary presentations than their less educated neighbors. It's just this sort of bias that legal representation is supposed to cancel out; but in an environment that forbids legal representation, it will persist. Second, in practice such courts often become debt collection mills, in which merchants seek and obtain judgments against trade debtors. Third, anecdotal evidence suggests that even a successful plaintiff in small claims court has difficulty in getting the judgment executed. It can be difficult to locate assets: the defendant is unlikely to volunteer to tell the plaintiff where she banks. In theory, discovery is available, but that process is sufficiently complex that an unrepresented party may be unable to use it effectively. Moreover, states regulate the seizure of assets in a confusing variety of ways that are neither intuitive nor known even to lawyers who do not specialize in this area: there is one way of seizing real property, another for bank accounts and wages, another for personal property, and so on. The chances are small that an inexperienced nonlawyer who has won a judgment in small claims court can easily collect.

Combined, these problems present grounds of reproach to the legal system and, more broadly, to the polity. To the extent that we want to continue the current design of our political and economic life, these concerns should be addressed. Unfortunately, there are few signs that they will be.

Looking Back and Looking Ahead: Two Futures

There may be something to be learned by looking back before I begin to speculate on the future of civil litigation. We know remarkably little about the shape of US litigation in the years before about 1980, when we began

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

to get good aggregate data on state courts. But a very limited number of historical studies caution us not to assume that the past looked like the present—and therefore doubly caution us not to assume that the future will look like the present.

One respect in which the past differs from the present is in the mix of cases. As this study has earlier noted, at present the docket divides itself approximately evenly between civil and criminal cases. Because the right to a speedy trial attaches itself to criminal, but not to civil, cases, that division has important implications for the speed at which cases are handled. Court administrators accordingly devote much time and thought to ways in which they can assure prompt consideration of civil cases with limited judicial resources. But so far as we can tell—and, again, our information is spotty—the current proportions have not held true for most of the nation's history. Though the story differs somewhat from place to place and among crimes, for much of the nineteenth century, private parties, not the state, prosecuted criminal cases. In some places, where access to the courts was easy—Philadelphia in the middle of the nineteenth century is one example—individuals with various grievances flooded the courts with what we would now call criminal complaints (often using them as leverage to press for favorable settlements in parallel civil suits). In other places—New York City in the nineteenth century—cost-conscious governments were so parsimonious with funds for prosecutions that often even the most serious crimes, including murder, were rarely prosecuted, and courts accordingly dealt with an almost entirely civil docket.

Today, in every US jurisdiction, prosecution is exclusively a governmental task and a governmental expense, and so is criminal defense for the 80 percent of defendants who are indigent. Moreover, in the past half century, the public has demanded vigorous prosecution of crimes and has created a broad array of new ones—especially those involving drugs. That public demand has resulted both in large criminal dockets (managed only by wholesale plea bargaining) and over-full prisons in most states, with the annual cost of housing each inmate rivaling the cost of a year in a high-priced private university. Although we have come to take this circumstance as a given, things could change. In recent years there have been faint signs of a reappraisal of this approach to criminal justice. Voices on the right, appalled by the expenditures of incarceration, have joined voices on the left appalled by its waste of human capital and disruption of lives outside the prison. Moreover, scientific and other advances have created a growing awareness of the possibility of wrongful convictions.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Were a coalition to form around this issue, we might, in a few decades, be looking at a greatly reduced criminal docket. This is less a prediction—the road to substantial decriminalization is likely to be politically risky—than a caution about assuming the immutability of our current docket.

The other lesson that might be derived from the sketchy information we have about our past is that there is wide regional and even intrastate variation. State and local polities have responded quite differently to the same environmental conditions, and the environmental conditions have varied substantially. That remains true today. We have already seen that different states have quite different caseloads per judge and quite different rates at which they clear civil litigation. Even between counties that appear demographically similar, rates of litigation can vary quite substantially—with people suing at the drop of a hat in one county and preferring to lump it in another. (The same phenomenon manifests itself in criminal law: a very small number of US counties account for an astonishingly large proportion of death sentences, and substantial variation exists even between adjacent counties in the same state.) Even in a nation of instantaneous digital communication, we continue to nurture very localized legal cultures that often change very slowly. We should therefore be quite cautious about assuming that everyone does things the way we do—whoever the "we" is.

Having suggested great caution even about the present, it seems foolhardy to speculate about the future. Therefore, I offer the next thoughts only tentatively. Looking forward, one can imagine two alternative futures. One might be called the regulatory state, the other the litigation state. In the regulatory state, bureaucratic regulation would do much of the work that litigation now does in the United States. Administrative agencies would regulate many more areas of life—and the regulation would be more pervasive and intrusive than it now is. That model recommended itself to the Republican party of the Progressive era and to the Democratic party of the New Deal Era, and it dominates the social democracies of northern Europe. In the second decade of the twenty-first century, it is anathema to the Republican party and only weakly embraced by the Democrats.

An alternative to the regulatory state might be the litigation state. In this form of organization, we would dismantle existing bureaucracies, leaving regulation to the outcome of civil litigation. Progressive, New Deal, and a few more recent agencies—ranging from the Food and Drug Administration to the Environmental Protection Agency—would be reduced

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

in size and scope, perhaps becoming monitoring and reporting units, somewhat like the Bureau of Labor Statistics or the Census Bureau, without enforcement powers or responsibility. At the same time, one would have to create private rights of action, as lawyers refer to them, to enforce the substantive law for which the now-shrunken bureaucracies had previously been responsible. Translated out of lawyer-speak, we would have to give to private citizens the right to enforce various regulations by means of civil lawsuits. That now happens in some areas of law. For example, federal securities laws can be enforced by the Securities and Exchange Commission, but individuals can also sue for violations of some securities laws. There are other areas where, under current law, only the relevant governmental agency has power to enforce the law. If we wished to transition to a litigation state, private rights of action would likely have to be broader than they now are.

But beneath these opposed visions of the regulatory and the litigation state lie more complex and nuanced forces. Under the current regime, the United States has settled on an uneasy compromise between pro- and antiregulatory forces. The compromise has entailed creating a fairly significant network of regulations but then underfunding enforcement efforts. As a result, in a variety of areas, from food safety to the Internal Revenue Service, the federal government fails to enforce many of the regulations that are on the books. That compromise allows those who pass the regulatory legislation to be, like the character played by Claude Raines in the film *Casablanca*, "shocked, truly shocked" that the regulation in question is not being regularly enforced when scandal strikes. For its part, the antiregulatory camp can rail against the existing regulatory scheme without having to propose a viable alternative.

Large institutions, both public and private, tend to prefer this form of regulation by underfunding. They have the capacity to monitor and respond to the inevitably slow changes that bureaucracies produce and some capacity to influence the outcome of bureaucratic processes: bureaucracies know how to talk with other bureaucracies. Moreover, they are in a position to gauge the likelihood that enforcement will actually occur and to act accordingly. The instability in this regime reveals itself when a scandal erupts—deaths from food or drug impurities, massive financial fraud, revelations of widespread tax evasion, and the like. At that point public pressure for regulatory enforcement becomes irresistible, and the underfunded regulators concentrate their efforts on whichever offender is most in public view. In such circumstances one cannot say that the offender is

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

guiltless, but one can say that enforcement has a certain arbitrary quality: the offender was quite likely doing what many similarly situated others had been doing, but then the spotlight of scandal suddenly shone on him.

Consider now the forces that might be unleashed were we to transition to a litigation state. Such a transformation would—in theory—be welcomed by those who believe that smaller government is better government. The only governmental institution that would expand would be the judiciary, since regulation by litigation would require more judges and courtrooms than we now have. It is hard to estimate how greatly the number of lawyers and judges would have to expand to call into being the litigation state, but the expansion would be considerable. How would such a transformation be received? However happy smaller-government advocates might be in theory, in practice, some of them—particularly large institutions—would be quite unhappy with such a development. Institutions like predictability, and litigation is less predictable than bureaucratic regulation.

A second group likely to be of two minds about such a transformation would be the actual and prospective jurors of the litigation state. Even with the current low rate of trials, courts have substantial difficulty in persuading jurors to serve. Replacing regulation with litigation would, to the extent that claims remained triable by juries, require larger jury pools. Even those who mutter about the excessive influence of distant bureaucrats might find the necessity to replace those bureaucrats by jurors an unwelcome intrusion on their routines. We would have to have a national conversation about the value of jury service, would need to use jurors' time more efficiently, and would likely have to compensate jurors at far higher levels than the nominal pay they now receive, to make them willing to serve.

Without regard to which of these two futures—or any of the various intermediate points between them—is more likely, it may be illuminating to note the different deployment of resources and the differing political pressure points they would imply. The regulatory state would, of course, enlarge governmental payrolls. To some extent this regime would cause taxpayers generally to bear some costs now borne by civil litigants: it would socialize those costs. In the current political climate, it would draw fire from those who fear big government—a term usually not employed to describe courts. To the extent that litigators would find themselves out of work (probably the extent to which they could not simply transfer their skills from courtroom to administrative settings), they might oppose it.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Though institutions tend to dislike regulation, they usually dislike litigation even more, so one can imagine at least tepid acquiescence by public and private institutions. Whether such a regime would better serve the interests of the unorganized public is a large question about which scholars and politicians differ: are regulatory agencies wise and disengaged, or are they likely to be "captured" by those they regulate?

