AMERICAN LAW INSTITUTE

STUDY ON PATHS TO A "BETTER WAY": LITIGATION, ALTERNATIVES, AND ACCOMMODATION

BACKGROUND PAPER

THOMAS D. ROWE, JR.*

Introduction ............................................. 825

I. Origins and Concern of the Study ......................... 827

II. Elements and Sources of the “Problem” .................... 829
    A. Symptoms ......................................... 830
    B. Causes, Data, and their Evaluation ................... 832
        1. Social and Political Setting ................... 832
        2. Theoretical Perspectives on Dispute Processing .... 835
        3. Caseload Data .................................. 836
        4. Implications of Caseload Sources ................ 838
        5. The “Litigation Explosion” Controversy ........... 839
            a. Volume ....................................... 841
            b. Cost ......................................... 842
            c. Evaluative arguments .......................... 843
            d. Conclusion ................................... 846

III. Procedural Values, Legal Institutions, and Social
     Constraints on Change ................................ 847
     A. Procedural Values and Goals .......................... 847
     B. Legal Institutions and Practices ..................... 851
        1. Litigation Finance Practices .................... 851
        2. Broad, Adversary-Led Discovery .................. 852
        3. The Civil Jury .................................. 854
     C. Social Constraints on Change ......................... 855

IV. Paths and Sidetracks: A Preliminary Sketch ............... 857

Copyright © 1989 by American Law Institute.

* Professor of Law, Duke University. B.A., Yale, 1964; M. Phil., Oxford, 1967; J.D., Harvard, 1970. Many people have provided valuable comments on earlier drafts of this article, especially the members of the Steering Committee for the Study and Professor Stephen Burbank. I also would like to acknowledge the help of Professors Ed Brunet, Paul Carrington, Joseph Little, Richard Marcus, and Marshall Shapo. The views expressed here are mine and do not represent positions of the Steering Committee or of the American Law Institute.
INTRODUCTION

Those who work in and study American dispute resolution may be left wondering in recent years whether familiar ground has been shifting beneath their feet. The levels of discontent and controversy about disputing and dispute processing seem quite high; even lawyers in a recent ABA Journal poll responded by a substantial margin that there is "too
much litigation." If lawyers feel that way, the perception that our dispute processing systems have significant problems must be widespread indeed.2

The questioning, however, goes beyond familiar complaints about the volume, cost, and delay of litigation. President Derek Bok of Harvard University, himself a lawyer, criticizes American society for diverting too much of its talent into the legal profession, which he views as a relatively unproductive use of well-trained minds.3 The pace of change in, and amount of controversy over, the Federal Rules of Civil Procedure have increased4 Judges often abandon their traditional role as relatively passive umpires, taking initiatives to deal with perceived new needs and complexities in litigation.5 Alternative dispute resolution (ADR), in both free-standing and court-annexed varieties, has become one of the American legal world's leading growth industries.6

A vigorous movement calls into question whether we really have a serious "litigation explosion"—and even if we do, whether it is such a bad thing.7 Seventh Circuit Judge Richard Posner, although himself a critic of writings skeptical of the "litigation explosion" argument,8 speaks of a "decline of lawyers' self-confidence." He attributes the perceived decline in large part to "a series of confidence-shattering events since the early 1960s. All sorts of reforms adopted in this period, reforms engineered by lawyers, appear to have miscarried."9

---

2. See, e.g., Newman, Rethinking Fairness: Perspectives on the Litigation Process, 94 YALE L.J. 1643, 1644 (1985) ("Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much cost upon litigants and taxpayers alike.").
5. See generally, e.g., Resnik, Managerial Judges, 96 HARV. L. REV. 374 (1982) (discussing characteristics, goals, achievements, and problems of movement toward more active judicial management of pretrial phases of litigation); Symposium on Litigation Management, 53 U. CHI. L. REV. 305 (1986) (examining the movement towards "managerial judging" and the measures imposed on litigants by such judges).
7. See generally, e.g., J. Lieberman, The Litigious Society (1981); Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 UCLA L. REV. 4 (1983).
8. See infra text accompanying note 58.
This paper attempts to describe the setting for the current controversies, to survey the state of theoretical and empirical understanding of dispute processing, and to explore promising approaches to dealing with our present problems. Its emphasis is on the procedural or adjective side, broadly defined, rather than on substantive law. However subordinate the role of procedure should be as the servant of justice, in America its role is relatively prominent perhaps because of our society’s heterogeneity and comparative shortage of shared substantive values. Given the complexity of the “problem,” the paper tries to avoid being too ambitious; it neither undertakes major fresh research into the quantitative dimensions of the problem nor attempts to recommend highly specific solutions. Rather, it seeks to advance understanding and facilitate reform—and a realistic appreciation of the difficulties of reform—by taking stock of the present state of knowledge, considering the social setting and its implications for change, analyzing major paths to a “better way,” and suggesting further work that could illuminate the choices to be made.

I. ORIGINS AND CONCERNS OF THE STUDY

Speaking to the Annual Meeting of the American Law Institute in May, 1985, Chief Justice Warren Burger called for an ALI study of litigation and its alternatives. His address included these remarks:

For some disputes, trials will always be the only means, but for many claims, we simply do not need trials by the adversary contest. As we now practice it, that system is too costly, too painful, too destructive, and too inefficient.

My submission is this: Has the time not come for a careful, thoughtful, objective examination—a typical American Law Institute study—of the whole litigation process under the common law system?

10. On the importance of considering not just immediate problems but their sources and contexts, see M. Feeley, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL xiii (1983) (“Focusing on the shortcomings of a single practice without placing it in historical and functional context usually leads to gross distortion and exaggeration. Efforts to eliminate such problems without altering incentives may result in their reappearing in another and perhaps more serious form.”). See also Rhode, The Rhetoric of Professional Reform, 45 Md. L. Rev. 274, 286-87 (1986) (“Informed decisions about the appropriate structure[s] of dispute resolution must depend on greater attention to the social, political, and legal culture in which they function. Analysis should center not only on the comparative efficiencies of available processes, but also on the collective values to be served.”).

11. See generally Resnik, Tiers, 57 S. Cal. L. Rev. 837, 841-42 (1984) (mentioning legitimating functions of procedure in heterogeneous American society with its few common cultural values); Tyler, What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 Law & Soc’y Rev. 103, 132 (1988) (finding that “different types of people within American culture define the meaning of procedural justice in a similar way,” which “suggests that definitions of the meaning of justice within particular settings may be part of the cultural beliefs shared by members of our society.”).
We need that study to answer the question: Is there a better way?

One question could well be whether the traditional lawsuit is the fairest and most efficient means of dealing with personal and property damage cases.

Another area of inquiry should probe the complex trials—anti-trust cases, complex financial transactions, and securities fraud claims.

Is our traditional "cross section" jury of lay persons capable of grasping these sophisticated problems, especially when accountants, business executives, lawyers and teachers are so freely excused from jury duty?

Yet another area deserving close study is the growing number of multiple disaster claims that have emerged in recent decades. Is the traditional jury trial the best way? I don't know. No one really knows, but it deserves inquiry. That is how the resolution of claims arising out of injuries in the course of employment came to be removed from the jury box to compensation tribunals.\footnote{12}

The Chief Justice's remarks indicate the possible breadth of the study. As he also acknowledged, the Institute is already considering some of the areas mentioned in his address. In particular, the Project on Compensation and Liability for Product and Process Injuries and the Study of Complex Litigation are major efforts to deal with related fields. The present study will not attempt to duplicate the work of these other projects. The study also will not deal in depth with issues of professional responsibility or family law matters, the subjects of other ongoing or contemplated ALI projects.\footnote{13} The remaining terrain is largely that of ordinary litigation, most commonly for damages, which provides the main setting for this study.\footnote{14}

To give more definite shape to the study, ALI Director Geoffrey C. Hazard, Jr., outlined its contemplated objectives in a proposal memorandum:

(a) To describe the components of the overall problem perceived by the Chief Justice and others, and the interrelationship of these problems. So far as possible on the basis of existing empirical studies,

\footnote{12. Burger, Opening Remarks, in American Law Institute, Remarks and Addresses at the 62d Annual Meeting 1, 8-10 (1985).}


\footnote{14. See generally Trubek, Sarat, Felstiner, Kritzer, & Grossman, The Costs of Ordinary Litigation, 31 UCLA L. Rev. 72, 84 (1983) ("[T]he cases in courts of general jurisdiction are modest. The parties are usually fighting over money, and the amounts at stake are $10,000 or less.") [hereinafter Costs of Ordinary Litigation].}
the description will seek to indicate the relative quantitative dimensions of the various components of the overall problem.

(b) To prepare an inventory and analysis of extant work that addresses one or more components of the problem. The inventory should be a substantial bibliographic undertaking. The analysis would endeavor to put the material into a coherent framework keyed into the description stated above.

(c) To explore the relation between the components of the present problem and the basic premises upon which the present system operates. . . . In that light, the aim is to suggest further work that might be fruitful concerning components of the problem, including research, pilot projects, short-term experiments, and projects for the development of state or federal legislation, new rules of judicial procedure, etc. To the extent practical, the [study] would identify organizations that might best undertake such work.

Discussing the possible product of the study, Professor Hazard’s memo stated:

The scope of the “litigation problem” obviously is very broad. It includes the antecedent dynamics of social conflict that can result in litigation as well as dispute resolution issues such as procedures in civil litigation. Approximate quantifying of the areas that contribute most to the “litigation problem” might help in identifying priorities.

[A final product] would not recommend specific substantive changes in law and procedure, but could help to state the proper questions and to identify paths on which society might proceed. Paths for inquiry might be the alteration of present economic incentives for prosecution and defense of claims, reallocations of the costs of litigation, and redefining the opportunities for review of administrative agency proceedings.

II. ELEMENTS AND SOURCES OF THE “PROBLEM”

The fields under consideration here are numerous and broad enough that exploration could begin at more than one point. Starting with a discussion of perceived maladies, rather than with the values and purposes to be served, could seem to put the cart before the horse—and to presume that things are seriously wrong in important respects, a view not universally shared. Still, it makes sense to begin with complaints about the civil justice system (and responses to them); the perception of problems was, after all, the origin of Chief Justice Burger’s call for the study. Moreover, discussion in later sections of values and goals can form part of a bridge to consideration of paths to “better ways,” along

---

15. The July, 1988 draft of this background paper, printed in limited quantity by the American Law Institute, contained an annotated bibliography, which is omitted here to conserve space. Sources from that bibliography are cited when relevant in the footnotes to this article. For an extensive recent compilation, see NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, DISPUTE RESOLUTION AND THE COURTS: AN ANNOTATED BIBLIOGRAPHY (1989).
with an understanding of the social constraints on change; the values and social constraints frame what we can and should be trying to accomplish. In any event, order of treatment here is not intended to prejudice issues concerning the existence, seriousness, and evaluation of problems in civil dispute processing systems, nor to imply that doing justice should take second place to clearing dockets.

A. Symptoms.

The litany of complaints about the civil justice system is largely a familiar one.\(^\text{16}\) Perhaps most frequently mentioned among the perceived problems are cost, high volume, and delay. Common dissatisfactions also include excessive complexity and formality; stress and aggravation of tensions between parties; lack of access to justice for many, especially the poor and those with relatively little experience in the legal system; and high incidence of frivolous claims.\(^\text{17}\)

To develop some of these themes in more detail, the problems of cost can include sheer cost to litigants and its effect of favoring the well-financed,\(^\text{18}\) the expenses of the judicial system, and what portion of total damage recoveries actually ends up compensating clients as opposed to paying their lawyers.\(^\text{19}\) The volume of litigation in America is often supposed to be high both in relation to historical experience and to rates in comparable nations;\(^\text{20}\) the caseload is frequently attributed to high and

\(^{16}\) For listings of elements similar to that in the text here, see J. MARKS, E. JOHNSON, & P. SZANTON, DISPUTE RESOLUTION IN AMERICA: PROCESSES IN EVOLUTION 16-19 (1984); E. JOHNSON, A PRELIMINARY ANALYSIS OF ALTERNATIVE STRATEGIES FOR PROCESSING CIVIL DISPUTES 1-4 (1977).

\(^{17}\) The picture sketched here is not necessarily that drawn by any one critic, since it contains possibly inconsistent elements—such as heavy deterrence to claims from the cost of pursuing them, along with large numbers of undeferred plaintiffs pressing undeserving claims. Moreover, as later discussion will bring out, several influential commentators question the accuracy of many of these perceptions, at least as a matter of degree, and also call into doubt whether high litigation rates—if they exist—should be viewed as that serious a problem.


\(^{19}\) Studies from the Federal Judicial Center and the Rand Institute for Civil Justice address these several aspects of litigation costs. See, e.g., J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION (1988) (indicating that about half of total of gross payments for tort compensation plus legal fees and expenses goes to injured parties); Levin & Colliers, \textit{Containing the Cost of Litigation}, 37 Rutgers L. Rev. 219, 222 (1985) (rising portion of GNP devoted to legal expenses); \textit{id.} at 227 (reckoning cost of tort trials to federal judicial system at approximately $600 per hour in 1982).

\(^{20}\) One nation sometimes cited as an enviable contrast, with high emphasis on conciliation and low rates of litigation, is Japan. \textit{But see} Galanter, supra note 7, at 59 (footnote omitted):

The real check on Japanese litigation is the deliberate limitation of institutional capacity; the number of courts and lawyers is kept small. . . . Of course many jobs done by lawyers in the United States are done by non-lawyers in Japan—and practically everywhere else. The small number of lawyers in Japan, however,
rising litigiousness and is believed to result, among other things, in backlogged courts, overworked judges, and assembly-line justice. Excessive delay itself denies justice. Moreover, especially if claimants do not receive prejudgment interest at market rates, delay systematically favors defendants and often tends to disfavor have-nots.

The judicial process, although widely admired for its procedural guarantees and thoroughness, can become too costly, cumbersome and formal in many of its aspects and for many types of cases. The system’s elaborateness creates openings for abusive, dilatory tactics that force settlements too removed from the merits (if not outright abandonment of valid claims or defenses), and confers unfair advantages on better-heeled or especially tenacious litigants. At the same time, many often complain that outlandish and frivolous claims are too frequent. A closely related, but perhaps not adequately emphasized, problem is the continuation of initially plausible claims and defenses once their lack of merit has become apparent. As later discussion will bring out, many elements of this bleak picture are challenged; but it seems important to set out as background the principal aspects of the perceived problems with dispute processing systems, even if it can be said of American courts that “half of the lies they tell about them aren’t true.”

reflects not an aversion to law, but a severe constriction of opportunities to enter the profession. . . . In sum, the low rate of litigation in Japan evidences not the preferences of the population, but deliberate policy choices by political elites.

See also Miller, Apples vs. Persimmons: The Legal Profession in Japan and the United States, 39 J. LEGAL EDUC. 27 (1989) (discussing differences between legal systems of Japan and America, including performance of out-of-court legal functions by those not licensed to try lawsuits; relative absence of legally enforceable civil rights and civil liberties provisions; and access barriers such as high up-front fees, shortages of judges, and large backlogs).

21. But see Galanter, The Day After the Litigation Explosion, 46 MD. L. REV. 3, 8 (1986) (“If there were a generalized litigation fever, loosening the restraints that inhibit the making of claims, we would expect to find that the increase was general—that the rate for all types of cases moved in the same direction. But . . . some kinds of cases are increasing while others are decreasing. The world of litigation is composed of sub-populations of cases that seem to respond to specific conditions rather than to global changes in climate.”).


23. Concerning the relative severity of delay problems, see COUNCIL ON THE ROLE OF COURTS, THE ROLE OF COURTS IN AMERICAN SOCIETY (1984) [hereinafter CORC REPORT]. The report states that a Justice Department study of patterns of court delay in five counties “suggests that while the delay rate may be higher today than at the turn of the century, for many types of adjudicated cases it is lower than it was in 1963-64.” Id. at 61.

For perspective on the question of delay, some amount of it may be the price for pursuing other valued ends. Professor Stephan Landsman of Cleveland-Marshall Law School argues that the adversary system—which he defends on several grounds, including the protection of individual rights—necessarily entails at least a considerable degree of deliberateness. Landsman, The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts, 29 BUFFALO L. REV. 487, 499-501 (1980).
B. Causes, Data, and Their Evaluation.

Any effort to account for the present condition of our dispute processing systems must reckon with a broad range of sources and causes. These include at least the following: the underlying existence of disagreements and potential disputes, and the influence of changing social and economic patterns on types of injuries and on the propensity of potential litigants to pursue grievances; long-standing attitudes toward using courts to resolve social and political issues, and changing ideas about legal entitlements and the legitimacy of pursuing them in court ("rights consciousness"); resulting changes in the size and makeup of court caseloads; and the efficacy of alternative dispute processing and problems with how the adjudication system itself handles disputes. A survey of these varying factors can help suggest the relative seriousness of our present dispute processing problems, how much they can be improved, if at all, and the relative desirability of general or targeted responses.

1. Social and Political Setting. No study of this sort would be complete without mentioning de Tocqueville's durable observation, "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."24 Two foreign observers recently have suggested reasons why de Tocqueville's insight remains accurate. First, at least as a matter of degree, the United States is almost certainly unique in the extent to which its constitutional guarantees are both quite general and readily enforceable in court.25 Second, the dispersion of American political authority, with the resulting difficulty of mobilizing for widespread change through ordinary political processes, makes litigation an especially attractive avenue for many of those seeking reform.26 Often, courts are simply the most efficient routes for getting

24. I A. de TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (Knopf ed. 1945). See also, e.g., M. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY 44 (1986), who states:

Many have observed that Americans tend to convert all sorts of problems into legal issues: even matters that are elsewhere perceived as not "legal" at all end up in American courts. In this Tocquevillian sense, American legal culture is undeniably "legalistic." . . . [T]he Constitution, a document studded with broad standards of ethical and political significance, . . . makes sharp separation of the ethical, political, and legal-technical domains both unnatural and impracticable.

25. See, e.g., FitzGerald, Grievances, Disputes & Outcomes: A Comparison of Australia and the United States, 1 LAW IN CONTEXT 15, 43 (1983) ("There is no effective counterpart [in Australia] to American Constitutional guarantees of due process and equal protection.").

