

CIVIL JUSTICE AND THE COURTS

"What happened to Kerry was not an act of God; it was an act of Dow."¹ That at least was Michael Ryan's explanation of why, four years after he had returned from military service in Vietnam, his daughter was born with multiple birth defects. Like many other soldiers serving in Vietnam, Ryan had been exposed to Agent Orange, a chemical defoliant sprayed by U.S. troops on fields and forests to destroy enemy crops and cover. And like them, he was convinced that Agent Orange caused death or debilitating illness in those exposed to the chemical and led to birth defects among their offspring. Ryan, together with other Vietnam veterans, blamed their problems on the chemical companies (e.g., Dow Chemical) that had produced Agent Orange and demanded justice.

Having a sense of injury and injustice is not, however, the same as proving liability in a court of law. Monsanto, Dow, and other producers of Agent Orange consistently denied that it had any toxic effects. Because the cancers suffered by veterans and the birth defects among their children were not distinctive, it would be difficult to prove that they were linked to Agent Orange rather than other causes. The legal effort to establish such a link would ultimately involve almost 1,500 law firms, representing more than 2.4 million Vietnam veterans and their families. Against them would be arrayed seven corporate defendants, who together spent roughly \$100 million in preparation for the Agent Orange trial.

The litigation began in 1978 when Paul Reutershan, a Vietnam veteran dying of cancer, filed suit against Dow and two other chemical manufacturers. Although Reutershan died before the year ended, other Agent Orange suits followed in several jurisdictions. Early in 1979, Victor Yannaccone, an attorney, filed an amended version of the Reutershan complaint as a class-action suit. His suit sought damages "in the range of \$4 billion to \$40 billion" as a trust fund for "all those so unfortunate as to have been and now to be situated at risk, not only during this generation but during generations to come."² A panel of federal judges authorized the formation of a class, which would include those

allegedly at risk because of Agent Orange. It then consolidated several cases as *In re Agent Orange Product Liability Litigation* for hearing by a federal district court in New York.

Before trial could commence, however, several crucial preliminary legal issues had to be addressed. Were the defendants immune from suit, as they claimed, because they had produced Agent Orange at the request of the government? Should the judge apply state or federal law in deciding the case? In addition to developing legal arguments on these and other questions, the plaintiffs' lawyers had to establish a causal connection between Agent Orange and the disabilities suffered by veterans and their offspring. This was particularly difficult because, as one of their lawyers put it: "Our clients could not help us prove our case. After all, they had not been hit by a truck, victimized by a doctor, or injured by a drug or other consumer product. They didn't know what had happened to them or when it happened. They only knew that something had gone wrong."³ Thus, to prove their case, the plaintiffs were forced to rely on laboratory studies, epidemiological evidence, and information culled from the files of the defendant companies.

Aggravating these difficulties was the disparity in resources between the parties in the litigation. As Judge George Pratt observed early in the case, the plaintiffs "have limited resources with which to press their claims and [their] plight becomes more desperate and depressing as time goes on," whereas the defendants "have ample resources for counsel and expert witnesses to defend them and . . . probably gain significantly . . . from every delay that they can produce."⁴ This problem led to the formation of a huge consortium of interested lawyers to bear the expenses of preparing the case. Even then, the plaintiffs' lawyers often found themselves overmatched.

After five years with little progress, the litigation shifted into high gear with the assignment in October 1983 of Judge Jack Weinstein to succeed Judge Pratt, who had been elevated to the court of appeals. Determined to move the case to resolution, Judge Weinstein established a trial date of May 7, 1984. His action spurred feverish—but largely unsuccessful—efforts by the plaintiffs' attorneys to develop evidence clearly linking Agent Orange to their clients' afflictions. The prospect of a trial also moved the two sides toward settlement because of uncertainty about its outcome and the calamitous consequences of losing for either side.

On Saturday, May 5, two days before the trial was to begin, Judge Weinstein convened all the attorneys to discuss a settlement, instructing them to "bring their toothbrushes" and to be prepared to stay all night Saturday and Sunday if necessary. His intervention succeeded. At 3 A.M. on May 7, just hours before jury selection was to begin, the weary negotiators reached a compromise settlement, under which the chemical companies refused to admit responsibility but agreed to pay the veterans \$180 million. The largest class-action suit to that point in U.S. history was over.

The Agent Orange litigation highlights three key aspects of civil justice in the United States.

1. Resolution by negotiation. Despite the intense preparations for trial, the Agent Orange case was eventually resolved through negotiations between counsel for the plaintiffs and counsel for the defendants. This is characteristic of the vast majority of civil cases, which are settled rather than adjudicated. Indeed, although not all judges are as active as Judge Weinstein in promoting settlement, most courts have adopted procedures that promote fact-finding before trial in order to encourage the settlement of cases. The negotiations in civil cases occur “in the shadow of the law”—that is, with the understanding that either party can demand a trial if a satisfactory agreement cannot be reached.⁵ Thus, the process of civil justice parallels the process of criminal justice in the United States in important respects: the encouragement of negotiated settlements, the prospect of trial should negotiations fail, and the resolution of most cases without trial.

2. Access to justice and the “litigation explosion.” The Agent Orange case also highlights an important dispute about the American system of civil justice. One view is that the basic problem in civil justice is ensuring access to the courts for ordinary citizens. From that perspective, one might view the Agent Orange litigation as something of a triumph. For the most part, the plaintiffs were persons of moderate means who had suffered health problems that they attributed to the negligence of large corporations. Nevertheless, these plaintiffs were able to secure legal counsel, to gain a hearing for their claims in the courts, and to obtain at least some redress for their suffering—in short, to gain access and secure some measure of justice.⁶

Other commentators, however, insist that the main problem confronting the U.S. system of civil justice is excessive litigation.⁷ From their perspective, the American propensity to litigate has in recent years produced a “litigation explosion,” overburdening the courts and weakening the domestic economy. The Agent Orange case by itself did not cause this problem, though it placed heavy demands on the courts during its six-year duration. It does, however, exemplify a type of case involving mass exposure to serious health risks that has significantly increased the civil caseloads of federal and state courts. Although proponents of this view acknowledge that those who cause injuries should be called to account, they contend that mechanisms outside the courts should be devised for dealing with such problems.

3. The diversity of civil litigation. No single case or set of cases can mirror the diversity of civil litigation in the United States. The Agent Orange case belongs to the category of tort law—that is, cases involving civil wrongs or injuries for which damages are sought. Tort cases may entail, as in the

Agent Orange litigation, multiple claims by workers or consumers against the actions or products of a limited number of corporations. More often, however, they involve relatively simple suits for damages by one individual against another, seeking compensation for damages or injuries suffered in, for example, an automobile accident. (Tort litigation is discussed in greater detail in Chapter 11.)

Although tort litigation constitutes a highly publicized component of civil caseloads, American courts also address many other sorts of civil cases. Some civil cases involve contractual disputes, either between businesses or, more frequently, between a business (usually attempting to collect a debt) and a consumer. Other civil cases arise out of domestic relationships, involving such matters as divorce, child support, and adoption. Still others involve the legal transfer of property from one party to another, as occurs through the administration of a will or the handling of the estate of someone who died intestate (without a will). Finally, an important category of civil cases involves the legal relationship between governments and citizens. These cases may range from constitutional challenges to governmental actions, such as mandatory drug-testing programs, to governmental suits to compel compliance with environmental regulations, antitrust laws, or other statutes.

This description of the types of civil cases, however, raises questions. Why do some conflicts get transformed into legal disputes and taken to court, while others do not? How do courts deal with civil cases brought before them? And how well is the U.S. system of civil justice operating? Are there ways to make it work better? This chapter seeks to answer those questions.

How Cases Arise

In the United States, under our adversarial system of justice, there cannot be a case without a dispute. However, not every dispute, even if it has a legal dimension, is brought to court for resolution. Figure 7-1 outlines the process by which disputes arise and the various means available for dealing with disputes.