By contrast, the litigation state would involve two shifts of resources. Dismantling existing regulatory bureaucracies would save money. But a real litigation state would require substantially greater investment in judicial resources. Even in a regime in which the parties bear the lion's share of litigation expenses, judges preside and process and decide motions. But because the number of judicial resources would be unlikely to attain the magnitude of existing bureaucracies, this regime would likely result in a net shift of cost from taxpayers at large to the litigants: it represents the further privatization of functions now performed by government. In theory the current Republican Party embraces privatization, though not in this arena. In theory the current Democratic Party opposes such a dismantling of the regulatory state; in practice, the Democrats have over the past few decades embraced the plaintiffs' bar, which might profit from such a shift.

Both of these alternatives suppose very substantial changes in the polity. The US Constitution, however, was designed to make large changes of any sort difficult to bring about, and some of the changes imagined would have to occur at the state rather than the federal level. So—if one had to predict—the best prediction would be that neither of these alternative visions of the future will come about. What then? What if we meander on with some version of the current situation? No one invented the current litigation system. Like much that is best and worst about our national life, it grew from rather variegated and homely roots: an evolving common-law tradition that seemed to Revolution-era citizens part of the natural background of life; a lightly regulated, entrepreneurial bar; a constitutional system that, under John Marshall's Supreme Court, made civil litigation constitutionally salient; procedural reforms in the first half of the twentieth century that put powerful investigative tools in the hands of litigators; the American system of legal fees (in which, absent a statutory exception, each side bears its own costs); the institution of the civil jury, which gave powerful political cover to verdicts that, left in the hands of judges, might have gone in other directions; the shared power between state and federal governments (and their respective court systems); and

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

the broad remedial powers of the courts as well as, paradoxically, the relatively restrained judicial role. All these created, without any conscious design, the system we now live with. At its best it has the potential to speak truth to power—something power doesn't like very much. At its worst it can involve much private and some public expense in the pursuit of meritless claims.

Because civil litigation has such broad roots and is not the result of a single vision or legislative act, it is likely to remain a robust part of our social and economic life. If one had to guess about the future—not a wise thing to do—one would imagine that, driven both by falling crime rates and the rising costs of prosecution and incarceration, the proportion of the docket devoted to criminal cases would decline slowly, with civil litigation moving into the vacated space. Given a bit more docket space, it is possible that we would see a small increase in the proportion of trials. That increase would, however, remain small so long as the current discovery system remained in place, because that system lets the parties know in advance of trial everything about the facts that they would learn at trial and makes settlement a likely risk-avoidance system. If the newly restrictive pleading barriers erected for federal litigation by the US Supreme Court were to remain (and if they were adopted by a substantial number of states), one could envision greater investment in prefiling investigation—various forms of private investigation and espionage, aimed at allowing plaintiffs to state a claim with the detail newly required. It's also likely that contract claims would continue to dominate the civil docket—though tortlike claims would likely occupy much of the trial time and many of the headlines. Harder to predict is the fate of arbitration. At the moment the drafters of arbitration clauses have the upper hand. If, however, the public perceives arbitration outcomes or processes as seriously unfair, the pressure on legislators to limit arbitration will become irresistible. One outcome would be legislative curtailment of arbitration. Another imaginable outcome would be serious efforts by the drafters of arbitration clauses—almost exclusively institutions—to make the processes sufficiently fair that such legislation would not occur.

A Concluding Normative Coda

This study has sought to stay firmly in descriptive territory, on the theory that understanding how the civil litigation system *does work* is difficult

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

enough without the distraction of thoughts about the way that world *should look.* Nevertheless, for those who have an interest in how I think the civil litigation system might be improved, I offer some concluding thoughts, set forth in three general groupings: the danger of unexamined factual assumptions; the danger of unintended consequences; and the modest virtues of a second-best world. I'll illustrate all three with examples, a few of which fall into more than one category.

Untested assumptions abound in the world of civil litigation. Generalizing wildly, one can say that lawyers (including law-trained judges) tend to be data-phobic: many of them chose law, rather than medicine or business, in part because they aren't comfortable with numbers. (Anyone who doubts this can try putting a few numbers on the board or screen of a law school class and watch the students' reaction.) A quip capturing this point has long circulated among social scientists who work in law-adjacent fields: "For lawyers, 'data' is the plural of 'anecdote.'"

This professional tendency has manifested itself in several areas of procedure. From about 1950 onward, several generations of procedural reformers thought it self-evident that litigation would move faster if judges helped lawyers rehearse for trial. The vehicle for such rehearsals was something called the pretrial conference. The underlying idea was both simple and intuitively appealing: if judges required lawyers, before trial, to review with a judge their major lines of assertion and proof, the trial itself would be shorter, cheaper, and more focused. The problem with such an appealing idea is that it doesn't seem to work in the real world. In the 1950s, Professor Maury Rosenberg of Columbia Law School, with the encouragement of then–chief justice Arthur Vanderbilt of New Jersey, did an elaborate double-blind study of civil litigation. Cases were randomly assigned to one of two tracks—one with a pretrial hearing, the other without—and the results were tabulated. Cases on the pretrial conference track differed from the control group only in one respect: they were slightly more expensive.

But because lawyers have a hard time believing that simple, attractive, and intuitive reforms don't work, forty years later we tried it again—this time in the federal courts. In the early 1990s, legislation sponsored by then Senator Joseph Biden required federal courts to establish litigation management plans. Hearings on the legislation promised all manner of good things, chief among them a faster time to resolution. Fortunately, the legislation also instructed an administrative branch of the judiciary to track the results among districts experimenting with various litigation

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

management techniques. Again the results were clear: among all the ingenious ideas to speed and improve litigation (and there were many), the only one that measurably shortened litigation was the plan created and implemented by a single federal judge in Virginia, who in advance set very clear deadlines by which various litigation milestones had to be reached and resolutely declined to extend those deadlines. Indeed, Judge Robert Merhige of the Eastern District of Virginia responded to lawyers who had missed deadlines by holding extra, Saturday-morning court sessions to make up for lost time.[7] Cases proceeded quickly on his docket; no other plan in the country produced comparable results. Nevertheless, because the idea of a "managed" case is intuitively appealing, the concept surfaced yet again in 2015. In that year an amendment to a Federal Rule of Civil Procedure encouraged—though did not require—judges to schedule early, in-person case management conferences, and it further asked lawyers to behave cooperatively in litigation. It is possible, of course, that the Rules Committee will this time have found the solution to litigation delay and expense, but history counsels skepticism.

The US Supreme Court not long ago acted on an assumption one would be tempted to call untested but for the fact that it *had* been tested—and found to be false. The assumption in question was the belief that the discovery phase of trial consumes too much time and too much money in a substantial proportion of civil cases. Procedural rules give judges various means to handle excessive discovery—including pretrial conferences. But at any gathering of lawyers, one can elicit ample anecdotal evidence that discovery is a nightmare: one or both sides seeks massively disproportionate discovery or resists every request, no matter how reasonable, as if civilization and the rule of law would crumble were the request granted. Such cases undoubtedly exist, but the data, collected by the Administrative Office of the United States Courts (as well as by various scholars), suggest that they are relatively rare. In the vast majority of federal cases, discovery causes neither excessive delay nor excessive expense. Unfortunately, the Supreme Court has recently demonstrated either that it has not read or that it does not believe the data produced by a branch of the system over which it presides. In *Ashcroft v. Iqbal* (discussed above, pages 74–75), the Court established a principle of pleading for all cases that, if taken at face value, will make it more difficult for an undetermined number of cases to advance to the discovery stage—because, as the Court explained, it was concerned about the possibility of excessive discovery.

That decision seems wrong at two levels. First, it ignores the available

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

data, collected and analyzed by a resolutely nonpartisan agency, that put to rest the concerns of unbounded discovery that apparently motivated the Court. Second, in reinterpreting a Federal Rule of Civil Procedure in an unexpected way that broke with five decades of consistent interpretation, the Court ignored the process that Congress established for amending a Rule. That process, which has been criticized for being cumbersome and lengthy, has some offsetting virtues: it assures that many perspectives will be heard and that, where relevant, data can be collected and analyzed. In a number of cases preceding *Iqbal,* the Court had rightly put aside arguments that this or that consideration suggested that pleading rules in some area should be tightened (to make it more difficult to reach the discovery stage). No, the Court had consistently said: that may well be a good idea, but it is an idea that should be filtered through the process for amending a Rule. Having thus opined, the Court suddenly, in a case that no one thought was about pleading, inexplicably turned the established understanding on its head, ignoring the benefits of the process ordinarily attending Rule amendments.