26. See M. DAMASKA, supra note 24, at 238-39; see also Atiyah, Tort Law and the Alternatives: Some Anglo-American Comparisons, 1987 DUKE L.J. 1002, 1018 (commenting on relative emphasis on decisionmaking by centralized political institutions in Britain, in contrast with greater role of markets and decentralized jury and judicial decisions in America).
attention paid to, and effecting action on, claims of broad social and political import as well as those of individual wrong.

Superimposed on long-established attitudes are the effects of social and economic developments. To begin with, economic growth itself may make social interrelations more complex and numerous so that they tend to breed more disputes. The increases in both crowding and anonymity that go with urbanization also may raise the underlying level of disputes and willingness to press grievances. Mass technology multiplies the effects of Murphy's Law; large increases in litigation resulting from technology probably began no later than with the automobile and have continued down to the present with such mass suits as those over the Dalkon Shield intrauterine device. The broad spread of insurance coverage raises the chances that suing a prospective defendant will be worth the effort and provides, through the liability insurer's obligation to defend, a form of legal expense insurance.

Furthermore, even after over a decade of deregulation, there is simply more law. As Professor Albert Alschuler of the University of Chicago Law School has put it, "one suspects that some of those who have decried the litigation explosion have simply misspoken. Their ill-articulated complaint has not been about the volume of litigation but rather the expanding reach of our substantive law." Many modern social developments have contributed both to the increase in regulation and to widened expectations that rights can and should be enforced. Professor

27. See Marvell, Civil Caseloads: The Impact of the Economy and Trial Judgship Increases, 69 JUDICATURE 153, 155 (1985) (suggesting that time-lagged correlation between economic growth and court caseloads "supports the conclusion that economic activity leads to more interactions and, hence, more chances for disputes and, later, litigation"); id. at 156 ("[e]conomic conditions greatly affect civil filings, especially regular civil cases. The likely cause of the impact is that more societal activity leads to more chances for disputes. The impact, however, is not immediate, and that is probably why it is not common knowledge.").

28. See, e.g., Sanders, The Meaning of the Law Explosion: On Friedman's Total Justice, 1987 AM. B. FOUND. RES. J. 601, 605 (reviewing L. FRIEDMAN, TOTAL JUSTICE (1985)) ("Litigation is . . . fostered by changes in relationships. The social and emotional distance between victims and their physicians, teachers, merchants, and landlords removes inhibitions against bringing a formal lawsuit . . . . In a closely knit society, a formal lawsuit is likely to destroy primary social relationships. As society moves from primary to secondary relationships there is a good deal less at stake.") (footnote omitted). But see Galanter, supra note 7, at 38-41 (discussing studies of pre-20th century American urban and rural areas indicating much higher litigiousness than today).

29. See, e.g., CORC REPORT, supra note 23, at 50 (attributing rise in tort cases from 1% of dockets in 1903-04 to 14% in 1963-64 primarily to rise of "automobile culture").


31. Alschuler, Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases, 99 HARV. L. REV. 1808, 1818 (1986) (footnote omitted), see also CORC REPORT, supra note 23, at 47 ("it is evident that legislation has generated huge numbers of cases"); Enslin, ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Continues, 18 N.M.L. REV. 1, 6-10 (1988).
Lawrence Friedman of Stanford Law School refers to "the general expectation of justice" as "a genuine feature of American legal culture."32 Friedman continues: "If somebody senses a wrong, she feels that there must be a remedy, somewhere in the system. These examples, then, are chips off a larger, more significant, block: the welfare state itself, and the principle of social insurance, products themselves of changes in social expectation."33

Yet despite the expectations of justice and redress, the welfare state in America today probably provides less comprehensive coverage against individual injury and misfortune than in most other industrialized democracies. Victims who want redress, but in other nations might be satisfied with benefits from social insurance schemes, often have no alternative in the United States but to press individual claims. Thus the failure of the left in the United States to enact broader redistributive measures may correlate with individual litigiousness, if indeed it is greater in the United States than elsewhere.34

---

32. L. FRIEDMAN, TOTAL JUSTICE 76 (1985). See generally Sanders, supra note 28, at 604-05 (pointing out how both technological and social changes, such as vaccines and widespread insurance, have led to increased control over risks; arguing that this control has changed popular expectations, contributing to more regulatory efforts to control risk and suits to seek expected compensation for injuries that are not the fault of victims).

33. L. FRIEDMAN, supra note 32, at 76. Whether our system is willing to and should satisfy such expectations, or whether the response will more likely—and appropriately?—be one of viewing resulting caseloads as excessive, is a subject of debate. For one view, see Merry, Disputing Without Culture (Book Review), 100 HARV. L. REV. 2057, 2072 (1987) (review of S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION (1985)) (footnote omitted):

Proponents of the notion that the courts are too congested, and therefore that new alternatives are necessary, may be responding to the presence of new users in the courts who are considered undesirable and who present frustrating and unrewarding problems . . . . These users are making difficult demands for protection from the courts. Their use of legal institutions, however, is a response to the new legal entitlements of the 1960’s and to the expansion of access to the courts produced by the vigorous legal services and legal advocacy of the same period.


The possible political phenomenon described in the text may also help explain why much of the defense of present litigation patterns in recent scholarly literature comes from those whose political views are generally to the left of the American center. If redistribution by broad legislation has achieved relatively little success, those whose views of justice call for more equality are likely to find our present unsystematic redistribution via litigation at least a second best worth defending. A nation with substantial inequalities should not expect the redistributive impulse to disappear entirely; that impulse, if frustrated in the legislative arena, will seek other outlets. See Prichard, Why Is American Tort Law So Different, in CAUSATION AND FINANCIAL COMPENSATION FOR CLAIMS OF PERSONAL INJURY FROM TOXIC CHEMICAL EXPOSURE 359, 364 (1986) (more generous social welfare system treatment for injury in Commonwealth countries than in America "reduces the pressure
2. *Theoretical Perspectives on Dispute Processing.* These and other numerous forces produce a large base of grievances that can ripen into disputes and lawsuits. The state of knowledge about the processes that determine to what extent grievances get pursued, and then accepted, abandoned, settled, or litigated, is not yet highly developed and is indeed itself the subject of some debate. A leading articulation of the available theory summarizes:

Attribution theory . . . asserts that the causes a person assigns for an injurious experience will be important determinants of the action he or she takes in response to it; those attributions will also presumably affect perception of the experience as injurious. People who blame themselves for an experience are less likely to see it as injurious, or, having so perceived it, to voice a grievance about it; they are more likely to do both if blame can be placed upon another, particularly when the responsible agent can be seen as intentionally causing or aggravating the problem . . . . But attributions themselves are not fixed. As moral coloration is modified by new information, logic, insight, or experience, attributions are changed, and they alter the participants’ understanding of their experience. Adversary response may be an important factor in this transformation, as may be the nature of the dispute process. Some processes, such as counseling, may drain the dispute of moral content and diffuse responsibility for problems; others, like direct confrontation or litigation, may intensify the disputant's moral judgment and focus blame. Thus the degree and quality of blame, an important subject of transformations, also produces further transformations.35

Two other students of “dispute transformation” question whether dispute behavior should be viewed as depending so much upon rational factors: “Our data suggest that much dispute behavior continues to be governed by affect, habit, and conceptions of right, appropriateness, or fittingness that are not subject to rational evaluation but are part of the taken-for-granted quality of daily life in particular communities.”36

Two empirical studies shed some light on this transformation process, focusing particularly on reasons why potential claimants do not

---


seek legal redress. The Centre for Socio-Legal Studies at Oxford University found that in England and Wales, “only a small minority of all accident victims initiate legal claims and obtain damages for the losses they have suffered.” Among those who gave some thought to claiming but did not even seek legal advice, “[a]n inability or unwillingness to undergo the possible trouble or bother of making a claim, assumed difficulties in providing evidence of liability, and fear of legal costs represent the three most important groups of reasons mentioned.” Based on interviews with American discrimination victims, Johns Hopkins political science professor Kristin Bumiller found some of the same influences but adds other possible factors that may inhibit the pursuit of civil rights claims:

The results of my interviews show that people who have experienced discriminatory treatment resist engagement in legal tactics because they stand in awe of the power of the law to disrupt their daily lives. At the same time, they are cynical about the power of the law actually to help them secure the jobs, housing, and other opportunities they lay claim to. They fear that, if they seek a legal resolution, they will not improve their position but will lose control of a hostile situation. These respondents also feel that asserting their legal rights would not enable them to express their sense of dignity but would force them to justify their worthiness against a more powerful opponent. Injured persons reluctantly employ the label of discrimination because they shun the role of the victim. Therefore, they chose to rely on strategies for economic and personal survival that perpetuate their victimization but are seen as more desirable than submitting to the terms of legal discourse.

Whatever the ingredients in the process of dispute transformation, one cross-cultural study of the United States and Australia suggests that the perceived American uniqueness may be only a matter of relatively small degree. Although he found somewhat less resort to law and courts for dispute resolution in Australia, Jeffrey FitzGerald concludes: “The most significant result to emerge from a comparison of the Australian and U.S. surveys reported here is the overall similarities of behaviour in relation to grievance and dispute.”

3. *Caseload Data.* From these many sources flow the streams—some would say rivers or floods—of disputes that make their way into our more or less formal dispute processing systems of courts, arbitration,
and other structures. Perhaps surprisingly, even the determination of caseload volume and growth rate, not to mention its implications, excites considerable disagreement.42 Before discussion of the "litigation explosion" controversy it should be useful to lay a common foundation by setting out the main facts about recent litigation volume trends that appear to be accepted with relatively little argument.

First, the mix of civil case types has changed over the last several decades, with commercial cases remaining quite important but not as dominant as they were in the early years of the century. Tort (particularly automobile) and domestic relations filings increased greatly, albeit with some recent decline in the relative proportion of tort cases—a probable consequence of no-fault legislation and growth in other parts of the docket.43 Second, although the proportion of total court expenditures devoted to the costs of trials is high, courts also do a large amount of routine processing of uncontested matters.44 Of cases filed in courts, the large majority—usually at least ninety percent—are resolved without trial.45 Although it is sometimes loosely stated that the remainder are settled, in fact a good many are abandoned or, in some cases, disposed of by judicial action short of trial.

42. See, for example, the sharp exchange between Thomas Marvell, Marvell, Are Caseloads Really Increasing? Yes ... , Judges' J., at 34 (Summer 1986), and Stephen Daniels, Daniels, Are Caseloads Really Increasing? Not Necessarily ... , Judges' J., at 34 (Summer 1986).

43. See CORC REPORT, supra note 23, at 50; see also Daniels, Ladders and Bushes: The Problem of Caseloads and Studying Court Activities over Time, 1984 AM. B. FOUND. RES. J. 751, 774 ("In general, the studies of civil litigation in state trial courts describe a rough pattern of change from a docket characterized primarily by private, market-oriented matters (e.g., property, contract) toward one more characterized by nonmarket matters (e.g., tort, family law.").) (footnotes omitted).

Since tort claims play a major role in perceptions of a "litigation explosion," see, e.g., Atiyah, supra note 26, at 1005, the finding of several studies that in recent years tort litigation generally has been a stable or decreasing portion of the total docket deserves emphasis. See, e.g., CORC REPORT, supra note 23, at 50; D. Hensler, M. Vaiana, J. Kakalik, & M. Peterson, Trends in Tort Litigation: The Story Behind the Statistics 11 (1987) [hereinafter TRENDS IN TORT] (auto accident claims are "steady or declining percentage of total court action," while high-stakes personal injury and mass latent injury cases have grown]; Marvell, Caseload Growth—Past and Future Trends, 71 JUDICATURE 151, 156 (1987) (growth rate in tort filings in 13 reporting state court systems during 1976-1986 approximately same as for civil cases generally).


45. See CORC REPORT, supra note 23, at 48 (footnote omitted) ("Some evidence suggests that of late courts are adjudicating a smaller fraction of the disputes brought to them. The larger portion are settled."); id. at 54 ("During the period from 1960 to 1980, the proportion of civil cases in the federal district courts terminated by trials remained relatively stable, declining from 8.4 percent to 6.1 percent of the cases filed. The decline is more apparent than real, reflecting the large numbers of suits by the government on defaulted loans and social security claims requiring no court action.") (footnote omitted).
Finally, it also seems to be common ground that federal court caseloads have increased disproportionately over the last quarter century. As Judge Posner has summarized it:

[T]he number of cases filed in the [federal] district courts more than tripled [from 1960 to 1983], roughly from 80,000 to 280,000—a 250 percent increase, compared with less than 30 percent in the preceding quarter-century. The compound annual rate of increase was 5.6 percent—six times the annual rate in the preceding period [1934 to 1960]. Contrary to popular impression, the growth has been larger on the civil than on the criminal side of the calendar . . . .

The sources of this increase have varied over time and include civil rights decisions and legislation broadening available actions and remedies, recent government policy decisions resulting in more vigorous pursuit of debts and stiffer resistance to benefit claims, and perhaps a small number of product liability situations that have produced huge numbers of claims.

4. Implications of Caseload Sources. Ideas and information about the sources of caseloads can have major implications for what, if anything, should be done in response. Viewed from within the dispute processing system, case flow can seem like an independent variable to which that system must simply adjust itself as best it can. But from a broader perspective, the quantities of disputes that make their way to

---

46. R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 63-64 (1985); see also, e.g., J. LIEBERMAN, supra note 7, at 6 ("The tide of federal cases has been out of all proportion to any growth in population and reflects the outpouring of congressional enactments from the mid-1960s on . . . ."); Friedman, Courts over Time: A Survey of Theories and Research, in EMPIRICAL THEORIES ABOUT COURTS 9, 31 (K. Boyum & L. Mather eds. 1983) ("Another piece of evidence is the one clear-cut ‘litigation explosion’—the explosion in federal courts. Federal courts keep better statistics than state courts, and there is no question that their filings are rising faster than the population is growing.").


48. See supra note 47, at 144. See also Galanter, supra note 21, at 17 (footnote omitted): If we break down the overall [123%] increase [in total federal district court filings, 1975-1984] we notice that the increase in filings over the nine years is heavily concentrated in a few areas. Indeed, five categories of cases—recovery of overpayments, social security cases, prisoner petitions, torts, and civil rights cases—account for almost three-quarters of the entire increase in filings.

Half of the total increase is accounted for by two giant increases—recovery cases and social security cases. Each is the result of deliberate and calculated official policy . . . .

49. See Galanter, supra note 21, at 20-26.
courts and other dispute processors are themselves in major part a variable dependent on factors outside the system, and different types of responses can follow from different assessments of what those factors are. Litigation flows or floods that spring from serious social problems, for example, are likely to require more than just tinkering with dispute processing mechanisms, whether the response be substantive legislation, "structural" judicial remedies, or a decision that the courts are not to intervene in the area.

Furthermore, information about the extent of caseload growth problems—often hard to come by, particularly for some state court systems—can suggest whether the situation is severe enough to call for drastic action. It also can be vital to know whether the sources of caseload increases are general or concentrated in a few specific areas; when an increase in cases from mainly one or two sources leads to a general sense of overload, it may sometimes be too easy to overlook the possibility of targeted responses aimed at particular causes. In Professor Austin Sarat's words,

[A]rguments which move from the litigiousness and inaccessibility of justice to proposals for court reform and a reallocation of disputes to alternative dispute resolution mechanisms need to be more carefully scrutinized. This does not mean that there are not problems of excessive litigation or inaccessible justice in specific types of disputes. Nevertheless, it cautions that court reform efforts, especially efforts to promote ADR, need to be more focused and tailored to particular problem areas.51

5. The "Litigation Explosion" Controversy. It is in this setting—the significance, for possible reforms, of caseload data and their evaluation—that the controversy over the existence and extent of a "litigation explosion" can well be considered. The lines of division have been quite sharp and the amount of genuine dialogue rather small, with some observers strongly convinced that general litigiousness, high awards, and other factors have led to a court-swamping, justice-defeating, unproductive explosion. Others argue that for the most part our justice systems are not in such bad shape, or at least that the "litigation explosion" charge is both unproven and a springboard for hasty, perhaps unneeded, access-reducing and pro-defendant proposals.52 Indeed, the arguments

50. See Atiyeh, supra note 26, at 1005 ("Complaints about the volume of litigation in America appear to focus on the volume of tort claims.").


52. Again, it seems to be widely agreed that growth in federal court caseloads has been disproportionate, even after discounting for filings that inflate numbers but have virtually no impact on judicial workload, such as increased student loan collections. Any uncertainties in that context are
reveal a reversal of common roles, with some on the left more or less defending the established order, perhaps from concern that the business community and conservatives might use "litigation explosion" concerns to justify restricted access or inferior forms of justice for society's have-nots.

During the 1970s, assertions of increasing litigiousness and caseloads went mostly unchallenged. Public figures such as Chief Justice Burger and commentators like Professor John Barton and Dean Bayless Manning 54 both reflected and spread the view that a litigation explosion was taking place. In the first half of this decade, however, those questioning that view had the stage largely to themselves in academic commentary. The first major challengers, those associated with the Civil Litigation Research Project (CLRP) based at the University of Wisconsin, remain those whose work is greatest in volume and most significant in both empirical data and theoretical argument. They have been joined more recently by Stephen Daniels of the American Bar Foundation (ABF) and a 1986 report from the National Center for State Courts (NCSC).

The critics have challenged the "litigation explosion" view on both factual and evaluative grounds. They have questioned not only whether litigiousness, caseload backlogs, and costs have been adequately shown to be as high as is sometimes asserted, but also whether we should be alarmed even if those measures are indeed quite high by some standards. The leading attack on the "litigation explosion" view has been Wisconsin law professor Marc Galanter's 1983 article, "Reading the Landscape of Disputes," in which he concluded:

I have argued that the hyperlexis reading of the dispute landscape displays the weakness of contemporary legal scholarship and policy analysis. We have seen the announcement of general conclusions relevant to policy on the basis of very casual scholarly activity. The information base was thin and spotty; theories were put forward without serious examination of whether they fit the facts; values and preconceptions were left unarticulated. Portentous pronouncements were made by established dignitaries and published in learned journals. Could one imagine public health specialists or poultry breeders conjuring up epidemics and cures with such cavalier disregard of the incompleteness of the data and the untested nature of the theory?55

over sources—general litigiousness or mainly some more specific phenomena, like greater government use of the federal courts and a small number of mass claim situations. See supra notes 46-50 and accompanying text.