Injuries and Grievances

If cases arise out of disputes, then disputes arise out of grievances, and grievances out of injuries. People suffer injuries—physical, economic, psychic—every day. These injuries do not become grievances, however, unless the injured party believes that she is unjustly deprived by another party of something to which she is entitled. Injuries do not become litigable grievances—that is, grievances one could take to court—unless one is deprived of something to

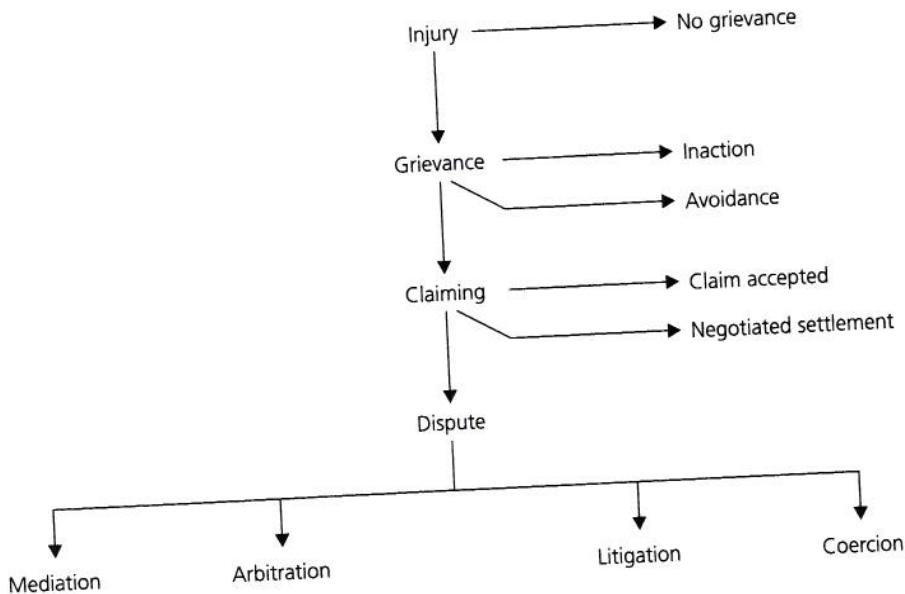


FIGURE 7-1
The Development and Resolution of Disputes

Source: Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15 (1980–81): 524–565.

which one is legally entitled. A few examples may help clarify this. You have no "grievance" against the government, for example, if it imprisons you for a crime you have committed, because your loss of liberty is deserved. Or suppose your house is destroyed by a tornado. In such a case, you suffered an injury that was undeserved, but you have no "grievance" because no one is responsible for the damage. Finally, suppose you operate a pizzeria, and a competitor cuts into your sales. You certainly have suffered a harm and know who caused it, but there is no litigable "grievance" because you had no legal right to a fixed level of sales or profits.

As these examples suggest, by establishing entitlements and imposing obligations, law defines what constitutes a litigable grievance. This definition may vary from one society to another and may change over time within a society, as the law responds to shifts in public opinion. Some scholars attribute part of the increase in litigation in the United States and elsewhere to legal changes brought about by just such a shift in public opinion.⁸ They contend that as advances in science and technology have made it possible to control situations of peril or need, the public has begun to claim a right to be free from unnecessary risk. The law, reflecting this claim, has imposed obligations on government and private parties to deliver goods and services that meet achievable standards of safety and usefulness. It has also made it easy to sue when these obligations are not met; as a result, civil suits have increased.

Responses

Suppose you buy a car that fails to perform to your expectations. You might respond to this problem in various ways.⁹ You might do nothing, perhaps justifying your inaction by arguing that everyone gets stuck once in a while ("lumping it"). You might also resolve never to purchase another car from that dealer or that manufacturer. Social scientists call such a change in behavior, designed to reduce or eliminate contact with a disputant, "avoidance."¹⁰ Alternatively, you might go to the dealership and claim that the car should be repaired or that you should be reimbursed for your inconvenience. The dealer might accept your claim, thereby resolving the matter. Or the dealer might make a counteroffer, perhaps to replace defective parts if you pay the labor costs, and a negotiated settlement might be reached. Finally, the dealer may reject your claim, in which case a dispute exists.

What are your options in such circumstances? One possibility is coercion, the threat or use of force to get what you claim is rightfully yours. Revolutions and fights exemplify the use of coercion to resolve disputes. In this example, however, other forms of dispute resolution are more likely. You might seek the intervention of a third party, such as the Better Business Bureau, to help resolve the dispute through mediation. Or you might seek a binding resolution of your dispute outside the courts through arbitration. (These modes of dispute resolution are discussed later in the chapter.) Finally, you might choose litigation, taking your grievance to court.

How do most people deal with their grievances? That depends on the grievance. Surveys indicate that people who believe that they have suffered discrimination are unlikely to take action, whereas those who have suffered physical injuries or damage to their property are likely to press claims.¹¹ Overall, however, according to a survey of 1,000 randomly selected households nationwide, most resolve their grievances outside the legal system (see Figure 7-2). Three factors largely explain why people are reluctant to take their disputes to court.

1. Adverse consequences of filing suit. Many disputants are reluctant to go to court because they fear that escalating the conflict will produce backlash. This is particularly true when the disputants have ongoing relationships that might be jeopardized by a suit. Thus, family members may prefer to settle their disputes out of court; so, too, may neighbors, business partners, and employees involved in disputes on the job. According to one victim of sex discrimination, if she were to sue, "a lot of people might go against me. . . . I wouldn't want to ruin the relationships I do have there."¹²

2. Costs of litigation. Disputants also recognize that litigation, with its attorney fees and court costs, is expensive. A trial also may require plaintiffs to miss work, costing them income or even putting their jobs in jeopardy. Added to these monetary costs may be psychic costs. Disputants may be uncomfortable

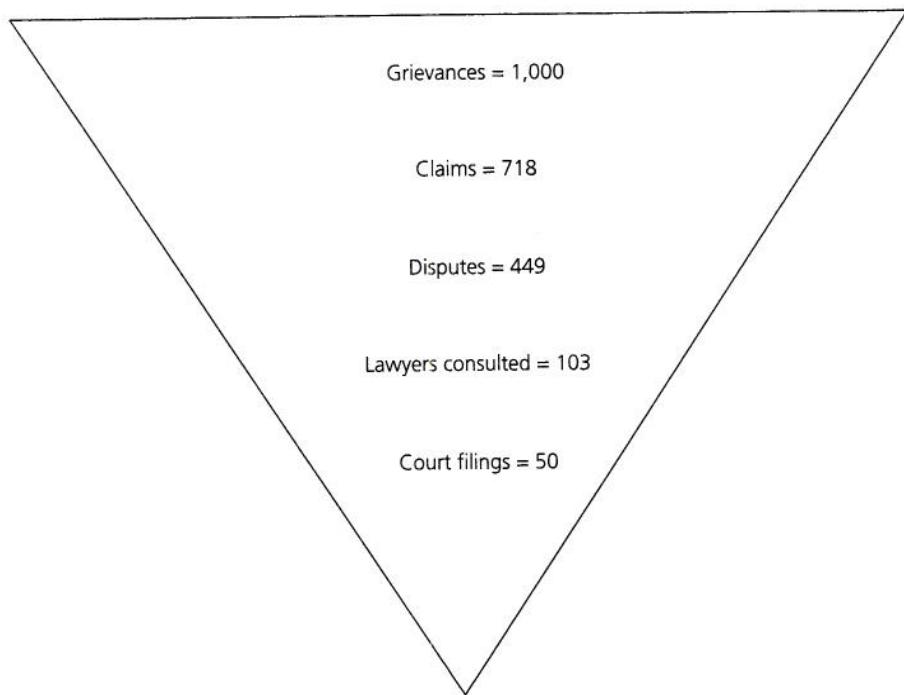


FIGURE 7-2
The Disputing Pyramid

Source: Richard E. Miller and Austin Sarat, "Grievances, Claims, and Disputes: Assessing the Adversary Culture," *Law and Society Review* 15 (1980–81): 544, fig. 1-A. Figures indicate the general level of disputing per 1,000 grievances. Reprinted by permission of Blackwell Publishing.

consulting a lawyer or anxious about appearing in court. Thus, even if they have a legitimate grievance, disputants may conclude that the costs of going to trial outweigh the expected payoff from a successful suit or that another less costly forum should be used for resolving the dispute.¹³

3. Uncertainty. Because they do not know the applicable law, potential litigants may be uncertain about their chances of success. They also may be skeptical about whether a single individual can prevail against a company or the government. This uncertainty may deter them from filing suit. As one victim of wage discrimination put it, it would be "me against a large corporation" and thus my "word against a [more powerful] someone else's."¹⁴

Nevertheless, some disputants are willing to consult lawyers and file suit. When they do, their cases proceed through certain legally established steps from initiation to resolution. It is to these steps, and to the law governing them, that we now turn.

RULES AND PROCESSES

Rules

Civil litigation is governed by three sets of rules. One set of rules establishes the substantive legal standards that judges apply in deciding cases. For example, a statute might define and outlaw racial discrimination, an administrative regulation might set water-quality standards, or the common law might determine when one can collect damages for injuries one has suffered. These standards are examined in Chapters 9 through 12.

A second set of rules (addressed in Chapter 2) governs the jurisdiction of courts and thus guides lawyers on the proper court in which to file a case. Finally, a third set of rules determines the procedures that lawyers must follow in framing and presenting a case from its inception to the exhaustion of all appeals. For most of American history, these procedural rules were established within each state, according to state statutes or rulings announced by state courts. Instead of developing their own procedural rules, each federal court followed the procedures of the state in which it heard cases. Many lawyers complained, however, that this lack of procedural uniformity was confusing, and the American Bar Association campaigned for a standard set of procedural rules for federal litigation. In 1938, in response to these efforts, the Federal Rules of Civil Procedure were adopted. These new rules established a uniform procedure for federal courts that its supporters hailed as “flexible, simple, clear, and efficient.”¹⁵ More than half the states have agreed with this assessment, conforming their procedural requirements to the Federal Rules of Civil Procedure.