Arbitration supplies a third example of procedural change resting on unexamined assumptions. At the start of the twentieth century, most courts in the United States were hostile to agreements to arbitrate (unless the agreement came after the onset of litigation); some thought this hostility flowed from the ignoble desire to maximize the courts' own caseloads (and thus legislative funding). As a result, many business disputes in which the parties wished to arbitrate instead ended up in court. In 1927 Congress, convinced that businesses should be able to choose their method of disputing, passed the Federal Arbitration Act. Though the legislative history is less than lucid, it appears that the intent was to allow disputes among businesses to be settled by arbitrators knowledgeable about the area of business in question. There things stood for fifty years, years that included several Supreme Court decisions explicitly rejecting arbitration in areas of important federal interest, including securities laws, antitrust, and employment discrimination. Starting in the 1980s, however, the Court steadily expanded the scope of the legislation and started to read the act not just as permitting but as encouraging arbitration. Sometimes the Court did so by overruling earlier cases. In other instances it has done so by expanding the act to cover cases one cannot imagine that Congress had in mind. For example, the statute says it applies only to cases involving "commerce"; in 1995 the Court extended it to cover an agreement between a homeowner and an extermination firm to rid a house of ter-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

mites. The Court has further extended arbitration to cover violations of federal civil rights statutes. And most recently, the Court, still purporting to interpret the original 1927 statute, blessed an arbitration clause that forbids small claimants to pursue class actions—thus, as the Court recognized, forbidding such claimants to pursue any remedy as a practical matter.[8]

Why, the reader may ask, do such decisions fall in my category of "unexamined assumptions"? The assumption in question here is that arbitration will provide a fair and perhaps somewhat cheaper and faster alternative to litigation. That assumption was likely true about the arbitration procedures envisioned at the time the statute was enacted: two businesses of relatively equal standing would choose someone—thought fair by both parties, and perhaps knowledgeable about the business setting—to decide a dispute between them. Such arbitrations had been taking place among merchants at least since the Middle Ages, and there is no good reason for courts to prohibit them. But the main uses of modern arbitration lie far from these roots. The most prevalent uses today involve arbitration clauses drafted by large public and private institutions and inserted in clauses of consumer agreements that involve everything from the terms of employment to software to medical care. One can reasonably believe that the purpose of such agreements is not to allow a fair arbitrator to decide disputes but to minimize damage judgments and to avoid both jury trials and class actions. The institutions drafting these agreements know the lists from which the arbitrators will come, and an arbitrator who regularly decides claims against the drafters of these agreements will find his name stricken from the list. The consumers and employees (and their lawyers) who are bound by the arbitration agreements will rarely have such knowledge, so even before the arbitration has begun, they are laboring under a handicap.

Moreover, some evidence suggests that, as currently constituted, arbitration in this modern form fails to live up to its promises of fairness and efficiency. The financial meltdown in the first decade of the twenty-first century created an accidental controlled experiment comparing the outcomes of litigation to those of arbitration of similar claims. When the economy collapsed, some financial institutions had arbitration clauses in contracts with their customers and borrowers; others did not and claims were thus brought in the courts. In the years that followed, both groups pursued similar claims against these banks. As a federal agency discovered, the differences in outcomes were stunning. The claimants bound by

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

arbitration agreements recovered almost trivial amounts. Those able to seek relief in the courts recovered multiple times those amounts. Such an outcome casts very serious doubt on the claim that arbitration is just a faster way of getting to the same outcome.[9]

What is more, the institutions that draft and impose these arbitration clauses as a condition of doing business seem far less taken with the virtues of arbitration than their arguments in court would suggest. A study of agreements entered into by major US corporations—many of whom insert arbitration clauses into the contracts their customers and employees must sign—found that almost none of them inserted arbitration clauses into their own business-to-business agreements.[10] Simply put, MegaCorp may require an arbitration clause accompanying every cell phone it sells, but it eschews such clauses when it enters into an agreement to purchase chips from a supplier. If the sauce is so good for the goose, one wonders, why isn't the gander interested?

This section has thus far focused on unexamined assumptions in procedural design. That problem has a solution that is theoretically robust, even if it can be difficult to realize in practice: identify the assumption and think about whether existing or collectible data support it before moving to alter the arrangement of civil litigation.

Our second problem is, even in theory, more difficult: how to think about the unintended consequences of procedural change. The prime example of such unintended consequences must be the widespread institution of discovery in civil litigation. Though one cannot be certain, little evidence suggests that those who drafted the Federal Rules in the 1930s and their state counterparts a few decades later intended to reduce trial rates; instead they wanted trials to reflect historical fact better rather than to display advocates' skills or tricks. As we have seen, they may have achieved their conscious goal, but it came with some other consequences as well. The unintended consequence—a reduced rate of trials—may not be a bad thing, but it was very likely not a consequence that the designers foresaw or wished for.

By greatly expanding the opportunities for discovery, modern procedural systems allow the parties to probe deeply into the facts that give rise to civil litigation. With those facts in hand, parties often settle—for reasons explored in earlier chapters. Though there is a minor key of academic commentary that bewails settlement generally, I do not belong to that camp. I do, however, believe that settlement on the scale we are now witnessing has two unfortunate consequences. First, the terms of resolu-

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tion disappear from public view. At the end of a trial, it is a matter of public record who won, and, if it was the plaintiff, what she got as a result. Such information is unavailable in a settlement, not because of confidentiality clauses but because there's no repository where one can find out what a broken leg and three weeks of missed work are worth in Seattle or what the unjustified firing of a middle-level manager yields in Atlanta. As the proportion of settled to litigated cases rises, one can imagine questions of legitimacy: when I settle, I'd like some assurance that what I receive lies at least in the middle of the range of similar cases. If I cannot get that information, I may entertain dark suspicions that I was fleeced. The same principle holds true for defendants. So long as the terms of settlement are unavailable—especially in a world where virtually every other form of information is available at the click of a mouse—we can expect that increasing numbers of persons will fear that they have been treated unfairly. One can imagine various forms of data collection that would, without invading litigants' privacy, collect and make available such information. At present, however, no such system exists, and we live in ignorance, an ignorance that is an unintended but regrettable feature of the procedural system that has made settlement an attractive outcome to increasing numbers of litigants.

The other unintended consequence of settlements has been the concomitant decline in trials, including jury trials. Trying cases by juries has two arguably desirable results in a democracy. First, juries exert a simplifying pressure on the law—legal professionals are propelled into a system in which they must describe the law with sufficient clarity and simplicity that it falls within the ken of ordinary citizens. That's a good thing; a citizenry convinced that a professional elite has taken control of law is not in the long run a contented citizenry. Second, juries by definition put lay persons in control of a powerful lever of government at the moment when law is applied. That lay participation helps assure all of us that the people rule not just at the ballot box but at the moments when law affects us in our pocketbooks. That's a powerful and important reassurance that we would lose if trials, including jury trials, became abnormal and vestigial. And that ought to worry us.

Before leaving the topic of unintended consequences, it is only fair to mention one development that may have beneficent rather than bad unintended consequences: third-party litigation finance. Discussed above, this development means that some very large cases are assured of financing and can thus be pursued as far as the merits suggest. Contrary to some

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

of the assertions made by those who dislike this development (the US Chamber of Commerce ranking high on that list), third-party financing is extremely unlikely to produce frivolous litigation. The entities investing in such cases want to make a profit, and frivolous litigation is unlikely to yield a profit. Instead, such investment will likely do the opposite: foster *meritorious* litigation—litigation that should, and is likely to, succeed. If one believes in the rule of law, that's a good thing. Moreover, third-party financing can help both clients and their lawyers by creating a second opinion about contemplated litigation. Clients and their lawyers tend to see their litigation prospects through optimistic spectacles. They are convinced of the justice of their cause and find it hard to believe that an unbiased third party would have any other view. To the extent that third-party financers pour cold water on some subset of the cases they are offered, they do both the prospective litigants and the legal system a favor—by discouraging marginal cases.

My final thought can be expressed in two phrases: "the virtues of a second-best world" and "compared to what?" There are many criticisms that can be leveled against the existing system of civil litigation in the United States. It can be slow, it can be expensive, and right does not always triumph. One can always imagine a better, friction-free system that combines speed, accuracy, fairness, and low cost. But imagination is cheap; it's much harder to point to real-world alternatives that combine these virtues. Many legal systems in the developed world involve somewhat less private expense than ours: in recent years both Germany and Japan have been held up as models in this regard. But neither of those systems carries the weight that ours does: both countries have much more elaborate (and occasionally stifling) regulatory regimes and social security systems that do much of the work of civil litigation in the United States. Moreover, neither regime carries anything like the political weight of the US system: civil rights, to the extent that they are enforced, are enforced outside the litigation system. And both systems manage their caseloads either by dramatically limiting access to justice (Japan) or by greatly expanding the public subsidy (Germany hires far more judges per capita than does the United States, and they play a more extensive and expensive role in litigation than do their US counterparts).[11]

Many other legal systems are often mired in paralysis or corruption—or occasionally both—that make direct comparisons impossible. There is, however, a way in which one can see how world opinion assesses other systems in comparison to that of the United States. Foreign companies

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

often seek to insulate themselves from the prospect of US jury verdicts, and that looks like a vote of nonconfidence in the US legal system. But looking at individuals tells us a very different story. For more than a century, immigrants have sought, sometimes at the risk of their own lives, to become residents and, where possible, citizens of the United States. There is surely far more than the legal system at stake, but the legal system is part of the story: looking at it from the outside, would-be immigrants give it a resounding vote of confidence. And even those who do not try to emigrate to the United States frequently try to get various torts, particularly those involving violations of human rights, into the US legal system. In spite of its numerous and obvious flaws, US litigation looks to them a whole lot better than their domestic alternative. The contrast is even more striking when one considers immigrants with capital. They may not completely understand the US legal system, but they are entirely—and justly—convinced that it will not strip them of their assets without good cause or as a result of next year's election. That is not a small virtue, and it is a virtue we should not lose sight of in a competitive global economy: investing in the United States looks like a pretty good bet, in part because of the fairness of the legal system.