55. Galanter, supra note 7, at 71.
a. Volume. Concerning sheer volume of case filings, the NCSC’s 1986 study surveyed data from almost half the states and concluded:

A careful examination of available data relating to tort, contract, real property rights, and small claims cases from a representative group of state courts provides no evidence to support the often cited existence of a national "litigation explosion" in the state trial courts during the 1981-84 time period.

There are some state courts that have experienced significant increases in the case types described . . . but the impact of that finding is reduced when one realizes that these are the courts in states that have also experienced significant increases in their total populations. Changes in the number of these filings are not attributable to an increase in the propensity of the average American to sue, but rather to a simple increase in the numbers of average Americans.

. . . .

In a significant number of state courts, selected civil filings have decreased [during] the period 1981-1984 . . . .

It may be that there was a litigation explosion that peaked around 1981.56

. If there are such peaks and valleys, Stephen Daniels of the ABF argues that we should neither be surprised nor extrapolate permanently skyrocketing caseloads even from rather alarming trends. He suggests in two articles57 that local and jurisdictional factors play a large role in determining caseloads, and that external influences on filing rates often spend their force and can lead downward as well as up.

These arguments have recently begun to draw responses. Judge Posner characterizes Galanter’s data as “very spotty.”58 Thomas Marvell faults the NCSC’s 1986 study for basing assertions on the unrepresentative 1981-84 period, in which litigation rates could have been expected not to grow because of bad economic conditions in 1980-82.59 He contends that more recent and longer-term data show caseload growth out of proportion to population increases, with filings rising in response to economic upturns.60 Marvell also argues that Daniels overlooks the


57. Daniels, We’re Not a Litigious Society, JUDGES’ J., Spring 1985, at 18; Daniels, supra note 42.

58. R. POSNER, supra note 46, at 76.


60. Marvell, supra note 43. A follow-up study by the NCSC also suggests somewhat greater state court caseload growth in 1985 than in the post-recession years of 1981-1984 covered in its
extent to which jurisdictional changes have given caseload relief to courts of general jurisdiction and how much litigation already has been diverted to administrative tribunals.\textsuperscript{61} Professor Atiyah's recent article on British and American tort litigation examines comparative statistics and concludes that volume, cost, and recoveries are considerably greater here.\textsuperscript{62}

\textit{b. Cost.} As for problems of excessive cost, no one would deny that legal costs in some big cases are staggering (although even in such cases, costs are often not large in relation to the stakes). The work of CLRP, however, has raised the question whether our vision may be impaired by such very prominent lights in the litigation sky.\textsuperscript{63} In their article on \textit{The Costs of Ordinary Litigation}, Trubek \textit{et al.} portray the typical case above the small claim level as still being one for modest stakes—$10,000 or less. Furthermore, such a case is

procedurally simple and will be settled voluntarily without a verdict or judgment on the merits. This case will involve some pretrial activity, but no trial. Each side's lawyer spends about thirty hours on the case, mostly gathering facts and negotiating a settlement. Judicial involvement, either ruling on motions or rendering judgment, will be rare. The typical case is a "paying" proposition for the parties.\textsuperscript{64}

Significantly, however, their data suggest that for cases involving recoveries of under $10,000 the total legal fees paid by both sides will equal or even exceed the net amounts recovered by the plaintiff. . . . As limited as our data are, they do suggest that the concern expressed over the cost of litigation is justified in the smaller cases.\textsuperscript{65}

Also, aggregate data compiled in a study for the Rand Institute for Civil Justice alarmingly indicate that net compensation to injured parties receiving recoveries in tort cases filed in courts of general jurisdiction


\textsuperscript{61} Marvelli, \textit{supra} note 42, at 43.

\textsuperscript{62} Atiyah, \textit{supra} note 26, at 1004-16.

\textsuperscript{63} \textit{Cf. Trends in Tort}, \textit{supra} note 43, a recent Rand ICJ study in which Hensler and her co-authors argue that there now exist three main types of tort litigation, with quite distinct characteristics—routine, most commonly automobile, personal injury claims; higher-stakes personal injury cases such as malpractice and product liability; and mass latent injury cases, as for asbestos-connected illness. They suggest that the differences are sharp enough to warrant different dispute processing approaches, such as court-annexed arbitration for routine matters and innovative mechanisms for the high-cost mass latent injury claims. If such distinctions between types of cases can be successfully drawn in practice, that could help make the possibility of "tracking" attractive as one response to litigation problems. \textit{See infra} text accompanying notes 183-90.

\textsuperscript{64} \textit{Costs of Ordinary Litigation}, \textit{supra} note 14, at 84.

\textsuperscript{65} \textit{Id.} at 121.
amounted to barely half of the total of system costs, legal fees, and victim compensation.66

c. Evaluative Arguments. The recent criticism of the “litigation explosion” view has questioned perspectives as well as facts, and suggests that the widespread perception may rest on overgeneralization from elite academic, practitioner, and federal judicial positions.67 The criticism goes on in essence to raise the question: “How much disputing is too much?” This paper can hardly hope to provide a definitive answer, but it can suggest several lines of approach to the question.

In brief, it does seem clear that at least in certain systems (such as the federal courts) and for certain types of claims (such as product liability and mass latent injury), there has been rapid growth in civil caseloads. Assessing whether that growth is in some sense excessive—and if so how to respond to it—requires looking from various perspectives, identifying sources and causes of the growth, considering the kinds of problems it may bring about, and reckoning as well the benefits of litigation. What might be called an “external” perspective emphasizing sources of caseload growth can provide valuable reminders that however much Americans may be increasingly or excessively litigious, much of the growth comes from changes in substantive law and quite possibly from more injury being suffered in modern society. Along these lines, it also can be valuable to think about “disaggregating” the sources by major types of cases; if litigiousness is generally rising, increases should appear in most major categories—which, from preliminary indications, they do not.68

The “transformation” or “victim” perspective emphasized by some social scientists looks to how much and why those who suffer potentially compensable injury do or do not seek redress.69 If many do not, that fact casts doubt on claims of excessive litigiousness and provides a basis for arguments that

66. J. KAKALIK & N. PACE, supra note 19, at xiv.

67. See Galanter, supra note 7, at 61 (much of “litigation explosion” view “is the product of a narrow elite of (mostly federal) judges, professors and deans at eminent law schools, and practitioners who practice in large firms and deal with big clients about big cases. Because they are attuned to the ‘top’ of the system . . . such elites tend to have a limited and spotty grasp of what the bulk of the legal system is really like.”); cf. Friedman, supra note 46, at 32 (contending that recent growth in “monster” federal cases accounts for much talk of a “litigation explosion”).

68. See generally Galanter, The Life and Times of the Big Six; or, the Federal Courts Since the Good Old Days, 1988 WIS. L. REV. 921 (dividing federal civil caseload into major categories; reporting sharp decline since 1960 in percentage share for tort cases, especially routine ones, and surprising increase for contract filings); supra note 21.

69. See supra text accompanying notes 35-39.
there may be too little conflict in our society. Many studies are “court-
centered.” They assess conflict from the point of view of courts which
perceive their resources to be limited. From this viewpoint, any level
of conflict that exceeds the court’s capacities is “too much.” Things
look very different, however, if we start with the individual who has
suffered an injurious experience.70

Developing this view, Professor Sarat argues:

What looks, from the courthouse, like a flood of litigation, appears
rather modest against a backdrop of potential lawsuits. ... This is not
to suggest that the courts have not faced a rapidly mounting caseload.
It does, however, call into question whether a mounting caseload
represents a growing proportion of potentially litigable injuries and
events—in which case one could talk meaningfully about a litigation
explosion and an expanded role for courts—or whether it represents a
rather constant response to an increase in the number of litigable inju-
ries or events experienced by the population. If the latter, we are then
witnessing an injury explosion rather than a litigation explosion, and
those who decry an allegedly increased appetite for litigation are, in
effect, blaming the victims.71

It is important that those strongly concerned with problems of
caseload volume consider perspectives like Professor Sarat’s before con-
cluding that major reforms are needed, and if so, what form the changes
should take. At the same time, one cannot ignore that many state and
federal judges feel strongly that caseload burdens are growing exces-
sively,72 at least in relation to the capacity that courts have or can expect
in the near future. Here a “system” perspective can validly emphasize
the many problems that flow from overloaded dockets; these range from
difficulty in attracting and keeping good judges to delay for litigants,
from rushed assembly-line justice in individual cases to lack of time for
careful deliberation about the crafting of opinions.

Still another perspective can, for lack of a better word, be called
“social” and takes into account the broader costs and benefits of litiga-
tion. We must be willing to consider whether the volume of litigation—
whatever its causes and justifications—is having negative side effects such

70. Felstiner, Abel, & Sarat, supra note 35, at 651.
71. Sarat, supra note 51, at 334-35; see also Abel, The Real Tort Crisis—Too Few Claims, 48

The real tort crisis is old, not new. It is a crisis of underclaiming rather than overclaiming.
The tort system does not encourage fraud or display excessive generosity but fails to com-
 pense needy, deserving victims. It does not place undue burdens on socially valuable
activities but fails to discourage unreasonable risks. And it does not censure the innocent
but fails to condemn the guilty. The rhetoric of those who deplore the burden of liability
and insurance costs is simply another expression of the conservative backlash of recent
years.
72. See, e.g., Edwards, supra note 22, at 285 (expressing frustration at inability of judges at
symposium “to convince the academics of the seriousness of the problem of overload in our case
dockets”).
as lower-quality adjudication, costly "defensive practice" in health care (and even law practice), inhibited willingness to try potentially productive innovations, and unavailability of insurance.\footnote{See, e.g., E. McGuire, The Impact of Product Liability (1988) (reporting Conference Board survey of corporate CEOs reflecting view that product liability has caused discontinuation of product lines, failure to introduce new products, and research cutbacks); Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1521 (1987) (in some instances, such as intrauterine devices, wine tasting, and day care, "insurers had refused to offer coverage at any premium, forcing these products and services to be withdrawn from the market"); Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability (1986); Tort Policy Working Group, An Update on the Liability Crisis (1987). But see U.S. General Accounting Office, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned (1988) (with respect to product liability litigation, questioning many of Tort Policy Working Group's methods and conclusions). Galanter questions whether the effects of litigation should be seen as altogether negative: [W]e hear much about the deleterious effects of litigation in the large—that it dampens enterprise, distracts managers, makes doctors practice defensive medicine, increases the cost of products, keeps useful products off the market, etc. All of these attribute to litigation a powerful effect not only on the behavior of the immediate parties but on other actors who respond to the signals that courts broadcast by doing and avoiding and spending what they otherwise would not have done or avoided or spent. Are all of these ramifying effects on conduct undesirable, so that we should account them as costs? Or should some of them be accounted as benefits? Galanter, supra note 21, at 29.}{\footnote{4. See, e.g., Alschuler, supra note 31, at 1813 ("Subsidized private litigation can benefit the public, not only by creating benchmarks that promote the settlement of disputes, but also by persuading potential wrongdoers that the violation of rights is likely to be unprofitable.") (footnote omitted).}}

\footnote{5. See id. at 1816.}
effects on wider audiences (general deterrence, moral validation, channeling, habituation . . . ).

Professor Laura Macklin of Georgetown, in an article that questions some current emphases on promoting settlements, notes a further set of benefits of litigation—those that flow from judicial factfinding. In addition to the traditional use of factfinding as a basis for decision in an individual case, she argues:

Fact gathering and judicial fact determinations often provide both trial and appellate courts with a set of facts upon which to base constitutional and statutory interpretation, and upon which to premise the development of common law principles. . . . [J]udicial fact determinations often provide members of the public, and other private and public entities, with a source of tested information.

Speaking more broadly, Galanter sums up in philosophical terms some of the virtues of having claims pursued through litigation. He argues that the “view of litigation as a destructive force, undermining other social institutions,” is misleadingly one-sided. If litigation marks the assertion of individual will, it is also a reaching out for communal help and affirmation. If some litigation challenges accepted practice, it is an instrument for testing the quality of present consensus. It provides a forum for moving issues from the realm of unilateral power into a realm of public accountability.

d. Conclusion. It may seem anticlimactic to arrive at the end of considerable discussion of the “litigation explosion” controversy without a firm conclusion. Much of the foregoing survey, however, illustrates the several reasons why it appears difficult, even unwarranted, to pronounce a broad, clear verdict. Some aspects of the picture do stand out: Tort litigation almost certainly plays a larger role in America than in other industrialized democracies, at least partly because of less comprehensive social insurance. Federal court civil dockets have increased dramatically over the last few decades, but recently tort filings have not been a rising portion of federal civil caseloads. A substantial fraction of recent federal

76. Galanter, The Radiating Effects of Courts, in EMPIRICAL THEORIES ABOUT COURTS 117, 135 (K. Boyum & L. Mather eds. 1983); see also Galanter, supra note 21, at 28-37 (giving illustrations of benefits of litigation in form of parties’ and others’ changed attitudes and behavior, and discussing research on impacts of judicial decisions).


78. Id. at 583.

79. Galanter, supra note 7, at 70; see also Fiss, Against Settlement, 93 YALE L.J. 1073, 1085 (1984) (job of judicial officials “is not to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”).
filing increases, moreover, has resulted from government policy decisions. Partly because of incomplete statistics, the overall landscape is less clear for state court systems. In any event, caseload trends—although apparently rising at least somewhat above population growth—are far from being entirely uniform in the direction of greater litigiousness, and it is important to disaggregate the totals to seek sources of major changes. Finally, any actions that may be taken in response to litigation problems must proceed with a sense of the goals to be sought and the constraints that may affect the feasibility of possible reforms—the subjects of the next part.

III. Procedural Values, Legal Institutions, and Social Constraints on Change

In the context of a study about, in a broad sense, procedural law reform, three analytically separable themes seem to warrant some amount of joint discussion. The values and goals that civil dispute resolution processes should serve are important in their own right but often underlie existing mechanisms as well. Especially to the extent that the values are widely shared, they also can channel, inhibit, or promote various changes. Existing legal practices and institutions can contribute to the problems discussed above as well as develop constituencies of their own beneficiaries and users, not to mention opponents. Both interest groups and social attitudes (such as widespread support for the civil jury or reluctance to fund major court expansion) similarly affect the feasibility of possible reform measures.

A. Procedural Values and Goals.

Identifying the major ends we seek to achieve through civil dispute processing is, of course, fundamental to thinking about possible reforms. It is difficult to consider fully the values underlying the desirable characteristics of a procedural system in fairly brief form. Whereas it may be easy to enumerate several values, difficulties lie in trying to classify them, to reckon how much they are likely to come into conflict, and to say how to deal with the tradeoffs among them when they do. A worthwhile and familiar starting point is the basic list of criteria in Federal Rule of Civil Procedure 1 and many parallel state provisions, that the rules be “construed to secure the just, speedy, and inexpensive determination of every action.” “Justice,” in this connection, presumably includes fairness in treatment of the litigants, accuracy in factfinding, and decision in accord with applicable norms. Speed and low cost emphasize somewhat more instrumental goals and efficiency concerns—which immediately raises
questions about how to deal with tradeoffs between fairness and efficiency. Trying to answer these questions proves difficult, however, since the characteristics of "fairness" have often not been specified with much exactness; in an era of emphasis on law-and-economics thinking, fairness concerns might be too readily submerged for their relative lack of precision.

As a rough approximation, and with the acknowledgment that specific values often could fit under more than one rubric, this section will discuss procedural goals under three headings: concerns of dispute processing system users, emphasizing fairness and the resolution of disputes; goals of system administration, stressing efficiency; and concerns for how well procedural systems serve the ends of substantive justice through accurate factfinding and enforcement of applicable rights and other norms.  

A noncontroversial aspect of fairness in contested actions is, presumably, an impartial decisionmaker. But to take advantage of such a decisionmaker, a party must of course have effective access to dispute resolution processes. And once parties are in court or before another adjudicator, fairness seems to require some measure of equality in their ability to present their cases. It also seems to be true in Western cultures that to accord with popular expectations—and thus to be

---

80. Two articles, one by Professors Robert Baruch Bush of Hofstra Law School and one by Judith Resnik of the University of Southern California Law Center offer fuller discussions and more elaborate classifications of procedural goals. Bush lists what he argues are the main aims of the civil justice system: efficient resource allocation, social justice, protecting fundamental rights, preserving public order, fostering human relations, maintaining legitimacy, and efficient judicial administration. Bush, Dispute Resolution Alternatives and the Goals of Civil Justice: Jurisdictional Principles for Process Choice, 1984 Wis. L. Rev. 893, 908-21. One value he stresses—fostering human relations—is of particular concern to many in the alternative dispute resolution movement, for a common criticism of our conventional dispute processing systems is that they exact too high a toll in stress and antagonism between the parties. Resnik classifies "valued features" in American procedure into those for litigants—their autonomy and persuasion opportunities; for decisionmakers—concentration of some power along with its diffusion and reallocation, impartiality and visibility, rationality and norm enforcement, and ritual and formality; and for decisionmaking—economy, finality along with "revisionism" to correct error, and consistency along with "differentiation" to account for relevant differences. Resnik, supra note 11, at 845-59.

81. See, e.g., Tyler, supra note 11, at 128 (finding decisionmakers' "ethicability, honesty, and the effort to be fair" to be among factors most strongly weighed in citizens' evaluations of process fairness).

82. Cf. Wade, On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions, 14 Hofstra L. Rev. 433, 434 n.1 (1986) ("most state constitutions have provisions commanding open access to the courts").

83. See ABA SPECIAL COMM. ON THE TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW, at 8-8 to 8-9 (1984) (noting agreement between defenders and critics of adversary system "that adequate resources [should] be made available to all litigants" (quoting J. Thibaut & L. Walker, PROCEDURAL JUSTICE 119 (1975)));

84. M. DAMASKA, supra note 24, at
perceived as fair and worthy of acceptance—dispute resolution mechanisms must give a considerable measure of control over the presentation of their cases to the parties themselves, rather than to the adjudicator.\(^{84}\)

Yet honoring these values threatens to lead to cumbersome processes that can jeopardize the important system administration goals of speed and efficiency—and even fairness to those litigants forced to wait or to spend incommensurate amounts on their disputes (or settle them on disadvantageous terms to avoid cost and delay).\(^{85}\) And since society is unlikely to spend the resources necessary to avoid all such unfairness, it seems inevitable to proceed from an acceptance of processes that do not measure up to the ideal in all respects. Similarly, efforts to achieve speed and efficiency, especially when backlog problems are severe, can threaten the extent to which procedures are able to serve substantive justice through accuracy in factfinding and application of norms.\(^{86}\) To give one final example of conflicting goals, user satisfaction through settlement or use of alternative dispute resolution procedures may clash with concerns for substantive justice through norm application and generation. Thus the problem of possible tradeoffs among competing values is always present, and it becomes important to ask both how much such tradeoffs may be necessary\(^{87}\) and how to approach them when they must be made.