The Process of Civil Litigation

Because most civil cases are resolved before trial, what occurs during the pretrial phase of litigation is vitally important. The pretrial phase serves to identify the applicable law, define the legal issues, and promote the discovery of factual information pertinent to the resolution of the case. The four major steps during the pretrial phase are: (1) pleadings, (2) discovery, (3) motions, and (4) pretrial conference.¹⁶

Pleadings A case begins when the plaintiff—or, more likely, the plaintiff’s attorney—files a written complaint with the trial court. Under the Federal Rules of Civil Procedure, which greatly simplified pleadings, a complaint must merely (1) describe the factual basis for the plaintiff’s suit, (2) explain why the court has jurisdiction over the case, (3) outline the legal theory on which the complaint relies, and (4) indicate the damages or other relief that the plaintiff seeks. The requirements of the Federal Rules of Civil Procedure are met if the

complaint reveals enough information so that the defendant can understand the basis for the suit and respond to the complaint.

Once the plaintiff has filed a complaint, the defendant in the case must be “served” with the complaint—that is, formally notified of the complaint and summoned to appear in court at a particular date and time. Should the defendant fail to appear at the appointed time, the judge may rule in favor of the plaintiff without hearing evidence. This is called a default judgment.

Usually, however, defendants file an answer to the plaintiff’s complaint. They may deny some or all of the allegations in the complaint. In the Agent Orange case, for example, the chemical companies denied that their product had caused the health problems suffered by the veterans and their children. Those matters on which the plaintiff and defendant differ then become the basis for the dispute. Alternatively, defendants may admit the truth of the plaintiff’s allegation but offer an affirmative defense—that is, they may introduce new facts designed to produce a decision in their favor. A skydiving instructor, for instance, may admit that a student died during a jump but reveal that the student signed a form acknowledging the dangers of skydiving and pledging not to hold the school or instructors responsible for any mishaps. Finally, defendants may respond with a counterclaim, the equivalent of a complaint against the plaintiff. Thus, a driver sued for damages arising out of a traffic accident might file a counterclaim for the damages to her car.

Even if a plaintiff has no intention of taking a dispute to trial, she may have tactical reasons for filing a complaint. She might file a complaint to “engage the authority of the legal system” on her behalf, thereby strengthening her position in the informal resolution of the dispute.¹⁷ Filing a complaint may also signal how seriously the plaintiff views the matter under dispute, thereby inviting the defendant to enter into negotiations to deal with the situation.

Discovery Discovery involves the pretrial exchange of information between the parties in a lawsuit. Under the Federal Rules of Civil Procedure, every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person.¹⁸ Thus, plaintiffs may demand from defendants (or defendants from plaintiffs) all the information they possess relevant to the subject matter of the case. They may also during discovery question witnesses and others who possess pertinent information. The sole exception to this requirement of full disclosure is for privileged information, such as communications between an attorney and client or between a doctor and patient. The Federal Rules of Civil Procedure permit such broad scope for discovery in order to prevent a party from hiding damaging evidence or an attorney from springing a surprise on an unwary opponent at trial. In so doing, the rules promote verdicts at trial based on the weight of the evidence rather than on courtroom tactics. Full disclosure of facts before trial may also encourage litigants to settle cases. Parties sometimes fail to settle cases because they overestimate

the strength of their own position or underestimate that of their opponents. Discovery, however, allows an informed assessment of the strengths and weaknesses of the opposing positions and of the likely outcome of a trial.¹⁹

Lawyers employ three tools during discovery: depositions, interrogatories, and the production of documents and other physical evidence. A deposition involves oral questioning of a witness under trial-like conditions. Attorneys for both sides question and cross-examine witnesses, and their answers are recorded. This testimony may later be introduced at trial—an alert attorney will pounce on any discrepancies between what a witness says at trial and what he said when he was deposed. An interrogatory consists of a set of written questions directed to a party in a case, to which written answers are prepared and signed under oath. A party to a case may also be required during discovery to produce documents or objects for the other party to inspect, photograph, or copy and to permit access to its premises and its files for these purposes. In addition, the plaintiff in a personal injury case may be required to undergo a physical examination by a physician chosen by the defendant or by the court to substantiate an injury claim. Should a party object to questions or to other requests for information or materials, a judge determines whether the requests are legitimate.

In most cases, the requests for information or materials during discovery are quite limited. However, discovery in complex cases can be time-consuming and expensive. In the first five years of the IBM antitrust case, for example, 64 million pages of records and documents were obtained through discovery.²⁰ In some instances, “overdiscovery” has led to abuses. According to one judge, “For many lawyers, discovery is a Pavlovian reaction. When the lawsuit is filed . . . the word processor begins to grind out interrogatories and requests for production. Deposition notices drop like autumn leaves.”²¹

Plaintiffs may file suit with little basis for their claims, hoping that a “fishing expedition” in the defendant’s files during discovery might provide them with the evidence they lack. Attorneys may also multiply requests for information during discovery to drive up the opposing party’s expenses or to induce a settlement. Thus, a lawyer for R. J. Reynolds candidly described the strategy behind the tobacco firm’s use of depositions in defending a suit: “To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds’s money, but by making the other son of a bitch spend all of his.”²² Although the Federal Rules of Civil Procedure permit judges to impose sanctions, including withholding attorneys’ fees, on those who abuse discovery, this has not curbed abuses.

Motions At each stage of the pretrial phase of a case, attorneys for either party can file motions—that is, requests that the judge either issue a legal ruling or take some other action.²³ Under the Federal Rules of Civil Procedure, these motions must be submitted in writing and must specify the legal basis for the motion and the relief or order sought.

Some motions concern procedural matters relating to the conduct of the case. For example, a defendant may file a motion requesting that the plaintiff should be required to amend his complaint to clarify the basis for the suit. Or either party may ask the judge to determine whether certain information is subject to discovery. With other motions a party may seek a resolution of the case in its favor before trial. In the Agent Orange Case, for example, the defendant corporations sought dismissal of the complaint, claiming that they were immune from suit because they were fulfilling a request from the government in producing Agent Orange. Similarly, if the defendant fails to respond to a complaint, the plaintiff may move for a default judgment. Finally, either the plaintiff or the defendant may move for a summary judgment—a binding determination of the case without a trial. However, a judge can grant a motion for summary judgment only if the law is clear and the facts of the case are undisputed, leaving no issue to submit to a jury.

How often are cases resolved through motions rather than settled or adjudicated? The best estimate comes from Herbert Kritzer's intensive study of a sample of more than 1,600 cases in state and federal courts.²⁴ Kritzer found that 12 percent of the cases were dismissed for technical reasons or dismissed for cause (e.g., failure to state a claim). In another 15 percent, the judge issued a summary judgment, entered a default judgment for the plaintiff, or otherwise decided the case. Thus, although only 7 percent of the sample went to trial, judges contributed to the resolution of an additional 27 percent of civil cases.²⁵

Pretrial Conference The Federal Rules of Civil Procedure authorize (but do not mandate) a conference between the judge and attorneys before a case goes to trial. Most states have followed the federal lead in providing for pretrial conferences. At these conferences, which are usually held after discovery is completed, the judge and the attorneys identify the points of agreement and the issues still in dispute. The attorneys also reveal what witnesses they will call and what evidence they will introduce, thereby facilitating the planning of the trial. In complicated cases a judge may schedule earlier conferences with the attorneys as well to expedite the process of discovery.²⁶

Pretrial conferences not only improve the conduct of trials but also promote the settlement of cases. As the Agent Orange litigation shows, judges may actively encourage settlement during pretrial conferences. Some initiate discussion of settlement when lawyers are reluctant to do so out of fear that the suggestion might be interpreted as a sign of weakness. Some also offer attorneys their own assessment of the strengths and weaknesses of the opposing positions and their views on whether settlement offers are reasonable. Lawyers generally applaud aggressive judicial participation in the settlement process. They are more likely to view a settlement as fair if it has received a judicial endorsement, and such an endorsement may help them persuade a recalcitrant client to accept a reasonable settlement offer.²⁷

CIVIL CASES AND THEIR OUTCOMES

The Universe of Cases

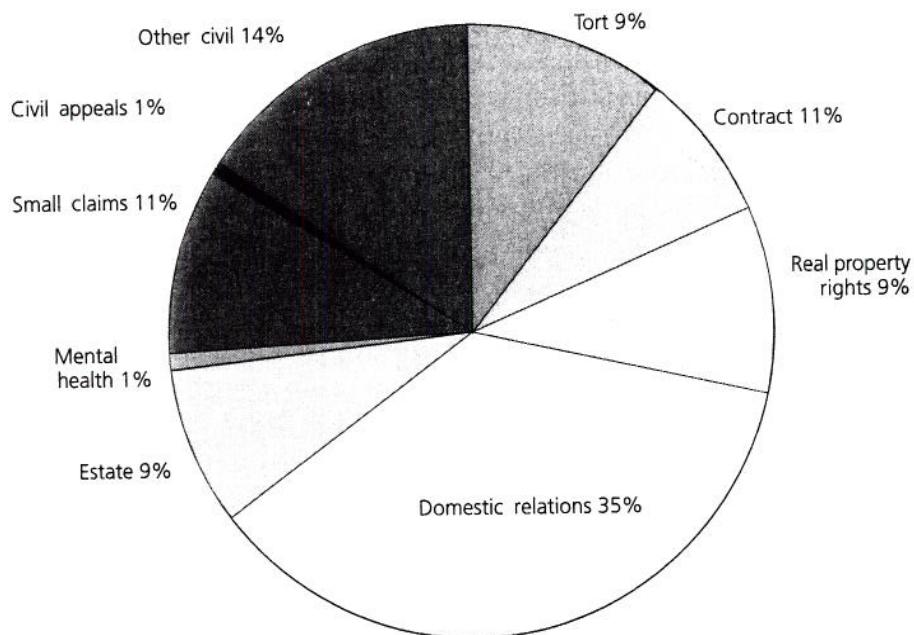
Federal district courts decide more than 250,000 civil cases each year, and state trial courts decide more than 16 million.²⁸ The civil caseloads in these courts are extremely diverse. Cases such as the Agent Orange suit and suits against tobacco companies involve hundreds of millions of dollars. Others, such as litigation to collect debts, may involve a few hundred dollars at most. Some cases drag on for years (again, the Agent Orange and tobacco cases are prime examples), while others are quickly settled. Still others—for example, uncontested divorces and adoptions—involve no real dispute but merely require judicial ratification of a settlement worked out between the parties.