The general point—that much of our system of litigation looks pretty good when one considers not theoretical but actual alternatives—holds true for many of its details. Discovery in the United States can be a tortured exercise, but it is likely to uncover historical truth, something that cannot be said of many of its alternatives. Jury trials do not always lead to outcomes that meet with universal approval, but they provide some assurance that a bored or lazy or corrupt judge will not derail a meritorious claim or defense. The contingent fee system can create odd incentives for lawyers and clients, but it also assures that indigent clients with meritorious claims for money damages will likely find competent representation—something that systems that ban contingency fees cannot always say. Arbitration looks like the promised land until one looks closely at its actual operation. And watching parties in litigation battle over seemingly trivial points looks quite unedifying—until one compares it with much of current political life, in which the battles are even pettier and there is no one with the power to step in and render a decision. So—as in Winston Churchill's epigram about democracy, US civil litigation may well be the worst of all systems—except for the alternatives. We have cobbled together, out of a millennium of common-law history, various nobly intended reform movements and a system of divided authority

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tied together by a constitution—a system that, at least on its good days, brings to a conclusion a remarkable number of varied disputes in ways that strike the parties and many outside observers as generally fair and generally accurate. That's a real accomplishment.

Finally, it is worth noting that when experts in development visit a country wallowing in the throes of postcolonial misery, they commonly make various suggestions about how the nation can better provide for its citizens. Some of those suggestions—relating to transportation, hospitals, hydroelectric power—involve large expenditures. But as Nobel Laureate Amartya Sen has taught us, some do not.[12] At remarkably low cost, using local talent, one can begin a program of literacy that will over a few decades work remarkable improvement; he makes a similar point about basic medical care. One can extend Sen's argument to legal institutions, creating at relatively low cost what the developmental economists call "the rule of law." That phrase stands for the topics with which this book has concerned itself: providing honest judges, many of whom can function with rudimentary training (as English and US justices of the peace did for years), who can decide who is telling the truth about ownership of the field or the cow, or whether in fact the parties did agree and, if so, whether one of them broke that agreement. No number of hydroelectric projects will compensate for the demoralization of citizens who believe that there is no honest official who will hear their grievance against a fellow citizen and decide it according to the facts rather than who is currently in political favor. Just as much as food, education, and medical care, all of us need to live in a polity where such a system exists. After many struggles we have—mostly—achieved that goal. We should cautiously and modestly recognize and celebrate that achievement.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Notes

Introduction

1. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Reports of the American Bar Association* 29 (1906): 395.

2. Patricia Refo, *Journal of Empirical Legal Studies* 1 (2004): v–vi.

3. Moorfield Storey, *The Reform of Legal Procedure* (New Haven, CT: Yale University Press, 1912), 26.

4. Marc Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in State and Federal Courts," *Journal of Empirical Legal Studies* 1 (2004): 459.

5. The 2004 Republican Party Platform, available at www.presidency.ucsb.edu/papers_pdf/25850.pdf.

6. Bayless Manning, "Hyperlexis: Our National Disease," *Northwestern University Law Review* 71 (1977): 767–82.

7. Aryeh Neier, *The Limits of Litigation in Social Change* (Middleton, CT: Wesleyan University Press, 1982), 213.

8. Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

9. David Sklansky and Stephen Yeazell, "Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure and Vice Versa," *Georgetown Law Review* 94 (March 2006): 683–738.

10. Theodore Eisenberg, John Goerdt, Brian Ostrom, David Rottman, and Martin Wells, "The Predictability of Punitive Damages," *Journal of Legal Studies* 26 (1997): 634.

Chapter One

1. The literature chronicling the debates and compromises surrounding the 1789 Constitution and the amendments constituting the Bill of Rights in 1791 is

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

overwhelming (since we seem to recast that history every few decades). A standard documentary collection is Bernard Bailyn, ed., *The Debate on the Constitution: Federalist and Antifederalist Speeches, Articles and Letters during the Struggle for Ratification,* parts 1 and 2 (New York: Library of America, 1993). A standard narrative account emphasizing the necessary compromises appears in Melvin Urofsky and Paul Finkelman, *A March of Liberty: A Constitutional History of the United States,* 3rd ed. (New York: Oxford University Press, 2011).

2. This result flows from a series of US Supreme Court cases creating what lawyers call "personal jurisdiction." See, e.g., Daimler AG v. Bauman, 134 S.Ct. 746 (2014).

3. This result flows from the confluence of Article III of the US Constitution, which opened the way for Congress to grant the federal courts jurisdiction in civil actions "between Citizens of different States," and section 1332 of Title 28 of the US Code, in which Congress currently authorizes the federal courts to hear such cases when the amount at stake exceeds $75,000.

4. The facts are taken from an entirely ordinary lower court decision, Hawkins v. Masters Farms, Inc., 2003 WL 21555767 (D. Kan. 2003).

5. There is an immense literature on jury trial and the civil jury; the interested reader might start with a symposium entitled "The Role of the Jury in Civil Dispute Resolution," *University of Chicago Legal Forum 1990 (1991): 87–117.*

6. Charles W. Wolfram, "The Constitutional History of the Seventh Amendment," *Minnesota Law Review* 57 (1973): 639–748.

7. The classic study reaching this conclusion is Harry Kalven and Hans Zeisel, *The American Jury* (Chicago: University of Chicago Press, 1971).

8. Daniel A. Farber and Suzanna Sherry, *A History of the American Constitution* (St. Paul, MN: West, 1990), 25–26.

9. James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1964), 285.

10. Robert LaFountain, Richard Schlauffler, Shauna Strickland, and Kathryn Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads* (National Center for State Courts, 2012), 11.

11. US Census Bureau, www.census.gov/.

12. Bureau of Economic Analysis, www.census.gov/library/publications/2011/compendia/statab/131ed/income-expenditures-poverty-wealth.html.

Chapter Two

1. The Jimmy Carter speech appears at www.presidency.ucsb.edu/ws/?pid=30750, an extremely useful online compilation of all presidential documents from the start of the nation down to the present day.

2. Stephen Yeazell, "Courting Ignorance: Why We Know So Little about Our Most Important Courts," *Daedalus* 143 (Summer 2014): 129–39.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

3. Christian Wollschlaeger, "Exploring Global Landscapes of Litigation Rates," in *Soziologie des Rechts: Festschrift fuer Erhard Blankenburg zum 60 Geburtstag*, ed. Jurgen Brand and Dieter Strempel (Baden-Baden: Nomos, 1998), 577–88.

4. The information about federal civil litigation comes from two sources: the annual reports of the attorneys general of the United States for the period before 1938, and thereafter from the directors' reports of the Administrative Office of the United States Courts, a unit established by Congress in 1938. Specific support for the text appears in the 1938 Attorney General Annual Report, 210; and the 1990 Director Administration Office of the US Courts Annual Report, 7, 10.

5. National Center for State Courts, 2016, "Court Statistics Project," www.courtstatistics.org/Civil.aspx.

6. See, e.g., Francis W. Laurent, *The Business of a Trial Court: 100 Years of Cases* (Madison: University of Wisconsin Press, 1959) (reporting the dominance of the civil docket over the period studied); Erik H. Monkkonen, *Police in Urban America, 1860–1920* (Cambridge: Cambridge University Press, 1981) (reporting that in nineteenth-century New York City only a minority of the most serious crimes, including murder, were ever prosecuted—because of the cost of investigations and prosecutions).

7. See, e.g., Herbert M. Kritzer, "Review: Abel and the Professional Project: The Institutional Analysis of the Legal Profession," *Law and Social Inquiry* 16, no. 3 (Summer 1991): 533.

8. Theodore Eisenberg and Charlotte Lanvers, "What Is the Settlement Rate and Why Should We Care," *Journal of Empirical Legal Studies* 6 (2009): 111, examines litigation in federal courts and reaches an aggregate settlement rate of 66.9 percent, with significant variation according to case type. An earlier study of state court litigation reached a similar conclusion: Victor E. Flango, *The Business of State Trial Courts* (National Center for State Courts, 1983), 45.