Obviously such large and general questions do not lend themselves to ready answers, but two significant articles illustrate how discussion of reconciling procedural goals can become somewhat more specific. Professor Tom Tyler of the Departments of Psychology and Political Science

---

\(^{84}\) See Walker & Thibaut, *A Theory of Procedure*, 66 CALIF. L. REV. 541, 566 (1978) (empirical studies indicate that most satisfactory form of process in largest number of legal disputes “assigns maximum process control to the disputants, but assigns decision control to a third party”).

\(^{85}\) Alschuler, for example, lists the “sources of unfairness that currently infect the settlement of civil lawsuits” as:

- first, the quantitative inadequacy of our adjudicative services;
- second (a closely related phenomenon), the complexity of our trial and pretrial procedures;
- third, the substantive uncertainty created by our inadequately law-bound system of jury trials;
- fourth, the exertion of direct judicial pressure to settle; and
- fifth, the ability of disputants to encourage settlement by driving up their opponents’ costs.


\(^{86}\) At least two other substantive justice concerns not yet mentioned deserve weight in evaluating and designing procedural systems: adequacy of remedies and their enforcement, and generation of useful precedent. To some extent they are part of goals already mentioned—adequate remediation is plainly vital to users—but they also stand enough on their own to warrant mention.

\(^{87}\) See, e.g., Resnik, *supra* note 11, at 844 (“[E]mploying the justice/efficiency dichotomy may misleadingly suggest that the two themes are distinct and always at odds.”).
at Northwestern University has recently reported on a survey of what criteria citizens regard as important in assessing the fairness of procedures in their encounters with legal authorities. He reports that two important factors—the ethical, honest, and dedicated effort on the part of the decisionmaker to be fair, and citizen participation or representation in the proceedings—appear to correlate positively with other values such as perceived accuracy of the decision. "Procedures that are viewed as leading to higher quality decisions . . . are also more ethical and allow more citizen input." Thus, "the choice of procedures for resolving disputes . . . does not require making the trade-offs discussed in the literature on distributive justice."89

Not all tradeoff problems, of course, can be avoided. A major contribution to the debate over tradeoffs between fairness and efficiency is an article by Second Circuit Judge Jon Newman, in which he argues that we should think less in terms of fairness in individual cases and more in terms of the aggregate effects of our procedural practices.90 His argument raises in another form the issue of how to balance concerns of fairness and efficiency. He examines the extent to which the balance should be struck on the level of the individual case or on that of the system as a whole—that is, how much will simplified procedures serve our ideas of justice and due process in the aggregate, even if they detract from the thoroughness with which justice is served in individual cases? His article underscores how, again, insistence on near-ideal justice in particular cases or situations may overlook not just resource constraints in general but also side effects on other cases, running the risk of making the perfect the enemy of the good. As Professor Donald Elliott of Yale has put it, "Nourishing the fiction that justice is a pearl beyond price has its own price."91

88. See Tyler, supra note 11, at 106, 128, 131.
89. Id. at 131.
90. See E. Lind & T. Tyler, The Social Psychology of Procedural Justice (1988). The authors emphasize the finding that people seem to be "much more concerned with the process of their interaction with the law and much less concerned with the outcome of that interaction than one might have supposed." Id. at 92. They address some specific problems of process design to minimize tradeoff problems, such as hybrid procedures to retain the benefits of the adversary model without its shortcomings, id. at 117, and court-annexed arbitration schemes designed to minimize the danger of providing what would be perceived as "second-class justice," id. at 124-27.
B. **Legal Institutions and Practices.**

Earlier sections discussed caseload growth, its sources, and evaluative issues. In addition to problems resulting from the sheer number of disputes, the ways in which a system treats them can speed or retard the flow and affect volume, cost, backlog—and results. This subsection briefly raises some prominent features of civil procedure in most American courts of general jurisdiction and suggests that they contribute significantly to our perceived problems. That suggestion does not imply that these devices should be abolished or drastically modified; they often serve important values, as does the jury by assuring popular involvement in the administration of justice. Indeed, recognizing that many litigation problems stem in part from institutions that would be difficult or undesirable to discard can be a crucial step toward choosing intelligently how to respond—whether it means accepting that the problems seem inevitable given the importance of the values the problem-causing devices serve, or approaching the problems from different angles, or even concluding that a long-term attack on a deeply rooted institution may be needed. Three characteristics of American civil procedure seem most significant for problems of volume, cost, and delay: (1) litigation finance arrangements—in particular, the American rule on attorney fee liability, the contingent fee, and the lack of cost-based court user fees; (2) broad, adversary-initiated discovery; and (3) the nature of American court decisionmaking, with its heavy reliance on juries and a fairly heterogeneous corps of judges.

1. **Litigation Finance Practices.** In brief, the American system of litigation finance that governs in most actions facilitates court access for damage plaintiffs in all but small claim cases. The rarity of fee awards against losing plaintiffs probably deters weak claims less than British and Continental loser-pays approaches would, and the generally token size of most American courts’ filing fees also works to make access easy. The contingent fee, even if it reduces net recoveries and gives lawyers an incentive to avoid weak cases, on balance probably encourages damage claims of medium and greater size or strength. In effect, a contingency fee gives the damage plaintiff a risk-bearing co-venturer in the person of

---
92. See, e.g., Rowe, *Predicting the Effects of Attorney Fee Shifting*, LAW & CONTEMP. PROBS., Winter 1984, at 139, 150 ("A standard objection to the American rule is that contrast to English-style fee shifting, it does not provide enough disincentive to nuisance litigation.").

93. In many European nations, however, the absence of these access-facilitating American practices is probably offset by lower attorney fees and more comprehensive legal aid programs.

94. See generally Atiyah, supra note 26, at 1017 (comparing the American system with the English system, which has not allowed contingent fees and which has lower volume of tort litigation).
the lawyer who will not get paid in case of defeat. The next effect of these several American litigation finance practices, compared to those in most other industrialized democracies, is probably to encourage pursuit of claims generally (except for strong small or nonmonetary ones) and to provide less discouragement for somewhat risky or novel claims.95

Although modified in important and increasingly numerous instances, the American rule generally denying fee recovery is part of a setting that emphasizes not placing too much inhibition (however much that might be) on access to justice and that includes the contingent percentage fee for plaintiffs' damage suits. The constraint is not that the American rule cannot be modified; it already has been in many instances and for diverse reasons.96 The changes that have taken place in the American rule, however, are mostly consistent with avoiding severe inhibitions on plaintiffs' access to justice, since they usually have involved one-way pro-prevailing-plaintiff rules,97 sanctions against frivolous claims or defenses or litigation misconduct,98 and two-way shifting only when sides are already equal or to equalize an existing imbalance.99 What seems unlikely—for better or worse—is adoption of the English loser-pays approach (although it does exist, more or less, in Alaska100), or perhaps any changes that would generally threaten with an adverse fee shift the good-faith plaintiff who has a claim of at least moderate strength.101

2. Broad, Adversary-Led Discovery. At least in cases that are fairly large and seriously contested, American discovery practice often adds significantly to cost and delay. The problem is only partly the idea of open discovery itself, with the possibility it creates for expensive and protracted pretrial proceedings. Magistrate Wayne Brazil identifies a

---

95. See Prichard, supra note 34, at 362-63.
99. See Rowe, supra note 96, at 664-65 n.63.
100. See ALASKA STAT. § 09.60.010 (Supp. 1989); ALASKA R. CIV. P. 82. See generally Comment, Award of Attorney's Fees in Alaska: An Analysis of Rule 82, 4 UCLA-ALASKA L. REV. 129 (1974).
101. See, e.g., Simon, The Riddle of Rule 68, 54 GEO. WASH. L. REV. 1, 75 (1985) ("The American Rule is predicated on the policy that anyone with a meritorious claim has the right to go to trial undeterred by the prospect of paying the opponent's attorney's fees if he refuses to settle or if the suit is unsuccessful.").
tension that compounds difficulties: "Minimal reflection reveals a fundamental antagonism between the goal of truth through disclosure and the protective and competitive impulses that are at the center of the traditional adversary system of dispute resolution." A predictable result of this tension between the ideal of open discovery and adversarial incentives is a high level of contention about discovery matters.

Discovery is probably just one of the most prominent examples of how issues relating to the adversary system bear on what reforms would be desirable and possible. The system serves many important values, such as litigant satisfaction through participation and control of case presentation, and more debatably the search for truth; it also can exacerbate antagonisms and create openings for gamesmanship. The adversary system has strong defenders and critics; among the critics, Professor John Langbein of the University of Chicago Law School argues with particular relevance to discovery that "by assigning judges rather than lawyers to investigate the facts, the [West] Germans avoid the most troublesome aspects of our practice." Such judicial fact-gathering probably would require considerably more judge-power than American systems now provide; but a major change like moving from judicial control over pretrial fact-gathering to judicial conduct of the discovery process might be so contrary to heavily entrenched adversary norms as to be politically infeasible. Such possible hurdles standing in the way of a fairly radical reform measure, whatever its desirability, illustrate the important issue whether we are in some respects confined to rearranging


103. For an excellent collection of views on the adversary system, see S. Landsman, Readings on Adversarial Justice: The American Approach to Litigation (1988). For a shorter summary of the system's strengths and weaknesses, see ABA Special Comm. on the Tort Liability System, supra note 83, at 8-1 to 8-14.


105. See Galanter, supra note 7, at 55 (number of judges in America is relatively small in comparison to other nations).

106. See also Flett, Civil Justice and Its Reform in West Germany and the United States, 13 Just. Sys. J. 186, 198-99 (1988-89) (expressing doubt whether "civil procedure in West Germany and the United States provides fertile ground for cross-national imitation" because procedural purposes and practices differ so substantially, and stressing need to take into account "respective conditions framing the legal profession as a whole" before attempting reforms transplanting specific procedures into context of different legal systems).

107. A key unresolved issue bearing on the desirability and feasibility of Langbein's proposal in the American context is whether party control is as important for litigant satisfaction with respect to fact-gathering as it seems to be for case presentation at trial. See supra note 84 and accompanying text; cf. E. Lind & T. Tyler, supra note 89, at 86-87 (describing studies indicating that process control preferences can be "subdivided," with high acceptance of hybrid procedure keeping much control over presentation of evidence and arguments in hands of adversaries while allowing greater-than-usual initiative by judge to ask questions and seek clarification).
the deck chairs on the Titanic. That may be the case if a major practice or institution is both inextricably rooted and a significant contributor to litigation problems.

3. The Civil Jury. Probably the single legal institution with the most far-reaching effects for purposes of this study is the civil jury. In both fundamental law and popular attitudes in this country, it seems to be such a fixture that extended discussion here of its pros and cons would be pointless. And even if a quite small fraction of cases actually go to trial before a jury, the impact of having juries may be more pervasive and widespread than is sometimes perceived. The introduction of a regularly changing decisionmaking group reduces expertise and predictability of verdicts, thereby injecting an element of uncertainty that diminishes the ease with which parties can agree on settlement terms before trial.\textsuperscript{108}

The existence of the civil jury also necessitates single-event trials rather than the sort of serial trial used in some Continental nations, with discovery and the judicial taking of evidence handled together but in a series of meetings with judge and parties that can be dispersed over time.\textsuperscript{109} Concentrated trials increase the need in America for extensive pretrial preparation procedures, whose existence affects not only cases that do end up at trial but can add to expense and delay in the large

\textsuperscript{108} See, e.g., Alschuler, supra note 31, at 1822 (referring to "the substantive uncertainty created by our inadequately law-bound system of jury trials"); Atiyah, Lawyers and Rules: Some Anglo-American Comparisons, 37 SW. L.J. 545, 555 (1983):

There is no question that English trial judges are . . . more rule-governed than American trial judges; but, in addition, the continued use of the civil jury in America makes the American trial a totally different exercise from the English trial. Trial by judge is just not the same thing as trial by jury. Judges give reasons for their decisions, juries do not; judges cannot openly discard or flout the law, juries can; judges at least attempt to put aside prejudice and emotion, juries often do not. Nobody can doubt that jury trial is a less rule-governed and less predictable mode of trial than judge trial.

The use and unpredictability of juries may contribute to higher verdicts, see id. at 556, and make it harder to reach settlements, at least unless a party is highly risk averse, as uncertainty makes it easier for the adversaries to retain divergent expectations of the outcome of trial.

Alschuler proposes to address the problem of "lawless damage awards" "through the establishment of 'damages commissions' and 'damages guidelines.' Jurors could then receive at least as much guidance in awarding damages as they currently receive in determining liability." Alschuler, supra note 31, at 1826 (footnote omitted).

\textsuperscript{109} See, e.g., M. Frankel, Partisan Justice 109 (1980) (referring to dispersion of trial hearings over time in France and Holland); Langbein, supra note 104, at 826-31 (surveying West German civil procedure including episodic "conference method" of adjudication). Interestingly, however, West Germany found its serial trial system too time-consuming and has attempted to move toward a more Anglo-American form of single trial in a major reform of its code of civil procedure. See, e.g., R. Trott, Germany: Practical Legal Guide on Costs and Fees, Court Proceedings and Commercial Law 31, 34 (1977) (discussing new procedure to include pleadings and discovery in a single hearing); von Mehren, Some Comparative Reflections on First Instance Civil Procedure: Recent Reforms in German Civil Procedure and in the Federal Rules, 63 Notre Dame L. Rev. 609, 614-22 (1988) (detailed discussion of workings of post-reform German system of less discontinuous trials).
majority that do not. The jury is also a main reason for many exclusionary evidence rules, and its selection and presence add to the time and expense of actual trial. Even when many of the streamlining reforms tried and proposed in recent years, like court-annexed arbitration, preserve the ultimate right to trial by jury, they attempt to do away with many of its consequences by such steps as abbreviating pretrial procedures, relaxing the rules of evidence, or providing juries with damages guidelines.

Any one of these three major characteristics of American procedural systems could lead to problems. Together, especially in many cases of significant scale, they can interact to multiply difficulties. If claims are fairly easy to pursue because of financing practices, if litigation becomes complicated by extensive discovery and the parties’ strategic behavior, and if cases sometimes prove unpredictable and fairly hard to settle, then the result is likely to be a good deal of expensive, protracted litigation.

C. Social Constraints on Change.

Various aspects of the social and political setting constrain the amount and nature of changes that are possible in the way disputes are handled in America. The historic tendency to judicialize many social and political issues, for example, probably can be curbed only to a moderate degree even in an age of judicial restraint. For one thing, reflecting the dispersion of authority in American government, some state court systems are likely to remain activist—with whatever contribution that makes to “litigation explosion” problems—even if the federal courts become much less so. Moreover, interest groups ranging from the business sector to the public interest law movement, the organized bar, and even the judiciary itself have important concerns that cannot be ignored in considering possible changes. Indeed, present arrangements

110. See, e.g., H. Zeisel, H. Kalven, Jr., & B. Buchholz, Delay in the Court 71-81 (1959) (estimating possible forty percent saving of trial time if bench trials replaced jury trials). Professor Hazard’s review of the Zeisel, Kalven, and Buchholz book argued that there were reasons to expect that the savings might be considerably greater. Hazard, Book Review, 48 CALIF. L. REV. 360, 369-70 (1960).

111. See generally Brennan, State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1977) (lauding the tendency of state courts to protect individual rights under state law beyond requirements of federal Constitution).

112. See, e.g., Hazard, Court Delay: Toward New Premises, 5 CIV. JUST. Q. 236, 240 (1986): [S]trong administrative control over the use of time by judges and court officials . . . conflicts with the self-interest of judges and court officials in maintaining their autonomy. But this self-interest is supported by considerations of constitutional principle, the principle of judicial autonomy in decision-making. . . . [T]he operation autonomy in decision-making conflicts with the principle of subordination in administration. Judges who are self-indulgent, or merely incompetent, thus have a principled basis for resisting reform in administration.
with all their problems may often be the products of delicate accommodations of conflicting interests that would be difficult to disturb.

To point out that various factors act as constraints on change is not necessarily to lament their effect, or even to imply that they always will inhibit reforms rather than advance them. Social institutions and attitudes that impede some possible reforms often reflect important values. We cannot afford to honor literally, for example, the sentiment that everyone deserves a "day in court," at least in the sense of a full jury trial. Yet the belief can appropriately check measures that would eliminate court access altogether or reduce it too sharply, and serve as a reminder of the importance of providing some form of impartial and effective hearing. Moreover, sometimes attitudes themselves can facilitate or channel reform when existing practices fail to measure up. The sense that "justice delayed is justice denied," for example, is a common thread among a large number of efforts (many of them controversial) at streamlining case handling; and concerns about limiting access to justice can support refining of litigation finance measures so that they filter claims rather than inhibiting them generally.

The combination of social and political setting, legal institutions and interest groups, and process concerns helps make it more understandable why major reforms that could make a substantial dent on the "litigation problem" will often be very difficult to adopt and implement. Moreover, the multiplicity of sources and causes makes it highly unlikely that any single change would have a great and lasting impact; we cannot expect quick fixes. And even radical improvements, should any be achieved, may have only passing effect; if the judicial wheel were to become less squeaky, it might get less oil for so long as to let it become rusty again. Such is likely to be the fate of measures that merely reduce or shift caseloads, however useful or otherwise justified they may be. These comments are not to suggest that no significant improvements can be accomplished, but rather to give a realistic sense of the difficulty of major reform in dispute processing and why the changes that can be effected may well be fairly marginal. And they provide background for the effort to think about which kinds of "paths to a 'better way'" are likely to be most promising, which is the question addressed in the remainder of this paper.