Types of Civil Cases One way to capture the diversity of civil cases is to look at the types of cases that trial courts hear (see Figure 7-3 and Table 7-1). Taken together, the table and figure reveal that, although federal and state trial courts both handle a wide range of civil cases, the mix of civil cases differs considerably. This is hardly surprising: Federal law and state law generally regulate different activities. For example, there is no federal divorce law and no state immigration law. Much of the civil litigation in federal courts involves the federal government as either plaintiff or respondent. Governmental actions and litigation priorities influence the character and extent of that litigation.

Take, for example, recovery and enforcement cases, which involve the United States as plaintiff seeking to recover overpayments of veterans' benefits and student loans in default. In 1980, such cases comprised less than 10 percent of case filings in federal district courts. During the early 1980s, however, the Reagan administration made recovery of money owed to the federal government a priority. As a result the number of these suits increased dramatically, and by 1985, they constituted almost one-quarter of all federal civil cases. When a new president with new priorities was inaugurated, the number of recovery and enforcement cases declined precipitously—by more than 33 percent from 1989 to 1990.²⁹

Federal legislation also affects the types of private case commenced in federal district courts. A good example is diversity of citizenship cases, which involve suits between citizens of different states. In 1989, Congress raised the amount that must be at stake for diversity cases to be tried in federal court from \$10,000 to \$50,000. As a result, from 1989 to 1990, diversity cases dropped 15 percent.³⁰

Types of Parties One may also look at civil cases in terms of the parties involved in the cases. One legal scholar, Marc Galanter, has suggested dividing the parties in civil cases into *one-shotters* (OS) and *repeat players* (RP).³¹ One-shotters are litigants who have only occasional recourse to the courts



The figure includes data from 27 courts

FIGURE 7-3

Types of Cases in State Trial Courts of General Jurisdiction

Source: *State Court Caseload Statistics: Annual Report 1992* (Williamsburg, VA: National Center for State Courts, 1994), p. 15, chart 1.17. Used by permission.

(e.g., spouses in divorce actions and taxpayers in tax cases). In contrast, repeat players are engaged in many similar litigations over time (e.g., collection agencies in debt cases and the Internal Revenue Service in tax cases). One-shotters may be either plaintiffs or defendants, as may repeat players. Table 7-2 categorizes various types of litigation based on the parties in the case. Let us look at each category.³²

OS versus OS Much of this litigation merely involves judicial ratification of settlements previously agreed to by the parties. For example, more than 90 percent of divorces—by far the most numerous of these cases—are uncontested. When the cases involve real disputes, however, conflict can be intense because the parties often have close personal ties. Spite, resentment, or revenge also may fuel the disputes.

RP versus OS Many repeat players have legal relationships with large numbers of one-shotters. Owners of apartment complexes, for example, enter into

TABLE

TYPES OF CASES IN FEDERAL DISTRICT COURTS, 2002

Contract Actions	38,535
Insurance	8,258
Marine	2,381
Recovery of overpayments and enforcement of judgments	8,646
Other	18,092
Real Property Actions	7,642
Foreclosures	4,985
Other	2,657
Tort Actions	48,549
Product liability	31,068
Other personal injury	17,481
Actions under Statutes	106,535
Antitrust	709
Bankruptcy	2,895
Civil rights	40,549
Environmental matters	1,749
Forfeiture and penalty	2,843
Labor laws	15,862
Prisoner petitions	8,400
Securities, commodities, and exchanges	3,595
Social security laws	17,059
Tax suits	1,126
Other	13,013
TOTAL CIVIL CASES	256,858

Source: Web site of the federal judiciary: www.uscourts.gov/caseload2003/.

contracts with large numbers of tenants, and finance companies attempt to collect debts from many consumers. These repeat players file suits as part of their normal course of business, using the law to enforce contractual obligations. These cases make up a large part of civil litigation, though many cases are settled before trial.

OS versus RP It is relatively rare for a one-shotter to sue a repeat player. The various factors discussed earlier—the adverse personal consequences of suing, the costs of litigation, and uncertainty about its outcome—deter most

TABLE

COMBINATIONS OF PARTIES AND LITIGATION

		INITIATOR OR CLAIMANT	
		One-Shotter	Repeat Player
DEFENDANT	One-Shotter	Parent v. Parent (custody) Spouse v. Spouse (divorce) Family v. Family Member (insanity commitment) Family v. Family Member (inheritance) Neighbor v. Neighbor Partner v. Partner OS vs OS I	Prosecutor v. Accused Finance Co. v. Debtor Landlord v. Tenant Internal Revenue Service v. Taxpayer Condemnor v. Property Owner RP vs OS II
	Repeat Player	Welfare Client v. Agency Auto Dealer v. Manufacturer Injury Victim v. Insurance Company Tenant v. Landlord Bankrupt Consumer v. Creditors Defamed v. Publisher OS vs RP III	Union v. Company Movie Distributor v. Censorship Board Developer v. Suburban Municipality Purchaser v. Supplier Regulatory Agency v. Firms of Regulated Industry RP vs RP IV

Source: Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Changes," *Law and Society Review* 9 (Fall 1974), p. 107, fig. 1. Reprinted by permission of Blackwell Publishing.

one-shotters from filing suit. The sole exceptions in this category are personal injury cases. Because attorneys take such cases on a contingent basis—that is, their fee is a percentage of the plaintiff's award—one-shotters need not bear the financial costs of litigation. They are therefore more likely to sue.

RP versus RP Many repeat players interact frequently with other repeat players. Examples include unions and companies, regulators and regulated firms, and builders and suburbs. To avoid jeopardizing these ongoing, mutually beneficial relationships, repeat players tend to develop mechanisms outside the courts to resolve their disputes.

There are, however, two exceptions to this pattern of low litigation rates. First, some repeat players—for example, the American Civil Liberties Union and the Sierra Club—are committed to furthering particular ends and may be

quite willing to reject compromise solutions and take disputes to court. Second, government also tends to be quite heavily involved in litigation with other repeat players, as both plaintiff and defendant.

Outcomes of Civil Cases

The outcome of a civil case depends largely on the facts of the case, the applicable law, and the presentation of the case by the attorneys or by the parties in the case, if they are not represented by counsel. While the facts differ from case to case, some generalizations can be made about the effects of the law and the type of representation. Once again, Galanter's distinction between one-shotters and repeat players is useful.³³

OS versus OS In terms of legal representation, one-shotters typically find themselves rather evenly matched. Generally, either both parties have retained counsel or neither has, and neither party is likely to hire an attorney from the elite ranks of the legal profession. Because disparities in the quality of counsel are unlikely to determine the outcome of disputes between one-shotters, the substance of the law may have a decisive effect on the outcome of the case.

The effect of the law—and of changes in the law—on case outcomes are apparent if one looks at the most frequent cases pitting one-shotters against one-shotters, namely, divorce cases.³⁴ Before 1970, every state required fault-based grounds for divorce, such as adultery or mental cruelty, with the conduct of the parties during the marriage the key determinant of their financial rights and obligations after divorce. Under this law, women fared relatively well in the distribution of marital property and the provision of financial support. In 1970, however, California instituted a system of no-fault divorce under which marriages could be dissolved on the basis of "irreconcilable differences." The California reform, which was soon adopted by other states, also established gender-neutral rules that removed many of the legal and financial protections that the law had provided. Thus, a consequence of instituting no-fault divorce, unanticipated and unintended by reformers, was that "women, and the minor children in their households, typically experience[d] a sharp decline in their standard of living after divorce."³⁵

RP versus RP Because litigation is a normal part of their doing business, repeat players typically retain experienced, specialized counsel. Thus, as in cases involving one-shotters, disputes between repeat players usually involve a rough parity in legal representation. Because repeat players, unlike one-shotters, expect to litigate, they tend to take steps to ensure that the applicable law is favorable to their interests. They may seek to influence the law that government creates. Business and labor, for example, lobby hard on legislation that is like to affect labor relations. If the applicable law arises out of private

agreements, then repeat players employ their legal expertise and negotiating skills to fashion favorable contracts. They also attempt to promote a body of judicial precedent favorable to their interests. Thus, in litigation, repeat players are concerned not merely with the outcome of individual cases but also with their long-term legal advantage. Repeat players who succeed in securing favorable legislation, contracts, and judicial interpretations can expect to advance their interests through litigation.

