

Everyone Loses Except the Lawyers

Modern American society has been criticized for being excessively litigious. Individuals and firms seem increasingly willing to turn to lawyers to resolve their disputes. But if, as is commonly argued, this dependence on litigation has significant social costs, why would a free market system generate so much business for lawyers?

The research of two economists, Orley Ashenfelter and David Bloom, suggests a possible answer.⁶ The decision to hire a lawyer to resolve a dispute is, they argue, the result of a prisoners' dilemma. Two parties in a dispute are collectively better off when they settle the dispute between themselves or hire a neutral arbitrator to resolve their differences. But if a party believes that by hiring a lawyer it will increase the odds of winning by a sufficiently large amount to make hiring a lawyer worthwhile, it will be a dominant strategy to hire a lawyer. But when both parties do this, the dispute is resolved no differently than if neither hired a lawyer, and each party is worse off by the amount it pays its attorney.

To test this theory, Ashenfelter and Bloom analyzed public employee wage disputes from 1981 to 1984 in

New Jersey. They also studied union grievance proceedings involving the rights of discharged workers in Pennsylvania. In both cases, they found strong evidence that hiring a lawyer is a dominant strategy and that the decision to hire a lawyer reflects a prisoners' dilemma type of situation. Based on the New Jersey data, for example, they found that when one party hired a lawyer, the chances of successfully persuading the arbitrator to accept its wage proposal went up from roughly 50 to 75 percent. When both sides hired lawyers, though, the odds of winning remained roughly 50 percent, indicating that the benefit of hiring a lawyer is canceled out when the other party also hires a lawyer.

The possibility that hiring a lawyer is a Nash equilibrium outcome of a prisoners' dilemma game suggests that making society less litigious is likely to prove quite difficult. Lawyers clearly have no interest in curbing the demand for their services, and the logic of the prisoner's dilemma suggests that a party in a dispute has a strong individual incentive to hire a lawyer, even though society as a whole would be better off if he or she did not.