113. See, e.g., Sarokin, Justice Rushed is Justice Ruined, 38 Rutgers L. Rev. 431 (1986).
115. See A. Vanderbilt, Minimum Standards of Judicial Administration xix (1949) ("Manifestly judicial reform is no sport for the short-winded or for lawyers who are afraid of temporary defeat.").
IV. PATHS AND SIDETRACKS: A PRELIMINARY SKETCH

A. Introduction.

With the foregoing landscape as a setting for efforts at reform, we can begin to consider the major paths to possible improvement. Lists and classifications abound in the literature; rarely is a major path an entirely novel or untried idea. The situation is somewhat like that of trying to deal with road traffic; depending on problems, resources, goals, and assessments of likely results, one may build more roads, improve existing ones, restrict traffic, require detours, levy tolls, relax or enforce speed limits, emphasize driver training, promote mass transit, provide bicycle paths, or even try to make trips unnecessary (or pointless).

The “more roads” alternative—more courts and judges—is often necessary, particularly to keep pace with population growth, but is unlikely to suffice as a major response to litigation cost and delay because the judicial system must continually compete with other claimants for scarce public resources. Since court expansion helps only until caseloads grow again, it seems not to be the most productive use of a transitory political will for court reform. Moreover, as adding superhighways can encourage people to drive more, adding trial judges may induce somewhat more filings. And increasing the number of judgeships comes with costs of its own in bureaucratization and loss of collegiality and prestige.

116. See, e.g., Hazard, supra note 112, at 237:

On closer examination, all standard remedies for court delay necessarily reduce themselves to one of two basic measures. The first is to increase the supply of adjudicative resources by creating more courts, more judges, larger clerical staff, etc. The second is to decrease the demand on existing adjudicative resources by reducing either the number of cases received or the scope of the consideration given to the average case.

See also Rosenberg, Can Court-Related Alternatives Improve Our Dispute Resolution System?, 69 JUDICATURE 254, 254 (1986) (“Basically there are three routes by which to improve the dispute resolution system: changing the substantive or procedural law, channeling disputes to non-adjudicative tribunals, and using alternatives as court-related mechanisms.”).

117. See, e.g., Hazard, supra note 112, at 238-39:

|Conventional reforms for systemic court delay . . . do not necessarily entail radical types of remedial measures. . . . The method of achieving radical reform is not that of discovering presently unimagined techniques, but of discovering how to orchestrate a new combination of presently obvious techniques.

118. See Marvell, supra note 27, at 156:

Apparently, trial court filings increase because new judgeships lead litigants to expect speedier decisions . . . . However, adding new judgeships does not result in a correspondingly large increase in filings. . . . Adding new judgeships is not self-defeating, although the impact is often blunted by new cases attracted.

119. For perspective, it bears noting that the number of judges in relation to population and to the number of lawyers in the United States is apparently fairly small. See Galanter, supra note 7, at 55. Such comparisons, however, can be treacherous because of different national patterns in the performance of adjudicative functions by administrative judges, private arbitrators, etc.
There are so many ways to approach dispute processing problems that it seems necessary to mention several paths but at the same time difficult to consider them all in depth. The remainder of this part will discuss briefly three approaches that deserve some discussion but are not the main focus of this study—the impacts of the form and content of substantive law; the use of administrative proceedings; and the role of lawyers' professional responsibility. Later parts will then treat in more detail other interrelated paths that may be the most worthy of further exploration in the context of this study—procedural rule reforms, litigation finance measures, and alternative dispute resolution.

B. Paths Not Emphasized.

1. Interrelations Between Substance and Dispute Processing. Dispute processing systems of course exist not for their own sake but rather (to oversimplify) to do justice, serve disputants, and enforce society's norms. This study's focus on the procedural side, broadly defined, is not to imply a primary role for procedure itself. Substantive law reform is the focus of other AII studies such as the project on Compensation and Liability for Product and Process Injuries, whose work this study seeks not to duplicate. Still, the significance of several aspects of substantive law for dispute processing warrants further mention. Without attempting an exhaustive list, this subsection briefly discusses several of the significant impacts. At opposite but related poles,120 substance can virtually remove possible claims from disputing by denying them totally (for example, rent decontrol), thereby leaving their resolution to private ordering (the market, contracting, unilateral decisions); or granting them automatically (as by outlawing literacy tests as a precondition to voting).121 And lest we overlook one of the basic goals of substantive law-making, it can reduce at least some forms of disputing if it actually has a major impact on an underlying problem that is a source of claims.122

Perhaps reflecting only a difference of degree from automatic granting of claims, substantive entitlements can be defined in ways that

120. The poles are related because the substantive measures in question usually amount to the abolition of a claim (rent control entitlement) on the one hand and of a defense (illiteracy, contributory negligence) on the other.


122. Such would be the case, for example, with effective transportation safety regulation that reduced mass disasters and consequent litigation. Ineffective enforcement, of course, as with Prohibition or modern drug laws, can have much less than its intended impact and lead to much collateral disputing such as suppression motions, trials, and asset seizure efforts.
attempt to minimize likely disputing. For example, legislatures can eliminate a major dispute-generating element (as with no-fault insurance and divorce) or define eligibility criteria in bright-line terms (for example, payability of Social Security retirement benefits at a certain age). Moreover, the sharpness of the lines drawn for substantive purposes can be affected by what enforcement mechanisms are available in connection with a regime of substantive entitlements, with consequent effects on settlement rates and the level of appeals (for example, ordinary court trial, normally by jury, for FELA cases versus specialized administrative processing of workers’ compensation claims). The predictability of substantive law can influence greatly the sharpness of the “shadow of the law” in which disputants bargain and dictate their decisions on settlement. The ease of applying bright line rules, of course, does not mean that such rules are always possible or desirable; we probably would not want a maximum age for driver’s licenses, at least not one that would exclude a good many drivers.

The impacts of substance can come in somewhat more subtle ways. It can affect incentives to start litigation at all and to litigate more or less tenaciously, as with the size of awards allowed (for example, punitive or treble damages); it also can influence the attractiveness of delay (as by award or denial of predication or postjudgment interest). Finally, the causal connection can sometimes run from dispute processing practices to substance rather than the other way around: courts may use substantive rules to circumvent or reduce undesirable effects of procedural rules (for example, questionably generous damage rules as ways to get around the American Rule denying attorney fee awards). The circumventions (viz. punitive damages) can themselves engender considerable litigation.

123. See CORC REPORT, supra note 23, at 112-13 (discussing economies from eliminating fault adjudications in workers’ compensation and automobile claims, and relying to considerable extent on insurance mechanism to provide remedies).

124. Legislatures do, of course, often leave difficult issues for courts by glossing over disagreements with vague language. Whatever the theoretical desirability of more precise legislative definitions of substantive rights, in other words, the workings of the political process can lead to many dispute processing problems for courts and litigants. See generally Friendly, The Gap in Lawmaking—Judges Who Can’t and Legislators Who Won’t, 63 COLUM. L. REV. 787, 792 (1963) (criticizing legislators for saying “enough to deprive the judges of power to make law” but not remedying problems that result from broad statutes); Ginsburg & Huber, The Intericircuit Committee, 100 HARV. L. REV. 1417 (1987) (discussing possible responses to problem of vaguely drafted federal statutes). Such “punting” to the judiciary also turns the courts into not just resolvers of individual disputes but arbiters of social issues incompletely resolved in the legislature.


2. Administrative Paths. The use of administrative agencies has long been and remains a valuable means of dealing with court congestion problems. Delegation of considerable responsibility for an area—substantive lawmaking, individual dispute processing, or both—to a specialized administrative body can take advantage of expertise, reduce court caseloads, and avoid the necessity for juries (to the extent that seems desirable). A classic example is workers’ compensation legislation, which moved most workplace injury litigation from the civil courts to compensation boards operating under liability, compensation, and procedural rules quite different from those governing tort actions. Such agencies can develop their own "litigation explosion" problems, but diversion to them of cases that for the most part require only application of settled rules in a specialized area will often be a wise division of labor, preserving the courts for more complex cases and those that involve not just applying general legal norms but also developing and refining them. At its best, the use of administrative paths may provide some key advantages of ADR, such as less formal and adversarial proceedings, without the cost of taking disputes out from under public control, which worries some ADR critics.

The idea that in the administrative context it might be possible to avoid some of the worst excesses of adversary litigation is an important theme that deserves some further attention. Especially if standards are clear and fact patterns tend to be simple and regular, such a model may be a workable, inexpensive alternative to more complex forms of claims processing. One recent illustration is the Veterans’ Administration (now Department), whose benefit determination proceedings mostly

---


Under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his client’s cause by any ethical means. Within the limits of professional propriety, causing delay and sowing confusion not only are his right but may be his duty. The appearance of counsel for the citizen is likely to lead the government to provide one—or at least to cause the government’s representative to act like one. The result may be to turn what might have been a short conference leading to an amicable result into a protracted controversy.

These problems concerning counsel and confrontation inevitably bring up the question whether we would not do better to abandon the adversary system in certain areas of mass justice, notably in the many ramifications of the welfare system, in favor of one in which an examiner . . . would have the responsibility for developing all the pertinent facts and making a just decision. Under such a model the “judge” would assume a much more active role with respect to the course of the hearing . . . .
have excluded lawyers and been subject to the most limited forms of judicial review.\textsuperscript{128}

Yet whatever the value of administrative alternatives in general, systemic reasons indicate caution on the particular idea of making administrative proceedings highly informal and nonadversarial. First, some studies suggest that public attitudes favor adversarial over inquisitorial approaches and find the results of adversarial proceedings easier to accept.\textsuperscript{129} Second, the durability of nonadversarial arrangements may depend on the continued acceptance by the bureaucracy of a perspective strongly oriented to client service. In the terms used by Professor Mirjan Damaska of Yale Law School in a recent book, such structures are likely to keep working well only if the state retains an “activist” or “managerial” perspective, but not if it swings to a more “reactive” view of the role of government:

Where government is conceived as a manager, the administration of justice appears to be devoted to fulfillment of state programs and implementation of state policies. In contrast, where government merely maintains the social equilibrium, the administration of justice tends to be associated with conflict resolution.\textsuperscript{130}

Nonadjudicative forms are the natural outgrowth of an “activist” attitude toward the role of the state; “adjudication and administration tend to converge as a government begins to approach its fullest activist potential.”\textsuperscript{131}

But the lack of consensus in America over the scope and nature of government’s role can keep the necessary equilibrium from remaining stable. Programs conceived and structured in a nonadjudicative mode during an “activist” period may not work at all in the manner originally intended when the political pendulum swings toward budget-cutting and less active government. At that point, the agency, under new political

\textsuperscript{128} For a fuller description of the VA claims process—which includes a right to an ex parte hearing without an official assigned to oppose the claim, before a panel that is required to assist the claimant in developing pertinent facts, consider any evidence the claimant offers, and resolve all reasonable doubts in the claimant’s favor—see Walters v. National Ass’n of Radiation Survivors, 473 U.S. 305, 309-10 (1985). Appeals are under similar rules; there is no statute of limitations; and claims may be resubmitted with new facts and no preclusive effect from prior denial. \textit{Id.} at 311.

Recent events in a major case, however, in which a trial court found extensive litigation misconduct by the VA, National Ass’n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 546-54 (N.D. Cal. 1987), raise some question whether its own nonadversarial attitude may be eroding, which if true could mean that lack of legal representation and judicial review would leave agency clients insufficiently protected from administrative arbitrariness. One scandal, of course, does not by itself undermine a whole approach. But as the text goes on to discuss, the problems in the VA case may result from built-in difficulties that raise doubt about how far social and political conditions in modern America permit reliance on informal, nonadversarial administrative conflict resolution.

\textsuperscript{129} \textit{See} J. Thibaut & L. Walker, supra note 83, at 81-93.
\textsuperscript{130} M. Damaska, supra note 24, at 11.
\textsuperscript{131} \textit{Id.} at 89.
direction even if its substantive mandate and administrative structures remain unchanged, is likely to become less the ally of its clients and more their adversary. Such a change in position can be legitimate as a matter of public policy, but it does not fit with a structure premised on nonadversarial attitudes and denying or sharply restricting review of agency determinations. The pendulum swings in American politics between more and less activist government thus provide reason for care and selectivity about building into the system reliance on highly nonadversarial administrative processes.

Two other aspects of administrative paths deserve mention. First, the administrative alternative can itself need ADR; as "agencies must handle increasing caseloads and are accused of exhibiting problems similar to those they were established to cure," "it is only logical that [they turn to] alternative means of dispute resolution" that are increasingly used by the courts.132 And given the regulatory as well as adjudicative role of agencies, ADR in this context can take novel and interesting forms, such as the increasingly popular approach of negotiated rulemaking, which seeks to exploit the satisfaction associated with participation to reduce disputing over regulations once they are promulgated.133

Second, the structure of the relation between courts and adjudicating agencies can be important for efficient dispute processing. Fractionated court review of a more or less unified bureaucracy, as is the case with review in the several federal courts of appeals of decisions of the Tax Court,134 can reduce consistency and encourage forum shopping—with attendant costs in maneuver and expense, difficulty in reaching settlements, and inequity from disparate treatment.135 Intensive review of some administrative decisions also may be unnecessary and overload the courts. The two present levels of judicial review of Social Security old age, survivors’, and disability benefit eligibility determinations136 produce


large numbers of highly fact-dependent cases. This structure may impose more of a judicial burden than is necessary in light of possible alternatives such as discretionary or single-level review, or perhaps even review confined mainly to an administrative appeals tribunal with provisions to ensure its independence.137

3. **The Role of Professional Responsibility.** The conduct of lawyers, in such forms as highly adversarial practices that run up costs and delay cases, obviously can be a significant contributing factor to many of our litigation problems. Effective canons of professional responsibility that help restrain such excesses can play a role in reducing cost and delay, to the benefit of the court system and often the clients as well. For two reasons, however, this paper does not devote major attention to such issues. First, other studies deal in more detail with the area; in 1986 an ABA commission released a report taking a thorough look at the subject,138 and a current ALI project is producing a Restatement of the Law Governing Lawyers.139

Second, much of the perspective of this paper focuses on the incentives that affect the behavior of lawyers and other participants in dispute processing. Such incentives can be tailored to try to encourage desirable conduct and thus reinforce the norms of professional responsibility. Without such incentive structures, however, lawyers as a realistic matter are placed in positions of conflict; those who observe the canons rather than the other incentives risk becoming the nice guys who finish last.140

---


It is no longer necessary, as it once was, to provide for review of agency adjudication in the federal courts simply to assure that it has been impartially conducted. We now have, as we did not in the first half of this century, a substantial administrative judiciary which can be relied upon to provide impartiality. It seems to me quite possible for large categories of high-volume, relatively routine cases—Social Security disability cases, for example, and freedom of information actions—to be disposed of with finality before an administrative law judge, providing appeal to the courts on issues of law only if the ALJ's decision is reversed by the agency.


The will to win—so essential to effective advocacy—cannot be limited to the courtroom; it does and to an extent should permeate the discharge of all the attorney's services to the client. Discovery abuse will not be significantly reduced by appeals to conscience when
The focus on incentives, then, is not to denigrate the norms of professional responsibility. Rather, it assumes that so long as our system retains its strongly adversarial nature along with conflicts between ethical rules and the other incentives facing lawyers, not too much should be expected of the canons and from exhortations that lawyers are officers of the court.\footnote{Cf. O. Maru, Research on the Legal Profession: A Review of Work Done 56 (2d ed. 1986) ("Many lawyers at all levels do not follow some canons of the codes of professional ethics, and in large metropolitan communities marginal practitioners frequently disregard ordinary standards of honesty and decency as well.") (footnote omitted).} And it suggests that we should think mainly about how to frame the incentives to encourage the kind of conduct desired of lawyers and others involved in dispute processing.

Yet even if one is skeptical about how much the rules of professional responsibility can help reduce litigation cost and delay, and agrees on stressing the incentives the system creates for desired conduct, what follows is not necessarily a bleak, narrow focus on tinkering with rewards and refining punishments. For much of the time, behavior that the system regards as desirable also falls within the enlightened self-interest of lawyers and clients.\footnote{Such happy coincidences, of course, will not always occur. A lawyer acting in a client's best interest could even have an ethical obligation to warn a client about and resist use of an ADR device if it appeared likely to produce inaccurate results, inhibit settlement, or add to expense. See, e.g., Summary Jury Trials Assailed as Inaccurate and Ineffective, 2 Toxic L. Rep. (BNA) 1189, 1192 (1988).} Law school training and continuing professional education can try to make lawyers more aware of the many times when it is not just nice but also smart to refrain from the most antagonistic, costly forms of adversarial conduct. A prominent theme in some recent writing has been that adversarial approaches to legal negotiation often overlook the possibilities of more cooperative efforts to identify and meet the needs of the parties. As Roger Fisher and William Ury put it in their exceptionally successful book, Getting to YES: "Even apart from a shared interest in averting joint loss, there almost always exists the possibility of joint gain. This may take the form of developing a mutually advantageous relationship, or of satisfying the interests of each side with a creative solution."\footnote{R. Fisher & W. Ury, Getting to YES: Negotiating Agreement Without Giving In 73 (1981); see also Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 840 (1984): [I]n a court system which is authorized primarily to award only polarized decisions and limited remedies, the parties will be able to better craft solutions outside of the official legal arena where greater variability can be achieved. . . . [B]y seeking to expand resources before dividing them, the parties may accomplish better results for themselves individually and increase the joint gain to both.} But many works still stress highly adversarial
approaches to legal negotiation, which suggests opportunities to change behavior through changed emphases in law school training and in continuing legal education.

In addition, it seems quite realistic to call on lawyers’ sense of professional responsibility to initiate and support reforms aimed at reducing cost and delay. It is one thing to hope for lawyers to observe canons (even though many will) when doing so might conflict with their gaining advantage for a client in a particular matter. It is quite another to expect them to put aside narrow self-interest in different contexts, such as considering changes in rules and practices that may presently raise lawyers’ fees by creating openings for costly maneuvering. Law reform in the broader public interest, after all, is one of the founding principles of the Institute.

V. ANALYTICAL THEMES

The problems and types of situations addressed in this paper are many and varied, and so are the possible ways of trying to understand and deal with them. Before moving on to more specific discussion of “paths to a ‘better way,’” this Part attempts to provide some threads for guidance through the maze. It suggests and develops three themes, which then are applied at various points in the following Part on possible paths and in the final part on illustrative measures. First is the concept from game theory of “zero-sum” and “non-zero-sum” situations—that is, whether all that is involved is slicing a pie of fixed size, or whether and to what extent opportunities or dangers exist to make all concerned better or worse off. The second concept, borrowed from economic analysis, is consideration of “external effects”—benefits or harms from an activity whose impacts are felt by others than those directly involved in paying for and profiting from the activity. Third is the significance and classification of “transaction costs,” which in dispute processing involve the many factors apart from the pure merits of a dispute, such as lawyers’ fees, costs of running the judicial system, and less tangible matters like the parties’ own time and aggravation from going through a litigation.