RP versus OS, and OS versus RP Repeat players enjoy significant advantages in their disputes with one-shotters. Expecting some conflicts in their transactions with one-shotters, repeat players can structure the law at the outset to place themselves at an advantage. As Galanter observes, “it is the RP who writes the form contract, requires the security deposit, and the like,” and one-shotters seldom seek to renegotiate the requirements.³⁶ Moreover, repeat players do not share the one-shotters’ concerns about litigating: They understand the process and have sufficient experience to calculate their chances of success. Unlike one-shotters, repeat players usually have hired or retained lawyers, and so their start-up costs for litigating are minimal. Because of this ongoing relationship, the repeat players’ lawyers tend to be specialists in the field, whereas those chosen by one-shotters often are not.

The different objectives pursued by one-shotters and repeat players may also work to the repeat players’ advantage. As plaintiffs, one-shotters are concerned with having their claims vindicated, and, as defendants, with avoiding or minimizing liability. Repeat players, in contrast, are concerned not only with the present case but also with promoting a favorable outcome in future cases. They therefore will be inclined to settle cases that might establish unfavorable precedents and to adjudicate those that will yield favorable ones. As a result, over time repeat players can create a body of law that serves their interests.

Are things really as dismal for one-shotters as Galanter’s analysis suggests? Yes and no. Suits by repeat players against one-shotters constitute the largest category of litigation, and several studies suggest that repeat players generally prevail, often by default judgments.³⁷ (Of course, in many of these cases—for example, creditor–debtor cases—they prevail because one-shotters have failed to meet their clear legal obligations.) One-shotters, however, have enjoyed considerable success as plaintiffs in product liability cases, in which they are suing manufacturers for injuries suffered as a result of alleged product defects.³⁸ These cases diverge in important respects from other disputes between one-shotters and repeat players. Expert legal representation for one-shotters tends to be readily available. Plaintiffs’ lawyers in product liability cases are legal specialists who take cases on a contingent-fee basis. In addition, this segment of the bar shares the repeat players’ interest in the long-term development of product liability law and acts to secure a body of law favorable to their clients’—and their

own—interests. In sum, aggressive attorneys representing one-shotters and their interests may help equalize the prospects of repeat players and one-shotters involved in a dispute.

A LITIGATION CRISIS?

The Indictment

In recent years, the U.S. civil justice system has come under sustained attack. Consider the indictment: Americans have developed “a mad romance . . . with the civil litigation process.”³⁹ However outrageous the claim, there is a litigant willing to press it and a court to hear it (see Box 7-1). And encouraging this propensity to litigate differences and file frivolous suits is the world’s largest legal profession. Not surprisingly, then, “[o]ur society has become the most litigious society in the world. No other nation is even close.”⁴⁰ Further, “[t]his massive, mushrooming litigation has caused horrendous ruptures and dislocations at a flabbergasting cost to the nation.”⁴¹ Litigants themselves bear some of the costs. With overloaded courts, justice is slower and more expensive than ever. The nation’s economy also suffers. “Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business.”⁴² Only the nation’s economic competitors benefit as energies and resources are diverted from “research and development” to “document production and depositions.”⁴³ Fundamental reform of the civil justice system is essential.

If this harsh assessment is accurate, then one could hardly oppose the call for reform. But is it accurate? Let us first consider the basic premise of the indictment, namely, that the United States is today an excessively litigious society.

Is the United States a Litigious Society?

One way to answer the question is to compare litigation rates in the United States with those in other nations. Contrary to the claims of alarmists, such a comparison suggests that the United States is not exceptional. Some countries—most notably, Japan—have litigation rates far lower than those in the United States (see Box 7-2). But several others—among them, Australia, Denmark, England, and Israel—have roughly comparable litigation rates, and many of these countries have likewise experienced a rapid growth in litigation in recent decades.⁴⁴

One might also consider whether Americans are particularly prone to resolving their disputes by taking them to court. In 2002, civil filings in state courts per 100,000 population ranged from 1,167 in Tennessee to 15,157 in Maryland. However, the surveys of potential legal problems noted previously suggest that Americans are reluctant to litigate and generally do not transform

BOX

Outrageous Suits?

- A man sues a former girlfriend, trying to force her to pay for his time and expenses on a date she did not keep.
- A class-action suit is filed against General Motors, on behalf of “all persons everywhere now alive and all future unborn generations,” seeking \$6 trillion in damages for pollution.
- After breaking her finger in a school softball game, a high-school student sues her gym teacher and the city, alleging that the teacher not only failed to instruct her on how to catch a ball but also failed to warn her of the dangers of the sport.
- A group of Washington Redskins fans sue to have a court overturn a controversial referee’s call that cost the Redskins a win in a football game.
- The Italian Historical Society of America sues the U.S. Post Office, asking a federal court to bar the issuing of a stamp celebrating Alexander Graham Bell on the grounds that the telephone actually had been invented by Antonio Meucci.
- A woman sues the state of California after being told that she did not win the state lottery, because her ball popped out of the winning slot after momentarily entering it.

Of course, filing a suit and collecting damages are two different things. Courts refused to rule for the plaintiffs in all but the last case. The jury in that case awarded the disappointed lottery player the \$3 million jackpot, plus \$400,000 for her emotional trauma.

Sources: The first case is described in Lawrence Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge, MA: Harvard University Press, 1990), p. 16; the next four, in Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), pp. 4–5; and the final case in Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991), p. 170.

their disputes into litigation. Americans’ willingness to litigate varies from issue to issue. The only comparative study of the propensity to sue concludes that Americans tend to sue in cases of personal injury somewhat more often than Britons or Canadians (but not more often than Australians).⁴⁵ This evidence hardly supports the notion of a populace involved in “a mad romance with the civil litigation process.”

Finally, one might consider whether Americans are more litigious now than in the past. Certainly, the level of litigation in the United States has risen over

BOX

2

Why Don't the Japanese Sue?

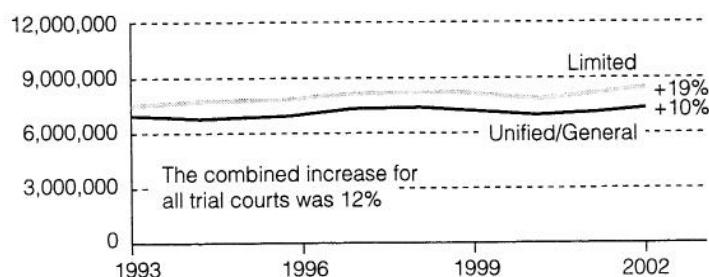
If the United States is seen as a litigious society, then Japan has just the opposite reputation. In 1986, for example, Japan's per capita litigation rate was only one-tenth that of California. This disparity is particularly striking because Japan shares with the United States many characteristics that presumably promote litigation, such as an advanced economy and an urbanized population. Why don't the Japanese sue?

One explanation for the disparity is cultural differences. Traditional Japanese values, it is argued, are oriented toward consensus, avoiding conflict, and subsuming personal concerns in the interest of the group. If the reluctance to litigate has derived from traditional Confucian beliefs, then one would expect litigation rates to rise as the modernization of Japanese society undermined those beliefs. In fact, litigation rates in Japan today are *lower* than in the past. Something in addition to cultural factors must be involved.

Even as Japanese society changes, litigation rates remain low because the government has designed policies to discourage litigation. The Japanese government has restricted the size of the legal profession, thereby reducing access to legal services. The total number of practicing lawyers in Japan is lower than the number of graduates each year from U.S. law schools, and in Japan only 500 new lawyers annually are permitted to pass the bar exam. The rules of Japanese courts, such as the ban on class-action suits, also discourage individuals from pursuing claims. Finally, when disputes do arise, the Japanese government has developed alternative forums to handle them, such as its system of court-annexed mediation and the Traffic Accident Dispute Resolution Center.

The Japanese experience reveals that when disputes arise, the values and expectations of the society can encourage or discourage litigation. But so, too, can governmental policies designed to reduce access, increase delay, and deny relief—or, alternatively, to facilitate legal redress of grievances. Far from being the inevitable product of societal development, litigation reflects the values and institutions of the society.

Sources: Takao Tanase, "The Management of Disputes: Automobile Accident Compensation in Japan," *Law & Society Review* 24 (1990): 651–689; Robert L. Kidder and John A. Hostettler, "Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies," *Law & Society Review* 24 (1990): 895–922; and Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985).