9. Stephen C. Yeazell, "Transparency for Civil Settlements: NASDAQ for Lawsuits?," in *Confidentiality, Transparency, and the U.S. Civil Justice System*, ed. Joseph W. Doherty, Robert T. Reville, and Laura Zakaras (New York: Oxford University Press, 2012).

10. "Civil Bench and Jury Trials in State Courts, 2005," Bureau of Justice Statistics, US Department of Justice, 2008, https://www.bjs.gov/index.cfm?ty=pbdetail&iid=554.

11. Ibid.

12. Ibid.

Chapter Three

1. A historical discussion of mail-order catalogs and their modern successors appears in Kenneth E. Stone, "Impact of the Wal-Mart Phenomenon on Rural Communities," *Increasing Understanding of Public Problems and Policies* (1997): 16.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

2. Lance E. Davis and Douglass C. North, *Institutional Change and American Economic Growth* (Cambridge: Cambridge University Press, 1971).

3. Charles W. Calomiris and Eugene N. White, "The Origins of Federal Deposit Insurance," in *The Regulated Economy: A Historical Approach to Political Economy*, ed. Claudia Goldin and Gary D. Libecap (Chicago: University of Chicago Press, 1994), 145–88.

4. An account of the Great Crash from a contemporary perspective can be found in Eugene N. White, "The Stock Market Boom and Crash of 1929 Revisited," *Journal of Economic Perspectives* 4 (Spring 1990): 67–83.

5. Calomiris and White, "Origins of Federal Deposit Insurance."

6. Title I of Pub. L. 73–22, 48 Stat. 74, enacted May 27, 1933, *codified at* 15 U.S.C. § 77a et seq.

7. Pub.L. 73–291, 48 Stat. 881, enacted June 6, 1934, *codified* at 15 U.S.C. § 78a et seq.

8. Florence Wagman Roisman, "National Ingratitude: The Egregious Deficiencies of the United States Housing Programs for Veterans and the 'Public Scandal' of Veterans' Homelessness," *Indiana Law Review* 38 (2005): 103, 116–34.

9. H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustment* (Chicago: Aldine, 1970).

10. Herbert M. Kritzer, "Seven Dogged Myths concerning Contingency Fees," *Washington University Law Quarterly* 80 (2002): 739.

11. One state requires that plaintiffs be offered an explicit choice between fee-for-service and contingency fees. N.J. Gen. Ct. R. 1–21–7(b).

12. Stephen C. Yeazell, "Getting What We Asked For, Getting What We Paid For, Not Liking What We Got," *Journal of Empirical Legal Studies* 1 (2004): 943, 951.

13. Jerome Carlin, *Lawyers on Their Own: A Study of Individual Practitioners in Chicago* (New Brunswick, NJ: Rutgers University Press 1962).

14. Jerome Carlin, *Lawyers on Their Own: The Solo Practitioner in an Urban Setting* (New Orleans: Quid Pro Quo Books, 2011), 87–90.

15. Michael J. Grinfield, "Justice on Loan," *California Lawyer* 19 (1999): 39.

16. See Private Counsel Agreement, 1999 WestLaw 1022131 at *1–*2 (E.D. Texas, Nov. 5, 1999).

17. See Laura Kendall, "The Losing Argument Continues for Prevailing without Winning: A Critical Summary of the Impact of *Buckhannon* on the Catalyst Theory," *Case Western Reserve Law Review* 54 (Winter 2003): 573, 576–80.

18. Danny DeVito (producer), *Erin Brockovich* (Los Angeles: Universal Pictures, 2000).

19. California Environmental Protection Agency, "P.G.&E Hinkley Chromium Cleanup," available online at www.waterboards.ca.gov/rwqcb6/water_issues/projects/pge/index.shtml.

20. Paloma Esquivel, "15 Years after 'Erin Brockovich,' Town Still Fearful of Polluted Water," *Los Angeles Times*, April 12, 2015.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Chapter Four

1. David A. Sklansky and Stephen C. Yeazell, "Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure and Vice Versa," *Georgetown Law Review* 94 (March 2006): 683, 687–96.

2. The changes and their consequences are described in more technical detail in Stephen C. Yeazell, "The Misunderstood Consequences of Modern Civil Process," *Wisconsin Law Review (1994)*: 631.

3. Allen Steinberg, "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History," *Crime and Delinquency* 30 (1984): 572.

4. The US Supreme Court has held that an indigent criminal defendant accused of a serious crime (defined, roughly, as involving a potential sentence of more than a year) is entitled to a defense lawyer at public expense. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Most observers estimate that about 80 percent of criminal defendants are entitled to such representation.

5. Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," *Reports of the American Bar Association* 29 (1906): 395.

6. The standard historical account appears in George Ragland, *Discovery before Trial* (Chicago: Callaghan, 1932).

7. John Oakley and Arthur Coon, "The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure," *Washington Law Review* 61 (1986): 1367; John Oakley, "A Fresh Look at the Federal Rules in State Courts," *Nevada Law Journal* 3 (2003): 354.

8. Geoffrey C. Hazard Jr., "From Whom No Secrets Are Hid," *Texas Law Review* 76 (1998): 1665.

9. 156 F. 3d 255, 257, 265 (1st Cir. 1998).

10. Ibid.

11. This provision appears in Federal Rule of Civil Procedure 26(a)(1)(iv) and has counterparts in most state procedural regimes.

12. For an account of the rise of what is sometimes called "big law," see Robert W. Gordon, "The Path of the Lawyer," *Harvard Law Review* 110 (March 1997): 1013.

13. Stuart Speiser, *Lawyers and the American Dream* (New York: M. Evans, 1993), 185–86.

14. The California state bar survey can be found at "Member Services Survey, February 2006," The State Bar of California, www.calbar.ca.gov/LinkClick.aspx?fileticket=AG4sVakYctc%3D&tabid=212.

15. Michael Grinfield, "Justice on Loan," *California Lawyer* 19 (1999): 39, 40.

16. A brief account of the process of deregulation appears in Stephen Yeazell, "*Brown*, the Civil Rights Movement, and the Silent Litigation Revolution," *Vanderbilt Law Review* 57 (November 2004): 1975, 1985–91.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

17. Nora Freeman Engstrom, "Run-of-the-Mill Justice," *Georgetown Journal of Legal Ethics* 22 (2009):1485.

18. Some of the facts appear in the opinion Abbot Ford, Inc. v. The Superior Court of Los Angeles County, 741 P.2d 124 (Cal. 1987). Others I gleaned from a telephone conversation with the plaintiff's lawyer.

19. Lewis Powell, "Attack on American Free Enterprise System," available online at www.webcitation.org/64jAmJkKB (accessed January 17, 2017).

20. See Paul Carrington and Paul Haagen, "Contract and Jurisdiction," *Supreme Court Review* (1996): 331, 345, quoting a case asserting that "awards resulting from such proceedings might also be described as Solomonic, halving the objects in dispute" (rather than making an award that reflects the law and the facts).

21. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

22. The somewhat hyperbolic description appears in Milton Handler, "The Shift from Substantive to Procedural Innovation in Antitrust Suits," *Columbia Law Review* 71 (1971): 1, 9.

23. A useful review of the course of modern class action, including the strategic use of sweetheart settlements to buy off plaintiffs' lawyers, appears in Robert G. Bone, "Walking the Class Action Maze: Towards a More Functional Rule 23," *University of Michigan Journal of Law Reform* 46 (2013): 1097–1125.

24. The odd-lot class action was Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974).

25. The Walmart decision is Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

26. One widely cited occurrence of the "short, plain statement" standard appears in Federal Rule of Civil Procedure 8(a)(2).

27. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); and Ashcroft v. Iqbal, 556 U.S. 662 (2009).

Chapter Five

1. One can be reasonably certain of accuracy concerning presidential statements about civil litigation because of a splendid resource developed and maintained by the University of California, Santa Barbara—a searchable index of all presidential (and presidential candidates') public statements, available at www.presidency.ucsdb.edu (accessed July 28, 2016).

2. President Jimmy Carter, "Remarks at the 100th Anniversary Luncheon of the Los Angeles County Bar Association," May 4, 1978, www.presidency.ucsb.edu/ws/?pid=30750.

3. President Ronald Reagan, "State of the Union Address," January 26, 1987, www.presidency.ucsb.edu/ws/index.php?pid=34430.

4. See Richard Child Hill and Cynthia Negrey, "Deindustrialization in the

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Great Lakes," *Urban Affairs Review* 22, no. 4 (June 1987): 580, for a review of several arguments explaining the manufacturing decline in metal-bending industries from the postwar era until the 1980s.

5. For a comprehensive overview of asbestos litigation and resulting bankruptcies, see Stephen J. Caroll, Deborah R. Hensler, and Jennifer Gross, *Asbestos Litigation* (Santa Monica, CA: RAND Institute of Civil Justice, 2005).

6. Michelle M. Mello, Amitabh Chandra, Atul Gawande, and David Studdert, "National Costs of the Medical Liability System," *Health Affairs* 29 (2010): 1569, summarizing the literature and concluding that malpractice, including resulting "defensive medicine," amounts to 2.4 percent of total health care spending.