These themes, of course, do not by any means exhaust the list of relevant analytical tools, but they seem to be among those with the broadest utility. Moreover, their use here is not meant to slight other values, such as the rights and wrongs of a dispute; these themes can provide a perspective, but not the only valid one, on litigation problems. Finally, the discussion to follow does not purport to offer a full-blown

144. See Menkel-Meadow, supra note 143.
theory of anything, such as classification of disputes for ADR treatment. It attempts, nonetheless, to advance matters by illustrating several applications of fairly well-known analytic devices.

A. "Zero-Sum" and "Non-Zero-Sum" Situations.

A "zero-sum" situation involves pure apportionment of a fixed amount of equivalent assets—if one side gets more, the other gets exactly that much less. From this perspective, for example, an ordinary tort damage case between strangers on its merits is normally a "zero-sum game" involving a decision on how much to transfer from defendant to plaintiff. "Non-zero-sum" situations, by contrast, involve some possibility of making both parties better (or worse) off, with each gaining from cooperation or losing from noncooperation rather than being limited to sheer apportionment. For example, parties that enter into a voluntary contract are presumably in a positive non-zero-sum situation; each party expects to benefit from the exchange. Disputes often have important non-zero-sum potential, both positive and negative: parties who are in a continuing relationship (such as regular business dealings or child custody between divorced parents) can find the relationship enhanced or impaired to a greater or lesser extent by both the way a dispute is conducted and the terms of its resolution.

Situations are often not inherently zero-sum or non-zero-sum; whether they work as one or the other, or contain elements of both, can depend on how society and the legal system structure them and on how the parties perceive their options. Legal rules are often framed in win-or-lose, zero-sum terms, but parties to a dispute may be able to come up with better solutions (from their joint, and arguably society's, perspective) than a court would be likely to decree. Even some apportionment situations can be at least partly non-zero-sum, as when tangible goods of varying natures are divided among recipients who have different interests (the grandchildren get the toys and the adult children get the objets d'art). Or tort case negotiators may be able to agree on a rehabilitation program that is better for the victim and cheaper for the defendant than payment of compensatory damages.146 Approaching situations in ways that inject mutual benefit also can take place at levels above that of the

---

146. Professor Carrie Menkel-Meadow of UCLA Law School argues that in fact most underlying situations with which legal negotiators deal are not zero-sum, even if their training keeps them from perceiving or acting upon the opportunities for cooperative dealing. Menkel-Meadow, supra note 143, at 784-89. Others, like Professor Sally Engle Merry, disagree: "[M]uch of negotiation occurs in a context in which one party's gain is possible only at the price of the other party's loss." Merry, supra note 33, at 2064 n.28. Even when the possibility of mutual benefit exists, there is also the question whether crafting a positive-sum solution is complex enough to make a zero-sum money transfer look relatively more attractive to negotiators.
individual case, such as when a labor contract or a law establishes an accident prevention program that ends up costing less than paying for accidents while also reducing suffering.

The concept of the zero-sum game and the potential for positive- or negative-sum variations have many applications to dispute processing problems, which are mentioned in particular connections at various points in this paper. To list several of these applications briefly for purposes of illustration, greater impersonality in social relations can reduce the relationship-destroying, negative-sum potential of many lawsuits, which may help explain rising litigiousness.\textsuperscript{147} Second, the transaction costs of litigation can add important negative-sum elements for the parties to a dispute, as the running up of costs can make both sides worse off—or permit a more powerful party to gain advantage by imposing unacceptable costs on a less well-financed adversary. Third, parties' recognition of the negative-sum danger can drive them to seek ways to avoid it, often by lower-cost ADR mechanisms or compromise settlements.\textsuperscript{148} Fourth, a positive-sum situation for the parties and the court system, whereby they save transaction costs by settlement or ADR, can be a zero-sum situation when the lawyers are added to the picture. At least in the short run, everyone else's gain can be the lawyers' loss in lower fees, which suggests that the legal profession may have to contemplate sacrifices from some "better ways."

Fifth, the chance to gain by positive-sum handling of a dispute, or at least to avoid the threat of negative-sum losses, provides perspective on criticisms of settlement; these arguments may have greater force in situations that are dominantly zero-sum in nature, but less of an impact if the parties can both be better off with a particular settlement. Sixth, a possibility already mentioned is that of training to make lawyers and judges more aware of chances to make all parties better off in negotiations or in framing relief. Seventh, some types of situations may be treated regularly enough as zero-sum or non-zero-sum that the distinction can help decide whether cases should be kept in the regular courts or handled by an ADR mechanism; it is commonly suggested, for example, that disputes involving parties in continuing relationships, like many child custody and contract situations, are good candidates for ADR. Finally and

\textsuperscript{147} See supra note 28 and accompanying text.

\textsuperscript{148} See, e.g., W. Brazil, EFFECTIVE APPROACHES TO SETTLEMENT: A HANDBOOK FOR LAWYERS AND JUDGES 11 (1988) ("Since the cost . . . of winning can be so great, there are a surprising number of situations in which a settlement that confers some benefit on an opponent leaves the party who conferred that benefit better off than he would have been after a favorable judgment.")
most broadly, those looking at and considering changes in American dispute processing systems can often profit by asking how well those systems do with the spectrum of positive- to negative-sum possibilities and dangers: do they, for example, inject major negative-sum elements by creating situations in which parties are tempted to try to run up adversaries' costs and face no strong reasons to refrain?

B. Externalities.

The idea of "externalities," borrowed from economic analysis, refers to the effects a transaction or dispute beyond has on those other than the parties themselves. Pollution is a standard example of an "external diseconomy"; when the polluter does not have to bear cleanup charges, pollution can be expected to occur at a level higher than is socially optimal. Similarly, litigation can have "external diseconomies" such as delaying other cases and possibly inhibiting innovation, or limiting the supply of emergency medical care. Generation of useful precedent can be an "external economy" of litigation, external at least to the parties who pay much of their own costs; yet if the litigants must bear the entire cost and not be rewarded for the external benefit, too little of such litigation will take place.

As a practical matter, virtually all third party dispute resolution has some externalities—such as others' knowledge that the law really does get enforced, which in turn helps them feel that socially disruptive self-help may be unnecessary for their own disputes. These external benefits are important, as Alschuler argues,\(^{149}\) in assessing the question whether courts should charge user fees generally; society should be wary lest it discourage too much an activity that confers social benefits as well as imposing costs. But what seems salient for most present purposes is whether further externalities of general concern exist such as courts' developing legal doctrines, or enforcing policies that are widely felt to be particularly important (as is stressed in "private attorney general" arguments for attorney fee shifting\(^{150}\)).

If a particular type of case often involves major externalities of broad concern, that suggests that such cases should not be diverted from the civil courts, at least not permanently.\(^{151}\) The lower the incidence of

---

149. See Alschuler, supra note 31, at 1813-16.

150. See, e.g., Rowe, supra note 96, at 662. Which policies are regarded as important, so that cases involving their enforcement involve significant externalities, will of course vary between observers and with differing social conditions.


[If ADR is extended to resolve difficult issues of constitutional or public law—making use of nonlegal values to resolve important social issues or allowing these the law seeks to]
such externalities, the more appropriate may be ADR or routing onto a simplified procedural track.152 Furthermore, it may be possible for some types of cases to use the presence or absence of significant externalities of public concern, together with the zero-sum/non-zero-sum distinction, to suggest what is likely to be the most appropriate form of dispute processing. If the system has settled on treating a class of cases in zero-sum terms, that is a reason to regard such cases as candidates for adjudication, although the courtroom need not always be the initial locus, depending on externalities like the importance of the policies involved. Non-zero-sum situations, by contrast, may be more suitable for either ADR153 or legislation, again depending on the externalities. Thus, for cases like discrimination suits—which involve important public policies and are often relatively zero-sum in nature—access to court can remain especially vital.154

Many private law disputes, like common tort litigation, are also zero-sum situations, but because of the lesser externalities can be somewhat stronger candidates for specialized administrative resolution or ADR mechanisms. Workers’ compensation and use of mandatory court-annexed arbitration schemes for routine tort claims provide good examples. Non-zero-sum matters with relatively few externalities of public concern, like some family law disputes or contract claims between parties in a continuing relationship, often hold special promise as candidates for negotiation, consensual arbitration, or other forms of ADR. And when a complex non-zero-sum situation contains great and far-reaching externalities, such as a case raising questions of institutional reform, an approach that is legislative in nature seems called for—whether it be by acts

---

152. See, e.g., TRENDS IN TORT, supra note 43, at 31 (noting increasing use of court-annexed ADR mechanisms for routine personal injury torts because of high volume and stable law).


154. The rough classification suggested in the text cannot, of course, exhaust all the factors relevant to how disputes should be treated. Professor Bumiller’s argument that discrimination victims often do not pursue redress in part because many feel threatened by legal proceedings, if found to be generally accurate, would suggest the importance of looking for less intimidating but still effective alternatives. See supra text accompanying note 39.
of Congress or state legislatures, administrative lawmaking, or judicial action of a "structural" sort.\footnote{155}

C. \textit{Transaction Costs.}

An additional perspective comes from focusing on the transaction costs of dispute resolution. These costs are of many types, virtually always involve "non-zero-sum" elements, and have benefits that may sometimes be overlooked. Various writers have emphasized several of the significant types of costs, but perhaps without bringing together enough of them at once. Alschuler, for example, has valuably pointed out that many analyses have dealt with what is really a three-sided transaction cost problem (adjudicator and both sides) as a two-sided one: policy discussion has emphasized party costs, principally attorney fees and their apportionment, while tending to ignore system costs and the possibility of user fees.\footnote{156} In addition, several others have shown how significant principal-agent problems can arise between lawyer and client. The economic incentives affecting lawyers do not always coincide with what would serve their clients' interests, as for example may be true when acceptance of a low, early settlement proposal would give a lawyer retained on a contingent percentage fee basis a good hourly return—but might not do so well by the client as would a settlement after considerable further effort.\footnote{157} (Aligning the interests \textit{within} a side, between attorney and client, may of course in some cases make agreement \textit{between} the sides harder to reach. This possibility illustrates the importance of the multiple players affected by litigation costs and resulting incentives.)

\footnote{155. A recent review by political science professor Austin Sarat of Amherst argues that classification efforts like the rough scheme suggested in the text are a "new formalism," ignoring the extent to which disputes and processing techniques are fluid and reciprocally shape and influence each other. He calls for more investment of energy in encouraging those with legitimate grievances to come forward. Sarat, \textit{The "New Formalism" in Disputing and Dispute Processing} (Book Review), 21 \textit{LAW \\& SOCY REV.} 695 (1988) (reviewing S. Goldberg, E. Green, \\& F. Sander, \textit{Dispute Resolution} (1985)). One can readily agree that classifications should not be too rigid, and that mechanisms will often have to be adapted to individual cases. Yet not all classifications are formalisms; there is presumably no disagreement that disputes do not all require the same treatment, which poses the problem of making the needed differentiations at wholesale or retail. Success in encouraging the emergence of more disputes as Sarat desires would place more pressure on dispute processing structures, making it all the more difficult to give each one full-dress treatment. The result would likely be a felt need for mass treatment with fairly rough-and-ready channeling rather than case-by-case tailoring, which leaves the question of how to do the job of classification.}

\footnote{156. See Alschuler, supra note 31, at 1815 n.23.}

Moreover, in a world of limited judicial resources, courts have come to recognize their own stake in the way disputes get handled. Judges must therefore be reckoned with as players in the game of allocating those resources, as they face such possibilities as imposing fees for abuses of the judicial system. Similarly, lawyers have professional and financial interests at stake—indeed, from the viewpoint of the clients, lawyers’ fees are the major non-zero-sum element in many litigation situations. Financially, with the lawyers added to the picture, the game can revert to being zero-sum, and the lawyers are the potential monetary losers (at least in the short term) from many cost-saving reforms.

Analytically, litigation finance problems therefore may best be approached by taking into account as many as five principal actors who regularly impose and bear costs—the adjudication system, plaintiff, plaintiff’s lawyer, defendant, and defendant’s lawyer. Decisions have to be made about who bears which costs, initially and finally, and how the costs are to be reckoned. American judicial systems tend to treat the services of public adjudicators as something close to free goods, which affects the choice between them and private, nonsubsidized adjudicators. (That policy also can have external effects on other users of the public system, contributing to backlog if the system is not expanded.) The United States, although with increasing exceptions, differs from the rest of the industrialized democracies in leaving party costs where they fall. And despite much discussion in recent theoretical writing,158 there is a tendency in practice to disregard the principal-agent problems caused by the means of cost allocation between principal and agent.

In contrast with the merits of much ordinary litigation, transaction costs at least as among the parties and the system have important non-zero-sum characteristics. If the parties can settle (or litigate) a dispute economically and reach an outcome acceptable to them, they and the system are better off in terms of time and expense.159 Running up litigation costs, on the other hand, will sometimes benefit only lawyers who are paid by the hour.

Yet parties and their lawyers face strong incentives to run up costs, with both the parties and the lawyers trapped in a “Prisoner’s Dilemma” situation in which each sees advantage in imposing costs on the other. The frequent result is that both do just that, as in the case of discovery

---

158. See sources cited in note 157 supra.
159. See, e.g., Cooter, Marks, & Mnookin, Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior, 11 J. LEGAL STUD. 225, 228 (1982) (“In pretrial negotiations, everyone has an interest in avoiding a trial. The surplus from cooperation is usually obvious, for example, legal fees, cost of delaying resolution of the dispute . . . ”). See also Menkel-Meadow, supra note 143 (problem-solving as opposed to adversarial approach can better serve the parties’ and the system’s needs).
abuse. The mixture of characteristics of the underlying disputes and the transaction costs turns what is often a zero-sum situation (the merits) into part of a larger context in which non-zero-sum aspects are important, even dominant, and in which the "Prisoner's Dilemma" nature of many transaction costs provides a powerful impetus towards running up costs of both the parties and the system. Yet recognition of this problem implies that potential gains are there to be captured, whether by cooperative negotiation, opting for less costly ADR, or reforms of the judicial system itself to reduce or eliminate the negative-sum pressures.

The unattractiveness of the cost-multiplication spectacle can make it too easy to overlook the values served in connection with at least some of the costs. Short cuts will sometimes mean more mistakes; conventional court procedures are in part framed with an eye to accuracy, and saving on process costs can lead—in economists' jargon—to higher error costs. Similarly, formal procedure may—as Delgado and his co-authors have argued in a critique of one aspect of ADR—do at least tolerably well its job of trying to assure impartiality and regularity. Yet if the parties lack equal ability to bear the costs associated with these benefits, that differential can reduce or cancel the benefits and induce strategic behavior to take advantage of the disparity.

160. See Note, supra note 102, at 352. The "Prisoner's Dilemma" concept from game theory describes negative-sum situations in which cooperative behavior could benefit both parties, but obstacles to cooperation lead each to behave in a way that makes both worse off as a result of their efforts to protect themselves from the other's feared noncooperation. See 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 973-76 (1987). The concept brings together the themes of negative-sum situations and externalities, because each party has incentives to try to impose on the other a cost created by its own behavior, which can result in the impoverishment of both. Lawyers, unfortunately, are somewhat in the position of the jailers in their clients' Prisons' Dilemma—able to benefit in this case financially, from what can be the mutually harmful noncooperation of the clients.

161. If the formal system creates—and then handles poorly—Prisoner's Dilemma situations, it has to expect some litigants to seek ways to escape the system and gain the benefits of more cooperative, less burdensome forms of dispute resolution. In other words, some criticism of voluntary resort to ADR (that it removes from the system cases that should stay in the public courts) might better be redirected at the problems in the system that make alternatives attractive in the first place.

Indeed, the Prisoner's Dilemma in litigation costs provides one weight in the balance in favor of involuntary ADR. If no other good means can be found to keep litigants from running up each other's costs, mandatory court-annexed arbitration may be one way to help them stop doing so, as may the summary (advisory) jury trial and short "rocket docket" deadlines. See generally AMERICAN BAR ASS'N, ACTION COMMITTEE TO REDUCE COURT COSTS AND DELAY, ATTACKING LITIGATION COSTS AND DELAY 17 (1984) ("If left entirely to attorneys' choice, a simplified procedure option will likely be underutilized.").


To the extent that potential disputants perceive the public adjudication system as having such attractive characteristics, that perception helps account for the system's popularity, resulting caseload problems, and the raising of many unresolved social problems in court.
The main themes discussed in this section can interact in several ways that bear on the “litigation problem,” particularly with respect to ADR and the shifting of costs and attorney fees. In addition to the suggestion that a case can be more or less appropriate for ADR depending on whether it is treated as “zero-sum” in nature and has major “externalities” of public concern, the relation between the stakes and transaction costs is another important consideration. Many common disputes, for example, are generally treated as zero-sum on the merits and have few major externalities—such as ordinary tort litigation. This mix of characteristics does not point strongly toward either regular court handling or ADR, but the ratio of likely costs to the stakes involved has implications for the treatment of such cases. A high-relative-cost matter like many ordinary small claims can be a good candidate for fee shifting, simplified ADR, grouping in the form of a class action if many such claims arise at once, or regulatory resolution if there is high repetition of an underlying problem. If a garden variety dispute involves large stakes, by contrast, even though it may entail few externalities it can still be a matter for ordinary litigation (albeit perhaps with user fees). Later discussion will illustrate how a focus on the “externalities” and “zero-sum” nature of a dispute can help define appropriate paths to a “better way” in specific contexts.

VI. PREMISES AND PATHS

Previous sections considered at length many of the sources of caseload and other litigation problems in their social setting, along with the implications for possible reforms. Yet whatever can be said or done about those external sources, the dispute processing system has numerous problems of its own that can magnify the difficulties arising from outside. The roots of these internal problems lie in some of the premises of our civil dispute processing systems, and an effort to identify the premises and their contributions can aid in selecting the most promising paths to respond to present problems. The sketch that follows is an exaggerated one, primarily because of the many and—as time passes—probably increasing ways in which the premises are qualified, departed from, or diluted. Moreover, even though some of the premises may make major contributions to our problems, for many reasons we should be reluctant to abandon them entirely. The following discussion of premises and how they contribute to the “problem,” then, can best be viewed not as a proposal for their abandonment but rather as an effort to consider whether and how the system should depart from them more than it already has.
A. Premises of the Traditional System.