**FIGURE 7-4**

Total State Court Civil Caseloads, 1993–2002

Source: *State Court Caseload Statistics*, 2003, at www.ncsconline.org.

time (see Figure 7-4). This does not necessarily mean, however, that Americans have become more litigious; because the nation's population has also increased, there are more Americans to file suits. Indeed, from 1900 to 1960, per capita litigation in the United States remained relatively stable.⁴⁶ Since that time, however, the increases in litigation have outstripped population growth. Although this seems to support the notion that Americans have become more eager to sue, one should be cautious about drawing that conclusion.

The greatest single source of the increase in civil cases is an increase in divorce and post-divorce proceedings (domestic relations cases). One author wryly notes: "Few of us, I suspect, know many people who filed for divorce because they were enamored of litigation or beguiled by lawyers."⁴⁷ In addition, although civil filings rose during the late twentieth and early twenty-first centuries, they did not increase uniformly in all regions of the country and in all areas of the law, as might be expected if Americans had grown more litigious (see Table 7-3). Moreover, historical studies reveal that the growth in litigation in the United States over the course of the twentieth century was episodic and uneven. The "litigation explosion" may thus be merely a short-term phenomenon. Indeed, there is some evidence to support this view. Although the civil litigation rate (excluding domestic relations cases) rose 14 percent in state courts from 1984 to 1999, the rate actually declined almost 7 percent from 1991 to 1999.⁴⁸ Finally, historical studies show that current levels of per capita litigation in the United States are not unprecedented. Higher per capita rates existed in colonial times and during part of the nineteenth century.⁴⁹

In sum, despite widely publicized claims to the contrary, the evidence suggests that the United States is not an unusually litigious society. Nonetheless, litigation in the United States may still adversely affect the legal system and the economy, as critics have charged. The economic effects of litigation will

TABLE

CIVIL FILINGS IN STATE TRIAL COURTS (SELECTED STATES)

State	Civil Filings Per 100,000 (All Courts)	Caseload Growth 2000–2002 (General Jurisdiction Courts)
Alabama	4,430	18
Arkansas	4,889	19
California	4,012	3
Hawaii	2,398	-14
Indiana	7,534	14
Kansas	7,263	13
Minnesota	3,080	7
Montana	5,314	8
New Jersey	8,844	6
New Mexico	3,549	8
New York	8,620	1
Texas	2,985	12

Source: Adapted from *Examining the Work of State Courts, 2003*, at www.ncsconline.org.

be considered in Chapter 11, when the discussion turns to tort law and product liability claims. The next section considers current efforts to respond to litigation levels and improve the system of civil justice.

Is THERE A BETTER WAY?

Despite their differences, critics of the “litigation explosion” and advocates of greater access to the courts agree that the American system of civil justice must be improved. The general public seems to share their dissatisfaction, viewing litigation as unduly slow, complex, and costly.⁵⁰ Other critics of American civil justice complain that formal legal processes hamper courts’ ability to address the problems underlying disputes and fashion lasting consensual solutions to those problems.⁵¹

During the 1970s, legal reformers began to propose that less formal forums be created outside the courts to help solve the problems of heavy caseloads, costly justice, and ineffectiveness in settling disputes. In recent years this movement for “alternative dispute resolution” (or ADR, as it is usually called) has enjoyed considerable success. In 1990, Congress enacted the Administrative Dispute Resolution Act, which requires federal agencies to consider ADR for settling disputes, and in 1998, it enacted the Alternative Dispute Resolution

Act, requiring district courts to establish ADR programs.⁵² More than half the states have established their own ADR programs.⁵³ Corporations and other private institutions have also pioneered their own mechanisms for resolving disputes without recourse to the courts.

Alternatives in Dispute Resolution

Alternative dispute resolution encompasses a wide range of forums and processes. Although considerable differences exist among ADR programs, most involve either *arbitration* or *mediation*.

Arbitration

Voluntary Arbitration After a period in the major leagues, a baseball player who cannot agree on a salary with his team is eligible to take the dispute to arbitration. The player proposes a salary that he believes is fair and offers arguments and evidence for his position. The team submits a different figure and supports its position. The arbitrator then chooses one of the two figures, and both parties are bound by that decision.

Baseball's system of salary arbitration reveals the basic features of arbitration: A dispute is submitted to a neutral third party, who hears arguments, reviews evidence, and renders a decision. As the example illustrates, most often voluntary arbitration is used to resolve labor disputes. In recent years, however, it has also been employed to settle commercial disputes in various industries, including construction and insurance.⁵⁴

Although the arbitrator plays a quasi-judicial role, voluntary arbitration differs from litigation in crucial respects. First, voluntary arbitration can occur only if both parties have consented, usually by contract, to submit their disputes to arbitration. Baseball's system of salary arbitration, for example, resulted from a collective bargaining agreement between the players' union and the team owners. Second, the arbitrators in voluntary arbitration are selected and paid by the parties. Agreement between the parties determines whether there shall be a single arbitrator or a panel of arbitrators, the scope of their authority, and how they shall be selected. Third, voluntary arbitration proceeds according to ground rules negotiated by the parties. Usually, formal rules of evidence and procedure are dispensed with in arbitration. This procedural informality simplifies and speeds the process. Fourth, voluntary arbitration promotes timely decision making. In simple cases, the arbitrator may render an immediate decision. Even in complex cases arbitrators, because they are not obliged to write opinions, announce their decisions quickly, usually within thirty days of the conclusion of the arbitration hearing.

Court-annexed Arbitration Court-annexed arbitration might also be called compulsory arbitration.⁵⁵ The court assigns selected civil cases, usually those

involving relatively small sums of money, to arbitration as a precondition to or substitute for trial. Nevada, for example, requires that all civil actions that arise out of automobile accidents and involve less than \$15,000 must be submitted to arbitration.⁵⁶ The arbitrator, usually designated by the state, hears arguments and evidence and renders a decision, applying the same legal standards that a judge would apply. If the parties accept the arbitrator's ruling, it is formalized as the court's judgment in the case. If either party objects to the ruling, it can demand a trial of the case; thus, the arbitrator's decision is not binding. In most jurisdictions, however, financial penalties discourage frivolous appeals of arbitrators' rulings. In Colorado, for example, unless the party demanding trial improves its position by more than 10 percent, it must pay up to \$1,000 of the costs of the arbitration proceeding.⁵⁷

Since 1952, when the first program was introduced in Pennsylvania, more than half the states and most federal district courts have instituted court-annexed arbitration programs.

Mediation Mediation attempts to resolve disputes by "assist[ing] the disputants to reach a voluntary settlement of their differences through an agreement that defines their future behavior."⁵⁸ In divorce mediation, for example, the agreement may resolve such contentious matters as the division of marital property, child support payments, and visitation rights. In neighborhood disputes, the agreement may specify the actions that each disputant will take or avoid in the future.

Mediators do not render authoritative decisions like arbitrators or judges at trial; they merely facilitate settlements between the disputants. The success of their efforts thus depends on their interpersonal skills and their ability to win the trust and cooperation of the disputants. Advocates of mediation view the lack of coercion as an advantage. Requiring disputants to become actively involved in resolving the dispute ensures that the outcome will be one that is acceptable to both parties.

Mediators promote settlement largely by fostering a productive negotiating climate in which issues are addressed in an orderly fashion, hostility is controlled, and the need for compromise is recognized. They may also play a more active part in the negotiations, obliging the disputants to clarify their objectives, offering suggestions for settlement, and translating the agreements reached into a written document.⁵⁹

In recent years government programs have promoted mediation for resolving disputes between divorcing couples and within neighborhoods. Many states now offer divorce mediation to promote settlements for the division of property, child custody, and visitation rights. California has mandated mediation in all such instances.⁶⁰ Although exact figures are unavailable, experts estimated that there were 28,000 divorce mediations in 1980 and more than 34,000 a year later, a rise of almost 25 percent.⁶¹ Similar growth has occurred in the use of mediation to

deal with neighborhood disputes. In 1975, there were only 11 neighborhood justice centers nationwide; a decade later, there were 182, and the number has continued to increase.⁶² Most of the centers employ mediators to resolve disputes brought by neighborhood residents or referred by police, local courts, or prosecutors' offices.

Does ADR Work?

Legal reformers insist that Alternative Dispute Resolution (ADR) provides fast and inexpensive justice, and the rapid expansion of ADR over the last two decades suggests that their arguments have been persuasive. Nonetheless, ADR has its critics.⁶³ They observe that some of the claims for ADR seem contradictory: Can ADR really promote greater access to justice and at the same time reduce the demands on the courts? Beyond this, the critics claim that ADR is a class-based reform that shunts the disputes of the average citizen to lesser tribunals while reserving the courts for the concerns and disputes of the elite.⁶⁴ Furthermore, they argue that because ADR emphasizes compromise and accommodation, it disarms victims of injustice who insist on the full vindication of their rights. In fact, ADR's emphasis on informal proceedings tends to reinforce unequal power relations by denying to the poor and disadvantaged members of society the due process protections of court proceedings and the equalizing assistance of representation by a lawyer.⁶⁵

These are serious charges. Let us look at the actual effects of ADR, focusing on its consequences for access to justice, the caseloads of the courts, the costs of securing justice, and the quality of justice obtained by those whose disputes are addressed through ADR.