7. President George H. W. Bush, "Remarks to the Community in Auburn Hills, Michigan," November 1, 1992, www.presidency.ucsb.edu/platforms.php.

8. President George H. W. Bush, "Remarks at a Welcome Rally in Anaheim, California," September 13, 1992, www.gpo.gov/fdsys/pkg/PPP-1992-book2/pdf/PPP-1992-book2-doc-pg1548–2.pdf.

9. For an account relating SEC funding patterns to political affiliation, see William E. Bealing Jr., "Actions Speak Louder Than Words: An Institutional Perspective on the Securities and Exchange Commission," *Accounting, Organizations and Society* 19, no. 7 (1994): 555, 558.

10. For a legislative history of the OSHA, including a history of underfunding, see Congressman Lloyd Meeds, "A Legislative History of OSHA," *Gonzaga Law Review* 9 (1973–74): 327, 341.

11. *Abandonment of the Private Right of Action for Aiding and Abetting Securities Fraud: Hearing Before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs*, 103rd Cong. 8 (1994) (statement of Sen. Howard Metzenbaum).

12. Jocelyn Bogdan, "Our Fatal Food Attraction: Regulatory Failures and the Civil Justice System 1–2" (2012). Bogdan's report appeared on the website of the Center for Justice and Democracy, a nonprofit organization based at the New York Law School, which describes itself as "fighting for civil justice [and] stopping so-called 'tort reform.'" www.centerjd.org/.

13. President William J. Clinton, "Remarks on the Patients' Bill of Rights in Louisville, Kentucky," August 10, 1998, www.gpo.gov/fdsys/pkg/PPP-1998-book2/pdf/PPP-1998-book2-doc-pg1416.pdf.

14. Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in U.S. Society* (Berkeley: University of California Press, 2002), 188.

15. Peter Huber, "Digital Innovators vs. the Patent Trolls," *Wall Street Journal*, April 18, 2011, A15.

16. American Association for Justice, *AAJ: Fighting for Justice*, www.justice.org/cps/rde/xchg/justice/hs.xsl/16.htm (accessed June 19, 2012).

17. "Tobacco Lawyers' Roundtable: A Report from the Front Lines," *DePaul Law Review* 51 (2001): 543, 549–50.

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

18. The current ABOTA rules appear at American Board of Trial Advocates, "Become a Member," https://www.abota.org/index.cfm?pg=HowToJoin (accessed July 25, 2016).

19. A comparison of English civil juries with their US counterparts appears in Justin C. Barnes, "Lessons from England's 'Great Guardian of Liberty': A Comparative Study of English and American Civil Juries," *University of Saint Thomas Law Journal* 3 (Fall 2005): 345.

20. The standard account is Charles Wolfram, "The Constitutional History of the Seventh Amendment," *Minnesota Law Review* 57 (1973): 639.

21. The best study of the contingency fee system by a scholar who has looked closely at the changing legal profession appears in Herbert Kritzer, *Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States* (Stanford, CA: Stanford University Press, 2004).

22. The study of California civil jury verdicts appears in Samuel Gross and Kent Syverud, "Don't Try: Civil Jury Verdicts in a System Geared to Settlement," *UCLA Law Review 44* (Fall 1996): 1.

23. The figures on the dominance of contract cases are drawn from one of the excellent publications of the National Center for State Courts, Richard LaFountain, R. Schauffler, S. Strickland, C. Bromage, S. Gibson, and A. Mason, *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* (National Center for State Courts, 2010), 26, www.ncsconline.org/d_research/csp/2008_files/Civil.pdf.

Chapter Six

1. The classic study of insurance adjusters appears in H. Laurence Ross, *Settled out of Court: The Social Process of Insurance Claims Adjustment*, 2nd ed. (New York: Aldine de Gruyter, 1980).

2. The opinion describing the Abbot Ford facts is Abbot Ford, Inc. v. The Superior Court of Los Angeles County, 741 P.2d 124 (Cal. 1987).

3. A description of high-low settlements appears in John L. Shanahan, "The High-Low Agreement," *For the Defense* 33 (July 1991): 25.

4. A good discussion of the Vioxx settlement appears in Samuel Issacharoff and Robert H. Klonoff, "The Public Value of Settlement," *Fordham Law Review* 78 (2009–10): 1177, 1183, 1197.

5. Theodore Eisenberg, Neil LaFountain, Brian Ostrom, David Rotman, and Martin T. Wells, "Judges, Juries, and Punitive Damages: An Empirical Study," *Cornell Law Review* 87 (2002): 743, 748.

6. A description of the imperfect information about settlements and a proposal for reform appears in Stephen C. Yeazell, "Transparency for Civil Settlements: NASDAQ for Lawsuits?," in *Confidentiality, Transparency, and the U.S. Civil Jus-*

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

tice System, ed. Joseph W. Doherty, Robert T. Reville, and Laura Zakaras (New York: Oxford University Press, 2012).

7. Judge Merhige's views on what is known to lawyers as a "rocket docket" appear in Robert R. Merhige Jr., "Interview: The Federal Courts: Observations from Thirty Years on the Bench," *University of Richmond Law Review* 32 (1998): 867, 873. Merhige was interviewed by J. Christopher Lemons.

8. The Court's extension of the Federal Arbitration Act to termite control services occurred in Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); the ban on class actions occurred in American Exp. Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

9. The massive report comparing arbitration to litigation outcomes in financial services is *Arbitration Study: Report to Congress, pursuant to Dodd–Frank Wall Street Reform and Consumer Protection Act § 1028(a)* (Washington, DC: Consumer Financial Protection Bureau, 2015), 11–14.

10. The finding that large businesses are far less enthusiastic about arbitration in their agreements with peers appears in Douglas Shontz, Fred Kipperman, and Vanessa Soma, "Business-to-Business Arbitration in the United States: Perceptions of Corporate Counsel," *RAND Institute for Civil Justice* (2011): 2.

11. Comparative judicial appointments per capita appear in Christian Wollschläger, "Historical Trends of Civil Litigation in Japan, Arizona, Sweden, and Germany: Japanese Legal Culture in Light of Judicial Statistics," in *Japan: Economic Success and Legal System, ed.* Harald Baum (Berlin: Walter de Gruyter, 1997).

12. Amartya Sen's influential recasting of the process of development appears in his *Development as Freedom* (Oxford: Oxford University Press 1999).

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

Index

Abel, Richard, 28–29
adjusters: and civil settlements, 66, 94, 99–100; and declining rate of civil trials, 43–44
Administrative Office of the United States Courts, 111
agreement-based claims, 14. *See also* contract claims
American Association for Justice, 84, 86
American Bar Association, 67; and court unification reforms, 24; symposium on "The Vanishing Trial" (2003), 1–2
American Board of Trial Advocates, 86
American Civil Liberties Union, 67
antilitigation movement, 83, 86–90. *See also* defense bar; Republican Party
appeals, 31; and arbitrators' awards, 69; criminal, 47; frequency of, 20; intermediate appellate courts, 24; in *Klonoski v. Mahlab*, 60–61; rules of appellate review, 11
arbitration: as alternative to litigation, 78, 87, 117; and class actions; 69; clauses, 14–15, 68–70, 109, 113–14; Federal Arbitration Act, 112; future of, 109; history of, 68; as procedural change, 112–14; and US Supreme Court, 75–76, 112–13
Articles of Confederation, 9, 13
Ashcroft v. Iqbal (2007), 74–75, 111–12
Association of Trial Lawyers of America, 86
awards: 16, 42; amounts of, 31, 32, 88; and arbitration, 69, 113, 117; availability of information on, 99; in class actions, 46–47, 71–72; compensatory, 5, 93; in contract cases, 44, 54; exemplary, 5; vs. injunctive relief, 48; and jurisdiction, 9–10; and litigation finance, 46–51; for "loss of consortium," 60; "pain and suffering," 98; in public enforcement actions, 48; for "outrageous" acts, 14; and poor people, 35, 53–54, 101; punitive, 4–5, 31, 87; and settlements, 97; "Solomonic," 124; in tort cases, 51, 54, 58, 93; in tried cases, 44

banking system, 36–38
Bank of the United States, 13
bar, US, 1, 8, 108; disciplinary standards of, 66; entry to, 28, 34; financing of, 35, 38; structure of, 29, 56, 100. *See also* American Bar Association; defense bar; plaintiffs' bar
Bell Atlantic Corp. v. Twombly (2007), 74–75
Biden, Joseph, 110
Bill of Rights, 9, 83
bills of exchange, 14, 15
Brockovich, Erin. *See* Pacific Gas & Electric case
Bush, George H. W., 80, 91

California State Bar, 63
Carlin, Jerome, 45–46
car loans, 6–7
Carter, Jimmy, 18–19, 21, 78, 85
checks, 14, 15, 36–37, 49, 99
child custody disputes, 19f*, 54, 101–2
Churchill, Winston, 117