To a considerable extent, our present civil dispute processing system is, at least formally, oriented toward full court trial after pretrial development of the facts and contentions through discovery, which occurs under a system of uniform procedural rules that govern most civil litigation. It employs neither a loser-pays approach toward the expenses of the litigants nor user fees for the public expenses of providing court services. It assumes that attorneys and litigants will conduct themselves most, but not all, of the time in accordance with the obligations and presumptions of the rules of procedure and professional responsibility, and that after-the-fact sanctions will suffice to deal with violations. Finally, it relies on the market for lawyers (and on lawyers’ charity) to provide legal services in the private sector with relatively little government involvement or support.

This picture, of course, was never fully accurate and was closer to the truth four decades ago than it is today. In recent years, judicial involvement in settlement exploration and discovery management has grown significantly and has received explicit sanction in rule amendments. By creation of some specialized courts and tracks, and with considerable judicial discretion to tailor proceedings in individual cases, the presumption of procedural uniformity (itself a reform escaping from the common law forms of action) has been qualified. Sanctions have been stiffened, including broader use of attorney fee awards for procedural abuse; fee shifting has grown enormously in several major areas of the law, although court user fees have remained small. Government-provided legal services for the poor have grown and shrunk again but continue. Nonjudicial forms of dispute resolution, and court uses of proceedings short of full-dress trials, have proliferated.

Yet in considerable part, the premises survive and contribute to our present problems. Uniform, primarily trial-oriented rules of procedure remain the norm and can impose excessive formality on a simple case, or, for that matter, deal inadequately with the intricacy or pretrial maneuvering in a complex one. Similarly, even though laxity concerning attorney and party misconduct has greatly declined, enforcement comes mostly via after-the-fact sanctions for misbehavior which are often time-

163. See Fed. R. Civ. P. 16(c)(7) (participants at pretrial conference may consider and act upon the "possibility of settlement or use of extrajudicial procedures to resolve the dispute"); id. 26(b)(1) (providing for limitation of discovery on court's initiative); id. 26(f) (giving the court power to order a discovery conference on its own initiative).

164. While debate has mounted over whether present civil rules are too "trans-substantive," no one is suggesting a return to the forms of action. Movement toward making more specialized tracks available would require facing issues of how to minimize jurisdictional fights over which set of rules should govern a case. See generally infra text accompanying notes 187-89.
consuming and engender side battles apart from the merits. The American rule against recovering attorney fees from adversaries remains the starting premise, even if it is not observed for most other costs and has become increasingly riddled with exceptions. And publicly subsidized legal services fared poorly in the Reagan era; while reduced government support allows market forces to provide some useful constraint on disputing, it also leaves unsolved the problems of access to justice for the poor and of how the disparity between legal costs and recovery often makes redress impractical in small and even medium-sized cases.

B. Lines of Inquiry.

Against this background, it may be profitable to think along some or all of the following lines: (1) Increased focus may be long on pretrial phases in general and on the processes of bargaining and settlement in particular, which would include facing such key questions as how much the system should encourage settlement and how much judges should be involved in settlement negotiations. (2) Greater use of “tracking” or different types of procedures (judicial or alternative) for different kinds of cases could be explored, bearing in mind the dangers of high transaction costs from disputes and decisions on the appropriate track for a case. (3) Conscious use of litigation finance, in the form of attorney fee shifting or court user fees or both, could be used to attack present problems. (4) Emphasis on incentives set in advance, or clear-cut rather than indefinite and discretionary sanctions, could encourage the behavior desired of parties and their representatives. (5) Finally, consideration could be given to how, and how much, the system should temper the operation of the market in determining how legal services get made available. These suggestions do not themselves call for specific measures but rather for approaches that can lead to reforms to deal with several different problems. To illustrate where these lines of thought could lead, the concluding part brings together several measures suggested by these approaches.

1. Focus on Bargaining and Settlement. Despite the emphasis in formal rules of civil procedure on pretrial and trial stages of fully contested litigation, bargaining and settlement are a major part of the disputing process. As James and Hazard put it,

The American court system as it exists partially accommodates authoritative justice, as exemplified in the English system. Some quotient of authoritative justice—actual adjudication according to law—is required in order to make a system of compulsory bargaining work. But
fundamentally the American system is one of compulsory bargaining in response to claims of right.\textsuperscript{165}

The Civil Litigation Research Project provided empirical support for this view:

One of the most striking aspects of our study of litigation was that bargaining and settlement are the prevalent and, for plaintiffs, perhaps the most cost-effective activity that occurs when cases are filed. This will come as no surprise to litigators, but it is remarkable how seldom this fact is taken into account in discussions of the litigation crisis, costs of litigation, and the need for "alternatives to litigation."\textsuperscript{166}

At the same time, considerable controversy exists about settlement generally\textsuperscript{167} and in particular the desirability of heavy judicial involvement.\textsuperscript{168} The importance of settlement, and the controversies over it, suggest the need for more thinking about the ends to be sought in dealing with settlement, the means of evaluating quality in settlement processes and outcomes, and the many approaches the system could take toward settlement—such as leaving it alone, encouraging it, rewarding it, or regularizing its processes.\textsuperscript{169}

Principal types of issues raised by a focus on settlement, which of course sometimes overlap, include (1) objection to settlement as such; (2) concern for the terms on which settlements are reached; and (3) the desirability of various means by which the system can influence settlement. Respecting the first of these, the most prominent critic of settlement is Professor Owen Fiss of Yale Law School. He calls for "justice, not peace," praising litigation in America for its function in making us live up to our ideals.\textsuperscript{170} The analytical themes developed in the preceding section can help place this argument in context. Fiss's criticism seems to have its greatest force in cases with significant externalities of public concern, involving the enforcement of important policies or primarily legal issues—the development and refinement of doctrine. Here, system perspectives and insistence on the doing of substantive justice seem to have the greatest weight.

\textsuperscript{165} F. James & G. Hazard, Civil Procedure 300 (3d ed. 1985).

\textsuperscript{166} Costs of Ordinary Litigation, supra note 14, at 122 (1983) (footnotes omitted). See also Galanter, supra note 21, at 8 ("The rate of settlements remains high. The great majority of civil cases are settled. The portion of cases that run the whole course of possible contest has continued a long historical decline.").

\textsuperscript{167} See, e.g., Fiss, supra note 79, at 1075 (settlement should be considered a "capitulation to the conditions of mass society and should be neither encouraged nor praised").

\textsuperscript{168} See W. Brazil, SETTLING CIVIL SUITS: LITIGATORS' VIEWS ABOUT APPROPRIATE ROLES AND EFFECTIVE TECHNIQUES FOR FEDERAL JUDGES (1985) (reporting general satisfaction with judicial participation but also strong minority opposition).

\textsuperscript{169} For a rich yet concise survey of the literature and issues on settlement, see Galanter, The Quality of Settlements, 1988 Dispute Resol. 55.

\textsuperscript{170} See Fiss, supra note 75, at 1085-87.
Yet litigants do not exist solely to serve the system's broader purposes. The users' perspective, from which justice may often have more to do with party preferences and satisfaction with results than with the application of legal standards, is a valid and important one as well, and deserves greater weight in situations different from the public law litigation Fiss emphasizes.¹⁷¹ As applied to cases involving few externalities, strong non-zero-sum aspects, and potentially high transaction costs, opposition to negotiated settlement would often be misplaced. For example, if separated parents and their children can agree that joint custody would be in the interest of all, in most cases there would be little or no reason for the system to press for an adjudicated solution.

Criticisms of settlement are perhaps most colorfully summed up in the charge that encouraging settlement (with its effect of reducing case backlogs) is like shooting hospital patients to free up bed space. The analogy, however, presumes among other things that disputes need trials the way sick patients need medical treatment. Some do, but pushing toward or through trial is not always the best or only way for a dispute and the disputants to arrive at the legal equivalent of health. Settlements close enough to what trial would have produced can get there faster, more cheaply, and with more certainty; an additional benefit may be less antagonism between the parties.¹⁷² Professor Menkel-Meadow argues in a recent review that formal rights are far from being all that is important to many disputants;¹⁷³ to the extent that settlement preserves valued relationships without sacrificing important rights, it can be better for the parties than adjudication.

Criticism or defense of settlement thus turns in part on how much it is possible to avoid major and involuntary compromise of legal rights. To some extent, of course, aspects of existing pretrial procedure further that goal, as when discovery brings out information that narrows the gap between parties' estimates of the likely outcome of trial and thus facilitates settlement. However, the costs of litigation, particularly those that the rules often permit to be forced on an adversary with little or no chance of recovery, can distort the bargaining process and lead to settlements (or abandonment of claims) with little seeming basis in the

¹⁷¹. See Eskridge, MetaprocEDURE (Book Review), 98 YALE L.J. 945, 959 (1989) (reviewing R. Cover, O. Fiss & J. Resnik, PROCEDURE (1988)) ("Fiss's anti-settlement thesis seems inapplicable to most lawsuits," such as typical claims for modest sums).


substantive merits of a dispute. Professor Richard Marcus of Hastings has argued:

To the extent that [the] decision to settle is made "in the shadow of the law" because it reflects a prediction of the substantive merits of the case, it accomplishes the objectives of the substantive law, albeit in a modified form because a settlement is not an "all or nothing" result.

The settlement model breaks down, however, when the defendant's payment to the plaintiff is based mainly on factors other than the substantive merits of the suit.\(^{174}\)

Given the importance of settlement, and the concern for skewing settlements away from likely outcomes on the merits, it becomes vital to consider the various ways the system does and can influence settlements. Judicial participation in negotiations, and sometimes pressure to settle, are among the hallmarks of the controversial practice of "managerial judging," a sharp departure from the adversarial model of neutral umpiring made under the felt pressures of caseload and complexity. Yet judicial involvement in settlement raises difficult issues of propriety.\(^{175}\) Magistrate Brazil's recent study reports quite high effectiveness of, and lawyer satisfaction with, judicial involvement in the settlement process.\(^{176}\) He also notes, however, intense opposition on the part of a small minority to judges having anything at all to do with settlements. Brazil's survey of lawyers' reactions underscores that it may be unwise for a judge who participated considerably in settlement negotiations to try the case if no settlement is reached, particularly when trial is to the court rather than by jury.\(^{177}\)


\(^{175}\) See generally Provine, *Managing Negotiated Justice: Settlement Procedures in the Courts*, 12 JUST. SYR. J. 91, 107 (1987) (empirical research on judicial intervention in settlement may have omitted question of how to evaluate judicial role, and ignored concern for public confidence in judicial fairness).

\(^{176}\) W. BRAZIL, supra note 168.

\(^{177}\) See id. at 5; accord Provine, supra note 175, at 108. That concern, in turn, suggests such possibilities as having a magistrate or judge who will not try the case participate in the settlement discussions—or ways of promoting settlement that do not involve judges and jeopardize their impartiality, such as offer of settlement rules and "quick look" ADR devices.

More generally, much of course depends on *how* the court goes about trying to promote settlement. Professor Galanter suggests a useful broad distinction when he refers to

the two recurrent themes that impel and justify judicial involvement in the settlement process. We might call these the "warm" theme and the "cool" theme. The "warm" theme refers to the impulse to replace adversary conflict by a process of conciliation to bring the parties into a mutual accord that expresses and produces community among them. The "cool" theme emphasizes not a more admirable process but efficient institutional management: clearing dockets, reducing delay, eliminating expense, unburdening the courts.

"Managerial" judges' promotion of settlements is understandable as a response to present problems, but given its difficulties it may prove to be a transitional second best if other effective mechanisms can be evolved. Professor Donald Elliott of Yale Law School argues:

Redesigning incentives with an eye to their effect on the terms of settlements will not only reduce the arbitrariness which is inherent in managerial judging, but will also be more likely than ad hoc intervention by judges to encourage just outcomes. For example, if the existing methods of compensating counsel do in fact create powerful economic incentives for lawyers to act in ways that are not in the best interests of their clients, restructuring the compensation system directly is more likely to be effective than managerial techniques. Similarly, if defendants are encouraged to delay judgment because of rules of law that deny successful litigants the full time-value of money during the pendency of litigation, restructuring the system of incentives is more likely to be successful than is an overlay of counterincentives imposed on an ad hoc basis by managerial judges.

Reforming procedural incentives to promote just settlements requires a fundamental change in the way that we view civil procedure. Before such changes can be made, we will have to stop thinking of the "pretrial" process as a prelude to trial, and start thinking of it as the "main event"—as the matrix of incentives within which the overwhelming majority of cases are going to be settled by two party-appointed arbitrators (the opposing lawyers). The most pervasive "ADR" system in the United States today is probably pretrial procedure under the Federal Rules of Civil Procedure, but this system has been designed with little or no attention to its effect on the terms of settlement.\footnote{Elliott, supra note 91, at 335-36.}

This is not the place to think through all the possible alternatives to "managerial judging" in connection with settlements, but one theme that can suggest several approaches bears emphasis: the reduction of uncertainty about likely outcomes, and its importance to reducing costs and facilitating settlements. James and Hazard argue that

the critical factor [in the cost of litigation] is the degree of uncertainty as to how the judicial system will assess a case once it proceeds beyond an initial statement of claim. Most discussions of procedural reform for reducing litigation cost ignore the uncertainty factor, apparently presupposing that uncertainty of outcome has to be taken as a given. In fact, however, there are changes in procedure and court organization that could significantly reduce uncertainty.\footnote{F. James & G. Hazard, supra note 165, at 293. See also Kritzer, A Comparative Perspective on Settlement and Bargaining in Personal Injury Cases (Book Review), 14 Law & Soc. Inquiry 167, 183-85 (1989) (reviewing H. Genn, Hard Bargaining: Out of Court Settlement in Personal Injury Actions (1988)) (discussing relative impact of greater uncertainty over liability in England and over damages in America, with uncertainty from lack of discovery combining with threat of fee liability placing one-shot litigant at extreme disadvantage in England).}
To be sure, one essential way of reducing uncertainty for some cases is litigating others to judgment.\textsuperscript{180} Moreover, "sharpening the shadow" of the law in which the parties bargain may not be of great value in settling cases that are non-zero-sum on the merits.\textsuperscript{181} Still, reducing uncertainty by judges' expressing "analytical opinion" was what Brazil's subjects welcomed most from judicial participation in settlement deliberations.\textsuperscript{182} Numerous devices and suggestions—such as "quick looks" through one or another form of ADR, offer of settlement rules, and damages guidelines—all share that common goal.

2. "Tracking"—and Alternative Dispute Resolution. One of the major reforms of the Federal Rules of Civil Procedure was to carry forward the process of unifying civil rules that had begun with the abandonment of the forms of action. This change is reflected in Rule 2 with its specification that there shall be "one form of action to be known as 'civil action.' " The artificial, historical divisions between law and equity and among forms of action had indeed become dysfunctional, and unification does serve to eliminate some jurisdictional disputes. But if the old divisions, primarily along lines of subject matter or type of relief, had become outdated, unification has its problems as well. Professor Maurice Rosenberg has argued that

the federal district courts and busy trial-level courts in the state systems need to diversify their procedures to satisfy the varied needs of the cases. Furthermore, they must be ready to make trade-offs. Sometimes they must give up the ideal procedures for processes that will better achieve simpler and less costly dispositions.

. . . . .

Recent experience suggests that many of the emerging procedural needs of a judicial system can best be met by creating different tracks for different types of cases and then routing the cases through the most suitable processing channels. This permits simple, streamlined procedures in cases that cannot use the more elaborate procedures the rules contemplate. Particularly, it allows cutting down on pretrial discovery.\textsuperscript{183}

"Tracking" can be viewed in part as a response to the point made by many studies that general civil litigation today is roughly divisible between numerous modest claims and a smaller number of large, frequently

\textsuperscript{180} Kritzer, Adjudication to Settlement: Shading in the Gray, 70 JUDICATURE 161, 165 (1986).
\textsuperscript{181} Cf. Menkel-Meadow, supra note 143, at 789 ("The assumption that only limited items are available in dispute resolution occurs because negotiation takes place in the shadow of the courts. Negotiators too often conclude that they are limited to what would be available if the court entered a judgment.").
\textsuperscript{182} See W. Brazil, supra note 168, at 2.
complex cases.\textsuperscript{184} It can take several forms and already is found to some extent in most jurisdictions, with special rules for such types of cases as small claims and probate matters. The state of the art is advancing, with such innovations as the apparently successful Differentiated Case Management Project in Bergen County, New Jersey, with three basic tracks (expedited, standard and complex) and regularized, active management as a case progresses.\textsuperscript{185} Current suggestions often focus on claims of moderate scale, on various types of alternative dispute resolution, and on some particularly complex matters, which this project leaves to the Institute’s Study of Complex Litigation.

The issues here are numerous and difficult enough that a brief treatment can do little more than attempt to identify and classify them. A threshold question, which takes various forms, is whether to attempt much categorization at all; Professor Austin Sarat’s recent book review, discussed above, criticizes some current efforts to channel disputes according to their type as a “new formalism.”\textsuperscript{186} Other scholars, questioning the failure of federal-style rules to differentiate by case type, ask whether the civil justice system can maintain the “trans-substantive” nature of present procedural rules, with one set of rules meant to provide the basic framework for most types of civil litigation.\textsuperscript{187} The area

\textsuperscript{184} See, e.g., NATIONAL CENTER FOR STATE COURTS, ANNUAL REPORT 1984, supra note 56, at 173; Friedman, supra note 46, at 32; cf. TREND IN TORT, supra note 43, at 2-3 (arguing that data suggest three-part division of tort litigation into routine personal injury torts, high-stakes personal injury suits, and mass latent injury cases).


\textsuperscript{186} See Sarat, supra note 155.


Providing more guidance for lawyers and their clients [on pleading and signature requirements] would necessitate inroads on trans-substantive procedure. Some types of cases may permit lawyers to know more about the facts at the initial pleading stage than others. Perhaps there should be different procedural rules for different types of cases. But . . . one cannot discuss what procedure should go with what substantive areas without acknowledging that the choices will deeply affect the substantive law and influence which cases are brought and won. This suggests a more active role for legislators in procedural rulemaking.