Access to Justice Many ADR programs have been designed to increase the accessibility of justice, especially for those involved in "minor" disputes. The programs do not charge for services or require lawyers. They may hold hearings at times convenient to all disputants, such as evenings or weekends, and provide multilingual staffs to serve non-English-speaking disputants.⁶⁶ Nevertheless, ADR programs have not attracted large numbers of disputants unwilling to bring their disputes to court. The vast majority of cases come to ADR programs on referral from courts or other institutions rather than from disputants directly seeking their services.⁶⁷ Thus, ADR programs have not substantially increased access to justice. Whether this will change as ADR programs become institutionalized and better publicized remains to be seen.

Effects on Court Caseloads Most disputes come to ADR programs on referral, which suggests that the programs relieve caseload pressures on the courts. Many proponents of ADR see this as its prime advantage.⁶⁸ Although ADR programs have reduced court caseloads somewhat, their impact has been

quite limited. In part, this reflects the small size of most ADR programs. An American Bar Association survey found that 60 percent of ADR programs received fewer than 500 referrals per year, and only 4 percent more than 5,000.⁶⁹ Beyond that, the parties using ADR might have settled their disputes before trial if they had not been referred to an ADR program.⁷⁰ Finally, ADR programs may not conclusively resolve the cases referred to them. When the disputants cannot reach an agreement in mediation, they may take their dispute to court. When an arbitrator renders a decision in court-annexed arbitration, the losing party has the option of taking the case to court (although relatively few elect to do so).⁷¹ In sum, ADR programs have had only a limited impact on court caseloads.

The Costs of Justice A major claim of ADR is that it reduces the costs to government of dispensing justice and to disputants of obtaining it. ADR eliminates judges and juries, streamlines procedures, and disposes of disputes more quickly than courts can. Thus, one study found that it cost about \$76 to process a case through arbitration and \$175 to hear a case.⁷² Disputants benefit not only from the greater efficiency of ADR proceedings but also, in most instances, from the opportunity to pursue their claims without incurring the cost of a lawyer. However, insofar as cases referred to ADR that would have settled rather than gone to trial, the financial advantages are limited.

The Quality of Justice The absence of judges, lawyers, and jurors, however, raises a serious question: Are disputants under ADR receiving "second-class justice"? Critics contend that government uses ADR to get rid of working-class citizens and their disputes rather than give them the serious consideration they deserve. Indeed, studies of mediation programs that deal with neighborhood problems have found that complainants come disproportionately from the lower-middle class.⁷³ However, not all ADR programs share this class character. Divorce-mediation programs draw disputants from all social classes, as do court-annexed arbitration programs.⁷⁴

Critics also contend that government gives first-class treatment to business cases, while palming off interpersonal disputes to ADR. Undoubtedly, courts are eager to avoid involvement in interpersonal disputes, which court personnel often refer to as "junk cases," complaining that they "don't belong here."⁷⁵ Yet their reluctance to deal with interpersonal disputes derives, at least in part, from the recognition that courts are ill-equipped to resolve such disputes. Moreover, ADR may respond to the desire for more harmonious relationships within the society. The real question is whether mediation and arbitration do a better job in resolving disputes.

Legal scholars have attempted to answer the question by surveying disputants' views about the fairness of the process and outcomes under ADR.⁷⁶ Their surveys reveal widespread satisfaction with how disputes were handled

and resolved. The responses are particularly striking when compared with litigants' evaluations of court processes. In divorce mediation, for example, where participants were involved both with courts and with mediation, 98 percent of those who had success in mediation expressed satisfaction with the process, as did 57 percent of those who had no success, while only 36 percent were satisfied with the court processes.⁷⁷ Similar results were obtained when disputants were questioned about how effective judicial rulings and mediation agreements were in promoting long-term solutions to their disputes. Surveys reveal that mediation promotes greater understanding, reduced anger, and improved relationships.

Although these findings suggest the superiority of mediation and arbitration to adjudication, at least for certain types of cases, they do not necessarily demonstrate that cases should be resolved by ADR programs rather than by courts. Most cases that come to the courts are, in fact, settled rather than adjudicated. Judges also engage in mediation to settle cases, as the discussion of the Agent Orange case showed. Thus, even before ADR was widely introduced, the boundaries between litigation and other forms of dispute resolution had blurred.

CONCLUSIONS

"As a litigant," a learned judge once wrote, "I should dread a lawsuit beyond almost anything else short of sickness and death."⁷⁸ Nevertheless, Americans file millions of lawsuits each year. This is not because Americans are unusually litigious; the evidence suggests that the United States is not an overly litigious society. But in a complex, populous society like the United States, disputes are bound to arise. Moreover, advances in technology have transformed expectations of justice, making people less willing to accept injuries as fated or as "nobody's fault." Courts afford one mechanism for resolving those disputes and redressing those injuries.

Litigation, however, is only one among a number of options for dealing with grievances. As we have seen, most grievances do not become disputes, and most disputes do not become court cases. Psychological and financial costs and uncertainty discourage potential litigants from filing suit. These costs, however, do not fall evenly on all segments of the population. The differences in the types of civil cases brought to the courts for resolution suggest that the costs weigh more heavily on one-shotters than on repeat players.

Even when litigants do file civil suits, their cases are far more likely to be settled than adjudicated. Indeed, what unites such reforms of the civil justice system as liberalized rules for discovery, pretrial conferences, and the alternative dispute resolution movement is the emphasis on promoting settlement and discouraging trials. Indeed, trials seem an anomaly, occurring only when the

various mechanisms designed to produce a consensual solution have failed. In this respect, the system of civil justice in the United States closely resembles the system of criminal justice, with its emphasis on plea bargaining rather than trial. The question remains whether these systems serve the interests of justice.

NOTES

1. Quoted in Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts* (Cambridge, MA: Belknap Press, 1986), p. 256. The description of the Agent Orange litigation relies on Schuck's account.
2. Quoted in ibid., p. 45.
3. Quoted in ibid., p. 85.
4. Quoted in ibid., p. 68.
5. Robert Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (1979): 950–977.
6. The argument that it is necessary to increase access to justice is presented in Laura Nader, ed., *No Access to Law: Alternatives to the American Judicial System* (New York: Academic Press, 1980); Mauro Capelletti and D. Garth, "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective," *Buffalo Law Review* 27 (spring 1978): 181–292; and Daniel McGillivray, *Community Dispute Resolution Programs and Public Policy* (Washington, DC: U.S. Department of Justice, National Institute of Justice, 1986), chap. 2.
7. The argument that the United States suffers from too much litigation is presented in Walter K. Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991).
8. See Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985), part 1, and Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), chap. 1.
9. This discussion uses a framework developed by William L. F. Felstiner, "Influences of Social Organization on Dispute Processing," *Law and Society Review* 9 (fall 1974): 63–94.
10. William L. F. Felstiner, "Avoidance as Dispute Processing: An Elaboration," *Law and Society Review* 9 (summer 1975): 695.
11. Barbara A. Curran, *The Legal Needs of the Public* (Chicago: American Bar Foundation, 1977), pp. 141–142.
12. Quoted in Kristin Bumiller, *The Civil Rights Society: The Social Construction of Victims* (Baltimore: Johns Hopkins University Press, 1988), p. 90.
13. For a comparative study that documents the importance of costs and alternative forums in deterring civil litigation, see Erhard Blankenburg, "The Infrastructure for Avoiding Civil Litigation: Comparing Cultures of Political Behavior in The Netherlands and West Germany," *Law and Society Review* 28 (1994): 789–808. The use of alternative dispute resolution (ADR) in the United States is discussed later in this chapter.
14. Quoted in Bumiller, *The Civil Rights Society*, p. 52.
15. Charles Alan Wright, *Law of Federal Courts*, 3d ed. (St. Paul, MN: West Publishing, 1976), p. 293.
16. The discussion of the stages in the process of civil litigation draws on Wright, *Law of Federal Courts*, chap. 10; Mary Kay Kane, *Civil Procedure in a Nutshell*, 2d ed. (St. Paul, MN: West Publishing, 1985), chap. 3; William P. McLauchlan, *American Legal*

Processes (New York: John Wiley & Sons, 1977), chap. 3; and David W. Neubauer, *Judicial Process: Law, Courts, and Politics in the United States* (Pacific Grove, CA: Brooks/Cole Publishing, 1991), chap. 11.