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

civil claims. *See* civil litigation; contract claims; tort claims
civil juries: in *Klonoski vs. Mahlab*, 60; lay persons on, 11, 115; merits of, 10–12, 13, 69, 86; shaping of procedure by, 12; "shopping" for, 10; in tort cases, 31–32; in a transition to a litigation state, 107; trials by, 8–13, 15, 28, 31, 68, 86–88, 108, 113, 115, 117; in US Constitution, 10, 86
civil litigation: amount of, 3, 7, 8, 16, 18–20, 30; amount of information on, 19; constraints on, 17; costs of, 13, 30; vs. criminal litigation, 4; culture of, 34; demographics of, 30, 32; defined, 3–4; efforts to collect data on, 23–24; federal, 20–21; financing of, 5, 42–55; and Gross Domestic Product, 21; and jurisdiction, 5–6, 9–10; lack of data on, 22; lawyers' conduct of, 19–20, 27–28; and levels of economic activity, 21, 24–25, 29; and liability insurance, 16; and market economy, 13–16, 19, 30; and market in civil claims, 7, 33; median length of time for civil cases, 32; in political discourse, 2, 18; popular perceptions of, 2, 8, 27, 30–31; and population levels, 16, 21, 24; privatization of, 28, 33–34, 55–58; singularity of US system, 57, 86, 116; as substitute for legislative regulation, 82–83, 106; too-small claims, 102
civil rights: and arbitration, 113; and attorneys' fee provisions, 48; enforcement of, 116; lawsuits, 74; movement, 65; segregated classrooms, 70. *See also* employment discrimination
Civil War, American, 9
class actions, 8, 68–73, 75, 96, 113
Clinton, William J., 80, 82, 91
community sentiment, 11–12
compensation of plaintiffs, 4, 82, 93–95, 99
Congress, US, 9; and the Administration Office of the United States Courts, 121n4; and creation of national market, 13; and data on federal civil litigation, 20; and Federal Arbitration Act, 112; and Federal Rules of Civil Procedure, 112; and fee-shifting, 47–48; and jurisdiction of federal courts, 120n3; and Veterans Housing Administration, 40; and voting trends by party, 83
Congress of 1787. *See* Continental Congress
Constitution, US: amendments to, 17, 81, 83, 86; Article III of, 120n3; and civil juries, 10, 86; and division of governmental and judicial authority, 8–10, 117–18; and judges, 28; and market economy, 13, as obstacle to large-scale change, 108; and powers of county courts, 6
Continental Congress, 8–9
contingent fee representation, 92; and broadened legal access, 55; and costs of discovery, 73; disparagement of by antilitigation movement, 83; vs. fee-for-service representation, 44, 122n11; incentives for lawyers and clients 117; incomes earned from, 87; and litigation finance, 44–48, 50, 52; plaintiffs neglected by, 54
contract claims, 14–15, 17, 94; against financial institutions, 113–14; costs to businesses of, 48; dominance of, 14, 24–25, 27, 31, 35, 89, 109; and litigation finance, 35–36, 49; plaintiffs in, 32, 43–44; and rules of procedure, 58–59; vs. tort claims, 20, 31–32, 51–54, 89
contracts: and 2008 economic collapse, 113–14; breaches of, 94–95; cell phone, 70; demography of, 52; disagreements over terms, 58; and general liability policies, 51; laws governing, 56; legal fee provisions in, 36; role in American legal system, 14–15, 17; and rules of procedure, 58
Council of Revision, 9
counties, 31; and appointments of local judges, 6; and data collection, 23; in emergence of US legal system, 5–6; and rates of litigation, 105; and revenues, 24
courts: appellate, 24; 59–60; and appointments of public defenders, 54; appointments to, 6; and arbitration, 14–15, 75, 112–14; and changes in civil procedure, 33; citizens' access to, 22, 101, 104; and contract claims, 52; and costs of litigation, 12; county, 5; and culture of civil discovery, 61; in early United States, 86; efficiency of court system, 18; establishment of US court system, 5, 9; in developed nations, 27–28; of first instance, 5;

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

and free market, 67; funding of, 24, 57–59; intermediate appellate, 24; and interpretation of insurance policies, 42–43; and jurisdiction, 12; lower, 9, 75; national unification of, 13, 17; orders, 27; persuading juries to serve, 107; and pleading barriers, 73–74; and private criminal prosecutions, 104; and privatization of civil litigation, 33–34, 56; and prolitigation lobby, 83–84; reform of, 23–24; remedial powers of, 109; small claims, 103; and social positions of litigants, 89; state-level unification, 24; trial, 5, 6; 24; under a litigation state, 107. *See also* state courts; US Supreme Court
credit arrangements, 14–15, 38
creditors: and complexity of credit structures, 16; and contracts, 14–15; urban, 86
criminal litigation: appeals, 47; vs. civil claims, 4–5, 11, 26–27, 59, 104–5, 109; compared across states, 24; enforcement of regulatory statutes, 47; private criminal prosecution, 4–5, 57; public defenders in, 54, 123n4; shift from private to public, 55, 57–58; surprise witnesses in, 61
currency, 13–14

damages. *See* awards
debtors: and complexity of credit structures, 14–15; protection from creditors for, 86; trade, 103
defense bar: and American Board of Trial Advocates, 86; and antilitigation arguments, 87–90; and arbitration, 68–70; and balance of power with plaintiffs' bar, 45, 69–73; and class actions, 68–72; and contingent fees, 45; and debates on civil litigation, 77; demographics of, 32; and litigation finance, 35–36, 44, 48–54; and pleading requirements, 68, 73–75; poor or indigent defendants, 16, 35, 54, 101, 104, 123n4; and procedural reform, 73–75
Democratic Party: of New Deal Era, 105; as prolitigation, 19, 77–78, 80–83, 89–90; and weakening of regulatory frameworks, 81–82
demography, 3. *See also under* civil litigation
Department of Justice, 24, 47
discovery, 95; and amount of civil litigation, 109; antitrust, 74; in arbitration proceedings, 68–69; costs of, 35, 73–75, 111; effects on modern litigation of, 61–32; and fairness of US legal system, 117; in *Klonoski vs. Mahlab*, 59–61; and litigation finance, 64; and pleading standards, 73–75; in small claims courts, 103; under changes to procedural rules, 56, 59–61, 114; and US Supreme Court, 111–12
dispersed authority, 5, 13
divided ownership, 15
divorce litigation, 27, 54–55, 60, 78, 101–2

economic life, 13–17, 37, 72, 90–91, 103, 109
Eisen v. Carlisle & Jacquelin (1974), 72, 124n24
employment discrimination: and arbitration, 112; duration of lawsuits, 32; and fee-shifting statutes, 53; and general liability policies, 51; and jury trials 11–12; in *Walmart Stores, Inc. vs. Dukes*, 72
English legal practice, 5–6, 10, 12, 86, 118
evidence: and civil discovery, 57–58; in class actions, 72; gathering of, 55; in insurance adjustment practice, 94, 95; in *Klonoski v. Mahlab*, 60–61; and legal expenses, 45; in minitrials, 95; rules of, 61; and rules of procedure, 58; and threshold requirements, 10; time for presentation of, 12

fact-finding, 11
Federal Arbitration Act, 112, 127n8
federal courts: and appointment of public defenders, 54; balance of power between plaintiffs and defendants in, 74; and class action and pleading standards, 75; and contract disputes, 14–15; data for, 20–25; and jurisdiction, 10, 20, 108, 120n3; and litigation management plans, 110; settlements in, 121n8
Federal Deposit Insurance Corporation, 38–39
Federal Reserve System, 38
Federal Rules of Civil Procedure, 59, 70, 111–12, 114
Federal Trade Commission, 47
fee-shifting, 44, 47–49, 53
Fight for Justice Campaign, 84

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

financial markets, 13, 38–39, 81, 90
forum: and contract claims, 14; in international disputes, 10; selection and disputes, 12–13, 17
friction-free theory, 52, 116

Gandhi, Mahatma, on lawyers, 18
Gideon v. Wainwright (1963), 123n4
Great Depression, 25, 38, 40
Great Society, 81, 85
Gross Domestic Product, 15, 42; correlated with amount of civil litigation, 20–21, 25, 33; correlated with number of lawyers, 29–30

Hurst, J. Willard, 14, 33
hyperlexis, 3

Indiana constitution, 28
insurance. *See* liability insurance
intellectual property, 83
interest rates, 14, 15
Internal Revenue Service, 106

Jacksonian era, 28–29
judges: and amounts of awards, 99, 100; judge-led trials vs. jury trials, 86, 108, 117; caseloads per judge, 105; in civil litigation system; in civil vs. criminal litigation, 57; constitutional roles, 10; data on federal judges, 20; data-phobia of, 110; in inquisitorial vs. adversarial systems, 28; and institution of civil jury, 86, 108; and jockeying by litigants for friendly forums; as local officials, 5–6; meetings of, 1; and minitrials, 95; number per lawsuit, 3; and pleading standards, 74; and predictability of legal outcomes, 11; and procedural rules and guidelines, 12, 110–11; professionalization of, 6; and public subsidies for trials, 58; quality of, 118; salaries of, 23, 28; and settlements, 71, 94; in a transition to a litigation state, 107, 108; in United States vs. rest of world, 20, 116
"junk lawsuits," 87–89
juries: and arbitration, 68–69; awards made by, 31, 99; in civil cases, 8–13, 15, 28, 31–32, 58, 68, 86–88, 93, 108, 113, 115, 117; in *Klonoski vs. Mahlab*, 60; lay persons on, 11, 115; merits of, 10–12, 13, 69, 86; in minitrials, 95; shaping of procedure by, 12; "shopping" for, 10; in tort cases, 31–32, 58; in a transition to a litigation state, 107; in US Constitution, 10, 86; verdicts by, 108
jurisdiction, 89, 104; in contract claims, 14; determination of, 9; of federal courts, 20, 120n3; multiplicity and redundancy of, 9–10
justice: citizens' access to, 101, 116; in Jimmy Carter speech (May 1978), 18, 78; vs. law, 11; in Pacific Gas & Electric case, 50; in political rhetoric, 83–84, 85, 87

Klonoski vs. Mahlab (1998), 59–61

law of contract, 14
lawsuits. *See* civil litigation; criminal litigation
lawyers: data-phobia of, 110; denouncements and distrust of, 18, 79–81, 83, 85–87, 91; and economic conditions, 29–30, 33; and fee-for-service representation, 36, 44–45, 52, 122n11; finances of, 16, 29, 35–36, 43, 44, 62, 64, 65–66, 93; and law practices, 62–67, 92; litigation investment, 45–48; numbers of, 18, 20, 29, 33, 62, 78, 93, 107; in present civil litigation system, 19–20, 27–28; and privatization of civil litigation, 33–34, 57; public defenders, 54, 57, 123n4; relations with juries, 11; requirements to become an American Board of Trial Advocates "advocate," 86; and rules of procedure, 58–59; in a transition to a litigation state, 107; "trial," 2, 80–81, 84–89
Lawyers on Their Own (Carlin), 45
legal defenses: and agreement-based claims, 14–15, financing of, 53; in housing law, 55; and juries, 117; and liability policies, 43–44; and pleading standards, 73; in small claims, 112; in too-small claims, 102; in tort claims, 51
legal system classifications, 28
legislation: arbitration, 109, 112; as catalyst of change, 3; and "Council of Revision," 9; health care, 91; for litigation management plans, 110; mandatory auto liability insurance, 42; regulatory, 37–38, 81–83, 106

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

liability insurance, 6, 92; home and auto, 41–44; in legislation, 42, 78; and litigation finance, 41–42, 61; product, 43, 78–79, 90; role in legal defenses; 16
litigation management plans, 110
Los Angeles County Bar Association, 18, 78
"lumping it," 16, 54, 105

manufacturing: asbestos, 79; decline of 78–79, 90; expansion of, 40–41
market economy, 13–16, 19, 30; checks on, 17; and contract claims, 14; and dispersion of authority, 13; as driver of civil litigation, 15, 16, 29, 33, 89, 92; and legal outlook of the poor, 54; primacy of private transactions in, 21, 26; regulation of, 13, 17, 27, 36–41, 47, 74, 81–85, 105–8, 116
markets: automobile, 41; in civil litigation, 44, 47, 56, 98–100; credit, 38–40; and economic organization, 13, 17; financial, 13, 81, 90; housing, 40–41; in liability insurance, 92; mass, 37; as remedy for social and economic problems, 84; secondary mortgage, 38; securities, 14, 38–39, 56; in settlements, 43, 100; transparency of, 98–100
Marshall, John, 108
medical malpractice litigation, 18, 59–60, 79, 81, 91
Merck Pharmaceutical, 97–98
Merhige, Robert, 111
Metzenbaum, Howard, 82
mortgages, 6, 14; Federal National Mortgage Association, 40; foreclosures on, 15; lending on, 40; and liability policies, 42; secondary markets in, 38

Nader, Ralph, 67
National Center for State Courts, 24, 89
New Deal: Democratic Party during, 105; and Fannie Mae, 40; regulatory framework of, 81, 85; and transparency of financial markets, 39
New Jersey Supreme Court, 24

Occupational Safety & Health Administration, 81

Pacific Gas & Electric case, 49–50, 51
Patients' Bill of Rights, 82–83
per capita income, 15
plaintiffs' bar, 63; and American Board of Trial Advocates, 86; and balance of power with defense bar, 45, 69–73; and Democratic Party, 89–90, 108; demography of, 32; deregulation of, 64; disparagement of, 12, 86–89; financing of, 35, 45–47, 50–52, 70–73; minority groups in, 12; and Republican Party, 12, 89; regulatory work of, 82; reshaping of, 56, 63–64, 66–67, 87; self-portrayals, 87–89
pleading barriers, 74, 109
population of United States, 57; compared to growth of US economy, 15–16; 19, 21; compared to increase in civil litigation, 19, 21–22, 25–27, 33; and creation of national market, 37; per lawyer in United States, 29
Pound, Roscoe, 1–3, 59
Powell, Lewis, 67–68, 76
private verdict reporters, 99
procedural design (unexamined assumptions in), 110–14
procedural reform, 1, 55, 59, 73, 108; unintended consequences of, 114–16
prolitigation movement, 83–84, 88–90. *See also* Democratic Party; plaintiffs' bar
prosecution. *See* criminal litigation
public enforcement actions, 48

redistribution of wealth, 37
Refo, Patricia Lee, 1–2
regulation: antitrust, 47; failure of federal government to enforce, 106–7; financial, 13, 36–39; securities, 13, 38–39. *See also* market economy
regulatory state, 105
Republican Party: as antilitigation, 19, 77–81, 83–85, 89, 91; and health care system, 78–79, 90–91; and litigation reform, 2; and privatization, 108; of Progressive era, 105; and regulatory state, 105; and tariff barriers, 90
Rosenberg, Maury, 110
"rule of law," 118
"runaway lawsuits," 27

Securities and Exchange Commission, 81, 106
Sen, Amartya, 118

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use

settlements, 4; academic commentary on, 114; amounts of, 53, 63, 67, 98; availability of information on, 99–100, 114–15; in class actions, 71–72; confidentiality clauses in, 30, 98, 115; and contingent fees, 44; creativity of, 94, 97; and criminal complaints, 104; culture of, 7, 12, 94–95; and discovery, 61; "file and settle," 63–64; finances of, 43, 46, 52, 53, 62, 65; high-low agreements, 97; in insurance cases, 93–94; market in, 43, 46, 98; number of in proportion to trials, 31, 115; and plaintiffs' bar, 47; rates of, 20, 30, 44; as risk-avoidance system, 109; "settlement mills," 66; sliding-scale, 95; in *Smith v. Abbott Ford*, 67, 96; specialists in, 51
Sherman Act, 13
single national government (proposed), 17
Smith v. Abbot Ford, 66–67, 96
social contract, 84
standard of living, 15
state courts, 6, 20; and appointment of public defenders, 54; and class action and pleading standards, 75; data for, 22–25, 104; and dispersion of US civil litigation, 5; and jurisdiction, 108; National Center for State Courts, 89; settlement rates in, 30, 121n8; "unification" of (in New Jersey and elsewhere), 24; in US Constitution, 9–10
states' attorneys general, 47
stock market, 15
Storey, Moorfield, 2–3

temporary joint ventures, 46
threshold requirements for lawsuits, 10, 12–13
tobacco litigation, 47–48
tort claims: and amounts of damages, 31, 44, 51; vs. contract claims, 20, 31–32, 44, 51; and duration of lawsuits, 32; financing of, 51–53; insurance cases, 94; mass torts, 46; in news media,14, 31, 109; by persons living abroad, 117; and prolitigation movement, 89; quantities of, 27, 31; "tort reform," 80, 85, 89; varieties of, 51
twentieth-century economic order, 37–41; and reshaping of civil litigation, 38

unified judicial system: as potential check on market economy, 17; vs. US system, 9
US Supreme Court: "activist-minded," 65; and advertising by lawyers, 62; and arbitration, 67, 112; *Ashcroft v. Iqbal*, 72–73, 111; and balance of power between plaintiffs' and defense bars, 65; *Bell Atlantic Corp. v. Twombly*, 72–73; and class actions, 70; and constitutional salience of civil litigation, 108; and Democrats, 80; and discovery phase of trials, 111; and employment discrimination cases, 12; establishment by Continental Congress, 9; *Gideon v. Wainwright*, 123n4; and personal jurisdiction, 120n2; and pleading barriers, 74, 109; and presidents and presidential candidates, 75; and securities laws, 80; *Wal-Mart Stores, Inc. v. Dukes*, 70

Vanderbilt, Arthur, 24, 110
Veterans Housing Administration, 40
"victimless" crimes, 4n†
Vioxx, 97–98

Wal-Mart Stores, Inc. v. Dukes (2011), 70
witness testimony, 58
World War II, 79; and US economy, 25, 38, 40, 90

Yale Law School, 2

EBSCOhost - printed on 2/10/2023 2:12 PM via . All use subject to https://www.ebsco.com/terms-of-use