17. Sally Engle Merry, *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago: University of Chicago Press, 1990), p. 87.
18. Wright, *Law of Federal Courts*, p. 398.
19. Richard Posner, "An Economic Approach to Legal Procedure and Judicial Administration," *Journal of Legal Studies* 2 (June 1973): 399–458.
20. Olson, *The Litigation Explosion*, p. 119.
21. Judge William Schwarzer, quoted in Robert E. Litan, "Speeding Up Civil Justice," *Judicature* 73 (October–November 1989): 162.
22. Quoted in Laurie P. Cohen and Alex M. Freedman, "Tobacco Plaintiffs Face a Grilling," *Wall Street Journal*, February 11, 1993, A-6. According to the late Chief Justice Warren Burger, the abuse of discovery has led to "trial by annihilation before the litigants ever reach the courthouse." Warren E. Burger, *Delivery of Justice* (St. Paul, MN: West Publishing, 1990), p. 143.
23. David W. Neubauer, *Judicial Process: Law, Courts, and Politics in the United States*, pp. 285–287.
24. Herbert M. Kritzer, "Adjudication to Settlement: Shading in the Gray," *Judicature* 70 (October–November 1986): 161–165.
25. Kritzer, "Adjudication to Settlement," p. 164, table 3.
26. This discussion of pretrial conferences draws on Wright, *Law of Federal Courts*, pp. 444–447, and Kane, *Civil Procedure in a Nutshell*, pp. 149–154.
27. Wayne D. Brazil, *Settling Civil Suits: Litigators' Views about Appropriate Roles and Effective Techniques for Federal Judges* (Chicago: American Bar Association Press, 1985), pp. 45–46 and passim.
28. For data on civil cases in federal district courts, see the Web site of the federal judiciary at www.uscourts.gov. For data on civil cases in state trial courts, see the Web site of the National Center for State Courts at www.ncsconline.dni.org.
29. See the Web site of the federal judiciary at www.uscourts.gov.
30. Ibid.
31. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change," *Law and Society Review* 9 (fall 1974): 97–107 and passim.
32. Ibid.
33. Ibid.
34. This analysis follows Lenore J. Weitzman, *The Divorce Revolution* (New York: Free Press, 1985). Subsequent studies have tempered Weitzman's conclusions. See, e.g., Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988), and Stephen D. Sugarman and Herma Hill Kay, eds., *Divorce Reform at the Crossroads* (New Haven, CT: Yale University Press, 1990).
35. Weitzman, *The Divorce Revolution*, p. x.
36. Galanter, "Why the 'Haves' Come Out Ahead," p. 98.
37. See generally Craig McEwen and Richard Maiman, "Small Claims Mediation in Maine: An Empirical Assessment," *Maine Law Review* 33 (1981): 237–268; Austin Sarat, "Alternatives in Dispute Processing: Litigation in a Small Claims Court," *Law and Society Review* 10 (spring 1976): 339–376; and Barbara Yngvesson and Patricia Hennessey, "Small Claims, Complex Disputes: A Review of the Small Claims Literature," *Law and Society Review* 9 (winter 1975): 219–274. For a cautionary perspective on those findings, see Neil Vidmar, "The Small Claims Court: A Reconceptualization of Disputes and an Empirical Investigation," *Law and Society Review* 18 (1984): 515–550.

38. Robert Roper and Joanne Martin, "Jury Verdicts and the 'Crisis' in Civil Justice: Some Findings from an Empirical Study," *Justice System Journal* 11 (winter 1986): 321–348.
39. Quoted in Marc Galanter, "The Day after the Litigation Explosion," *Maryland Law Review* 46 (1986): 3.
40. Quoted in Richard D. Catenacci, "Hyperlexis or Hyperbole: Subdividing the Landscape of Disputes and Defusing the Litigation Explosion," *Review of Litigation* 8 (fall 1989): 320.
41. Quoted in Galanter, "Day After the Litigation Explosion," p. 3.
42. Quoted in *ibid.*, p. 4.
43. Quoted in Gregory Brian Butler and Brian David Miller, "Fiddling While Rome Burns: A Response to Dr. Hensler," *Judicature* 75 (February–March 1992): 251.
44. Marc Galanter, "Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) about Our Allegedly Contentious and Litigious Society," *UCLA Law Review* 31 (1983): 54–59; and Marc Galanter, "Law Abounding: Legalization around the North Atlantic," *Modern Law Review* 55 (January 1992): 1–25.
45. Herbert M. Kritzer, "Propensity to Sue in England and the United States: Blaming and Claiming in Tort Suits," *Journal of Law and Society* 18 (winter 1991): 400–427. Data on civil filings in American state courts are drawn from *State Court Caseload Statistics, 1999–2000*, available at the Web site of the National Center for State Courts: www.ncsconline.org.
46. David W. Neubauer, "Are We Approaching Judicial Gridlock? A Critical Review of the Literature," *Justice System Journal* 11 (winter 1986): 365.
47. Galanter, "Day After the Litigation Explosion," p. 10.
48. Stephen Daniels, "Ladders and Bushes: The Problem of Caseloads and Studying Court Activities over Time," *American Bar Foundation Research Journal* (1984): 751–796, and Wayne V. McIntosh, *The Appeal of Civil Law: A Political-Economic Analysis of Litigation* (Urbana: University of Illinois Press, 1990), chap. 7. Data on civil filings in American state courts are drawn from *State Court Caseload Statistics, 1999–2000*, available at the Web site of the National Center for State Courts: www.ncsconline.org.
49. Galanter, "Day After the Litigation Explosion," p. 5, and McIntosh, *Appeal of Civil Law*, esp. p. 166, table 7.4.
50. For public opinion data on courts and their operations, see the findings of the 1999 National Conference on Public Trust and Confidence in the Justice System at www.ncsc.dni.us/PTC.
51. A representative exposition of this viewpoint is Stephen B. Goldberg, Eric D. Green, and Frank E. A. Sander, *Dispute Resolution* (Boston: Little Brown & Co., 1985). Not all commentators share this assessment; see, e.g., Christine B. Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport, CT: Greenwood Press, 1985), chap. 3.
52. Karen V. W. Stone, *Private Justice: The Law of Alternative Dispute Resolution* (New York: Foundation Press, 2000), p. 5.
53. Standing Committee on Dispute Resolution, American Bar Association, *Legislation on Dispute Resolution* (Washington, DC: American Bar Association, 1990), and Stone, *Private Justice*, p. 799.
54. This discussion of arbitration draws on John W. Cooley, "Arbitration vs. Mediation—Explaining the Differences," *Judicature* 69 (February–March 1986): 263–269, and Susan M. Leeson and Bryan M. Johnston, *Ending It* (Cincinnati, OH: Anderson Publishing, 1988), chap. 3.
55. This analysis draws on the treatment of court-annexed arbitration in Leeson and Johnston, *Ending It*, chap. 4; Deborah Hensler, "What We Know and Don't Know about

- Court Administered Arbitration," *Judicature* 69 (February–March 1986): 270–278; and Note, "Court-Annexed Arbitration: The Verdict Is Still Out," *Review of Litigation* 8 (fall 1989): 327–346.
56. Standing Committee on Dispute Resolution, *Legislation on Dispute Resolution*, p. 75.
 57. Colorado Mandatory Arbitration Act, reprinted in *Legislation on Dispute Resolution*, p. 80.
 58. Cooley, "Arbitration vs. Mediation—Explaining the Differences," p. 266, and Leeson and Johnston, *Ending It*, chap. 6.
 59. Kenneth Kressel, *The Process of Divorce: How Professionals and Couples Negotiate Settlements* (New York: Basic Books, 1985), pp. 179–180.
 60. Ibid., p. 182.
 61. Ibid.
 62. McGillis, *Community Dispute Resolution Programs and Public Policy*, p. 7.
 63. Major works critical of alternative dispute resolution include Richard Abel, *The Politics of Informal Justice* (Orlando, FL: Academic Press, 1982); Jerold Auerbach, *Justice without Law* (New York: Oxford University Press, 1984); Harrington, *Shadow Justice*; and Lisa Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact on Women," *Harvard Women's Law Journal* 7 (1984): 57–113.
 64. Abel, *Politics of Informal Justice*.
 65. Owen M. Fiss, "Against Settlement," *Yale Law Journal* 93 (May 1984): 1073–1090, and Penelope E. Bryan, "Killing Us Softly: Divorce Mediation and the Politics of Power," *Buffalo Law Review* 40 (May 1992): 443–523.
 66. McGillis, *Community Dispute Resolution Programs and Public Policy*, p. 87.
 67. Merry, *Getting Justice and Getting Even*, pp. 182–188.
 68. Harrington, *Shadow Justice*, chap. 1.
 69. McGillis, *Community Dispute Resolution Programs and Public Policy*, p. 77.
 70. See Deborah R. Hensler, "Our Courts, Ourselves: How the Alternative Dispute Resolution Movement Is Re-Shaping Our Legal System," *Penn State Law Review* (summer 2003): 165–196.
 71. Hensler, "What We Know and Don't Know about Court Administered Arbitration," p. 275.
 72. Ibid., p. 274.
 73. See the excellent summary of these studies in Merry, *Getting Justice and Getting Even*, pp. 182–188.
 74. See Kressel, *The Process of Divorce*, and Hensler, "What We Know and Don't Know about Court Administered Arbitration," p. 275.
 75. Merry, *Getting Justice and Getting Even*, p. 14.
 76. These paragraphs rely on the summary of survey data in McGillis, *Community Dispute Resolution Programs and Public Policy*, pp. 61–67. For a dissenting interpretation, see Harrington, *Shadow Justice*, chap. 5.
 77. McGillis, *Community Dispute Resolution Programs and Public Policy*, p. 63.
 78. Learned Hand, "The Deficiencies of Trials to Reach the Heart of the Matter," in Association of the Bar of the City of New York, *Lectures on Legal Topics* (New York: Macmillan, 1926), p. 105.