The major work that remains to be done, if the idea of “trans-substantive” rules is to be modified, is to identify the relevant grounds for distinction—whether they be subject matter, complexity of case, type of procedural problems involved, or others—and to suggest what different rules should apply to each distinct type. For a detailed argument against non-trans-substantive rules, using as an example the proposed revisions of the Federal Rules of Civil Procedure dealing with unfounded
abounds in tradeoffs: trans-substantive rules can lead to the danger of
Procrustean uniformity, while categorical tracking can yield possibly
higher transaction costs due to lawyers having to master more sets of
rules and jurisdictional battles over which track a case should be on.\textsuperscript{188}
With fairly detailed individual-case tailoring, as opposed to categorical
tracking, there is a likelihood that it would be cost-effective only in cases
involving fairly large stakes. Thus far, the most promising "tracking"
approaches appear to classify by scale and complexity rather than by
substance,\textsuperscript{189} which may respond to many of the perceived problems
while having the incidental virtue of provoking less political controversy
with its often accompanying delay and advantage for organized interest
groups.

To the extent that more refined categorical treatment seems desir-
able and feasible, the most frequently mentioned indicators for classification,
beyond the amount claimed and the likely ratio of costs to stakes,
include the absence of issues involving major public policy; the equality
of the power relationship between the parties, which may suit a dispute
better for negotiation or ADR than if the parties have quite different
bargaining strengths; the presence of a continuing relationship between
the parties; and the apparent need of a dispute for application of settled
law versus crafting of creative solutions.\textsuperscript{190}

3. \textit{Litigation Finance—Attorney Fee Shifting and Court User Fees.}
In both actual use and law review commentary, attorney fee awards have
been a growth industry for the last several years. Court filing fees, by

\textsuperscript{188} See, e.g., Carrington, \textit{Civil Procedure and Alternative Dispute Resolution}, 34 J. Legal Educ. 298, 302 (1984) ("much talk and effort is inverted in designing varied procedures for different
types of cases "means confronting the demons of technicality, line-drawing, and definition"). Professor Subrin sees offsetting benefits from more precisely tailored procedural rules, viewing them as a
conceivable way of avoiding ADR, managerial judging, and settlement pressures:

My point is not that alternative dispute resolution is bad. Rather, it does not help solve,
and indeed resembles, an equity-based procedure that fails to concentrate on how law can
be applied in a reasonably consistent and predictable manner.

The momentum toward case management, settlement, and alternative dispute resolution
represents, for the most part, a continued failure to use predefined procedures in a
manner that will try, however imperfectly, to deliver predefined law and rights.

\textit{Id.} at 991, 1001-02.

\textsuperscript{189} See supra note 185 and accompanying text.

\textsuperscript{190} See S. Goldberg, E. Green, & F. Sander, \textit{Dispute Resolution} 10-11 (1985); Ed-
wards, \textit{supra} note 151, at 676.
contrast, have not been widely used and remain quite modest, continuing to bear little relation to actual court costs. Thinking about economic incentives and market approaches, however, appropriately puts court user fees on the agenda as well. Since background of the American rule has been discussed above,\textsuperscript{191} this section will focus on court user fees and the purposes of litigation finance measures. Consideration of specific possible changes in fee shifting and user fees appears in the concluding part.

In contrast to the cottage industry surrounding fee awards, our usually nominal court user fees have been the subject of few developments and relatively little commentary—until just the last few years, when writings by Judge Posner,\textsuperscript{192} former Solicitor General Rex Lee,\textsuperscript{193} and Professor Alschuler\textsuperscript{194} have discussed them in some detail and from varying perspectives. To the extent that courts in this country do charge user fees, they are normally borne in the end by the loser as "costs," thus being a sharp (if most often minor) departure from the dominant American practice on attorney fees. A modern judicial system can feasibly operate with quite substantial user fees; the general policy for civil courts in England is that the government pays the judges and the litigants pay for everything else.\textsuperscript{195}

More generally, litigation finance measures can take many forms and can be aimed at serving several different goals by deliberate use of the allocation and reckoning of transaction costs. An important overall theme is to allocate costs so as to internalize for the parties the external economies and diseconomies of a suit, in order to achieve an optimal level of litigation.\textsuperscript{196} Attorney fee awards, for example, can be allowed (1) in an effort to encourage suits of certain kinds (such as those to enforce important policies), thus basing the justification on the nature of the underlying claim; or (2) because costs disproportionate to the amounts at stake otherwise make pursuing small claims uneconomical, thus focusing on the relationship between transaction costs and the claim

\textsuperscript{191} See supra text accompanying notes 92-101.
\textsuperscript{192} See R. Posner, supra note 46, at 131-36.
\textsuperscript{194} Alschuler, supra note 31.
\textsuperscript{195} J. Spencer, Jackson's The Machinery of Justice 445-47 (8th ed. 1989). Relatively generous civil legal aid in England means, however, that the source of much revenue from court fees is the budget of another government agency. See id. at 447.
\textsuperscript{196} See, e.g., T. Campbell, Federal Rule of Civil Procedure 68: A Comment 19 (Stanford Law School Law and Economics Program Working Paper No. 31, 1987) ("As long as plaintiffs or defendants escape having to pay the full cost of going to trial (most importantly, by not paying the other side's attorneys' fees) it can be expected that they will each indulge in more than the optimal amount of litigation.").
itself; or (3) to deter, punish, and compensate for litigation misconduct such as discovery abuse, thus using transaction costs to deal with a problem that itself largely has to do with misuse of transaction costs; or (4) in the case of offer of settlement rules, in hopes of inducing realistic bargaining on the merits. Because discussion of such devices gets quickly into specific proposals, further treatment of both attorney fee awards and court user fees is saved for the final part on illustrative measures.

4. Advance Incentives versus Requirements-cum-Sanctions. There are perhaps two main (and often overlapping) ways to encourage desired behavior. One is to tell people that they must do something and then, if they do not, to impose sanctions. These either can be fairly clear and automatic or more indefinite and discretionary. The second way is to tell people in advance that if they do something, they can qualify for some benefit they want, or that their rewards will be reckoned in a certain way (which those setting the rewards expect normally to result in desired behavior). Under the second general approach, those who find the benefits not attractive enough, or fail to take the desired steps, simply do not get the benefits, or find their rewards calculated in ways that turn out to be disadvantageous given how they conducted themselves. The second route can have the advantage of making after-the-fact sanctioning proceedings unnecessary.

As Professor Maurice Rosenberg wrote in the same article in which he advocated “tracking”:

Rather than devise additional rules propelled by threats of sanctions and penalties, a modern procedural system should try to develop incentives and rewards of positive kinds to encourage lawyers to act in harmony with the system’s goals. Essentially, it should look for ways to reward compliance rather than punish non-compliance. The incentive approach is not only more pleasant, it is more efficient, for it does not require enforcement activities, satellite litigation, or other extra steps.197

Although the general point is far from a novel one, it may not have been prominent enough in thinking about litigation reforms. Some procedural rules do use sanctions clearly defined in advance that normally do not require much judicial effort to determine and implement: no one compels litigants to present a personal jurisdiction dismissal motion

197. Rosenberg, supra note 183, at 248; see also Elliott, supra note 91, at 322 (footnote omitted): We would almost certainly do better by structuring a procedural system in which the incentives presented to private litigants and their attorneys rewarded the kind of behavior that we as a society wish to encourage, rather than depending on judges to detect undesirable behavior and repress it after the fact.
when they make another motion relying on Rule 12(b) grounds, or orders them to file a compulsory counterclaim; the rules make it clear beforehand that waiver is a consequence of failure to make a timely motion or filing. Still, many rules either do not take advantage of advance incentive possibilities (for example, denial of prejudgment interest), or rely heavily on post-misconduct individualized sanctioning proceedings (for example, discovery).

5. *The Provision of Legal Services and Access to Justice.* Efforts to deal with cost, volume, and delay in conventional litigation face a dilemma, or at least a danger: the remedies used to attack these problems could come at too great a cost to other goals, as by reducing the availability of legal services and providing inferior or ineffective redress for the violation of legal rights. Caps on attorney fee awards, even if defensible on various grounds, discourage attorneys from taking affected cases in the first place. ADR is sometimes criticized for providing "second class justice" to society's have-nots (and defended as more accessible and even better than assembly-line justice in overcrowded courts). Substantial user fees applicable to a broad range of cases, or general loser-pays fee shifting, as a practical matter might too often close courthouse doors. At the least, then, reform efforts must pay close attention to the side effects that the paths being explored would have on access to justice.

The dilemma, however, may be less intractable than it at first appears, for responses to litigation problems can serve multiple ends. Careful crafting of litigation finance rules, for example, can enhance desirable access by encouraging strong claims and equalizing party strengths while acting as an appropriate filter against very weak claims.198 The present fee shifting regime for federal civil rights cases attempts to accomplish these goals with its basically one-way pro-prevaling-plaintiff approach, sensibly tempered with the *Christiansburg* rule199 allowing shifting in favor of defendants when plaintiffs brought or pursued baseless claims, and the *Marek* rule,200 permitting defendants to reduce their fee exposure with an offer of judgment.

198. See, e.g., Leubsdorf, *supra* note 126, at 449 ("If properly shaped, . . . a rule [allowing recovery of attorney fees as damages] would not encourage plaintiffs' lawyers to spend needless hours on cases, or discourage defendants from raising valid defenses, or reduce settlements. Indeed, the rule might be formed so as to make defendants more willing than they are now to raise valid defenses and to maintain incentives to settle."); Rowe, *supra* note 92, at 148-54 (discussing effects of different fee rules on pursuit of strong small claims, on "nuisance" suits, and on claims and defenses of litigants of modest means); Note, *Fee Simple: A Proposal to Adopt a Two-Way Fee Shift for Low-Income Litigants*, 101 HARV. L. REV. 1231, 1241 (1988) (advocating loser-pays fee shifting but with attorneys rather than clients liable for shifted fees).


VII. ILLUSTRATIVE MEASURES

The foregoing discussion of problems and approaches attempts to frame general issues without going too deeply into highly specific proposals. To add concreteness, and because more than one of the themes and approaches discussed above often bear on a single possible response, this section picks out several main potential reforms for purposes of illustration. Two seem to warrant mention but little additional comment—changes in administrative review, discussed above,201 and prejudgment interest on damage claims. The latter is fairly simple and straightforward; it follows both from ideas of full compensation and from focus on ex ante incentives, since it makes delay less attractive for defendants.202 Many states now provide for prejudgment interest,203 most often not from the time of the wrong but rather from the date of filing,204 that approach makes some sense to encourage people to file early rather than wait until near the running of the statute of limitations, although it can deny full compensation and encourage “sue first, ask later” premature filings.205 In any event, either variation seems preferable to the traditional rule of no prejudgment interest.206

The major possible paths considered here are: (1) broadened attorney fee shifting to encourage meritorious claims, discourage groundless ones (thus stopping short of the English rule), and deter and punish abusive tactics; (2) means of reckoning attorney fee awards that require less after-the-fact contention, and provide better advance incentives, than the present method of rate-times-hours “lodestar” approach and case-by-

201. See supra text accompanying notes 127-37.
202. It might also reduce somewhat the urgency that plaintiffs feel about getting paid, although they may need the money quickly without regard to whether they can expect interest on it. At any rate, delay that is objectionable to both parties would be preferable to delay caused by one party’s taking advantage of a one-sided, undercompensatory rule to the detriment of the adversary.
205. Id. at 219.
206. In support of the award of prejudgment interest, see Gorenstein Enters. v. Quality Care USA, 874 F.2d 431, 436 (7th Cir. 1989) (Posner, J.) (adopting federal common law presumption in favor of prejudgment interest for victims of federal law violations); Alschuler, supra note 31, at 1823. For a preliminary empirical study suggesting that juries already may inflate verdicts so that they effectively award prejudgment interest at more than the market rate, see S. Carroll, JURY AWARDS AND PREJUDGMENT INTEREST IN TORT CASES (1983). For illustration of persisting inconsistency in the law on awards of prejudgment interest, compare Loeffler v. Frank, 108 S. Ct. 1965, 1970 (1988) (prejudgment interest available in suit against United States Postal Service under federal civil rights laws because of “sue and be sued” clause in statute governing USPS) with Monessen S.W. Ry. v. Morgan, 108 S. Ct. 1837, 1844 (1988) (state courts may not award prejudgment interest in suit under Federal Employers’ Liability Act because Congress has failed to amend law enacted when denial of such awards was general rule).
case determination of a contingency multiplier; (3) provision for formal offers of settlement affecting liability for post-offer attorney fees, with adaptations to existing fee shifting rules and possibly some protections against severe effects; (4) substantial cost-based court user fees; and (5) depending both on arguments over values and goals and on the results of current experience and studies, expanded use of alternative dispute resolution mechanisms, primarily to provide early evaluations so as to facilitate voluntary settlements, as a lower-cost track for cases of moderate scale, and for non-zero-sum disputes.

A. More Attorney Fee Shifting?

The varieties of conceivable attorney fee shifting schemes are many, and any major change would have to be carefully designed to accomplish its purposes and not cause too many side effects in the form of unjust results and high transaction costs. (It is always possible to give a good idea a bad name by carrying it out badly.) Specific possibilities include: (1) two-way, loser-pays fee shifting on the English and Continental model; (2) primarily one-way, pro-prevailing-plaintiff shifting, at least in selected areas in which it is desirable to provide strong incentives for the pursuit of claims, as has already been done with federal civil rights claims and with small claims in several states; (3) fee shifting against parties (perhaps with liability at least shared by attorneys) who are found to have filed unreasonable claims or defenses, or to have maintained them after it became apparent they were baseless; and (4) expansion of fee shifting against unsuccessful discovery motions and resistance, and against procedural abuses generally. In addition, sections below on fee award calculation and offers of settlement bear on the points being discussed here.

1. The English Rule for America? Those responding to American litigation problems often look for solutions to England’s loser-pays rule on attorney fees. Indeed, fee shifting proposals may be something of a barometer of attitudes in American legal culture. No one should be too surprised that in a society with fairly strong emphasis on easy access to the courts, the virtually unique American rule, particularly its aspect that denies recovery to prevailing defendants, has retained fairly strong roots. The 1960s and 1970s, when the emphasis on access to justice became even stronger, saw the enactment of many of the most prominent one-way pro-prevailing-plaintiff fee shifting statutes. And recent calls for

a closer look at the English rule\textsuperscript{208} seem to correlate with a sense of Tocquevillian surfeit, that in keeping access to justice easy we have made too much of a good thing.

Loser-pays fee shifting does have desirable effects—for example, fuller compensation of winners and deterrence of nuisance claims. The English approach, though, has negative effects as well, and it may be possible to get the benefits without at least some of the problems. In brief, the English rule works harshly in close cases, especially when a plaintiff was entirely reasonable in pursuing a claim that turned out at trial to lose.\textsuperscript{209} As a result, the rule may excessively discourage the pressing of plausible but not clearly winning claims, particularly when the prospective plaintiffs are strongly risk averse. This effect is especially likely to fall heavily on middle class people with something to lose but not so many assets that they can tolerably afford to lose much.\textsuperscript{210} Furthermore, for cases in which the parties remain in disagreement on their assessment of the likely outcome of trial, the English rule can actually make settlement less likely—other things being equal, it increases the gap between the litigants.\textsuperscript{211}

2. One-Way Pro-Prevailing-Plaintiff Fee Shifting. For various reasons, some kinds of claims may not get brought as much is socially optimal unless they receive extra encouragement. Furthermore, in some kinds of litigation, there often exists a regular disparity in power between the sides, as can be the case with employees suing their employers for wage and hour or civil rights violations, or with private individuals suing the government. In such situations, a rule that a prevailing plaintiff, but not a prevailing defendant, is normally entitled to a fee award can encourage the pursuit of claims and help equalize the litigating strengths of the parties.\textsuperscript{212} Such considerations seem to underlie much existing fee

\textsuperscript{208} See, e.g., Figa, supra note 207; Schraub, Don't Tinker with It, Reform It!, Wash. Lawyer, July-Aug. 1989, at 22-24.

\textsuperscript{209} See, e.g., Rowe, supra note 96, at 655-57.

\textsuperscript{210} See, e.g., Rowe, supra note 92, at 153-54.

\textsuperscript{211} See id. at 157. One-way rules can have that same effect, but to a lesser extent. Id. For an excellent economic analysis of the likely effects of different fee shifting rules, see Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEGAL STUD. 55 (1982).

\textsuperscript{212} See, e.g., Rowe, supra note 96, at 663-64 ("When one side in a particular type of litigation regularly has the advantage of superior resources, holding out the prospect of reimbursement of fees can improve the position and stiffen the resolve of the relatively weaker side.") (footnote omitted).

Empirical research seems needed on the basic question of how much attorney fee award provisions actually encourage pursuit of claims. Professors Stewart Schwab and Theodore Eisenberg of
shifting, demonstrated in federal minimum wage\textsuperscript{213} and civil rights cases\textsuperscript{214} and under the federal Equal Access to Justice Act.\textsuperscript{215}

One area in which pro-plaintiff fee shifting is under-used—although the suggestion is likely at first to seem out of place—may be small claims. Even strong small claims often are not worth pursuing because plaintiffs' attorney fees could take too much of, or even exceed, any recovery. Encouraging small claims by fee shifting raises the specter of an already burdened system facing a flood of added small claims. Yet several states do have fee shifting laws for small damage cases,\textsuperscript{216} and on further reflection the idea of encouraging the pursuit of strong small claims by fee awards may not be so frightening after all. They are often not pursued now because they are not worth pressing; but if plaintiffs did pursue them, it is likely that such claims usually would be settled quickly (often, even before court filing) because they would not be worth defending.\textsuperscript{217}

To put it another way, most small claims will not be litigated fully because they are not worth litigating; that can come about in either of two ways—their not being pursued at all, or their not being defended against. Between the two alternatives, the second seems clearly preferable. Yet now, a plaintiff's threat to pursue even a strong small claim is often hollow because of the expense, which can permit prospective defendants to refuse to negotiate. Making the threat more real could lead to more effective enforcement of rights without, perhaps, many more court filings because the threat could yield pre-filing settlements and even altered primary behavior.\textsuperscript{218} Finally, smaller claims—if they do get pursued—are strong candidates for simplified alternative dispute resolution,\textsuperscript{219} as discussed below.

\begin{footnotesize}
\bibliography{paths}
\end{footnotesize}
3. Fee Shifting Against Groundless or Unreasonable Claims and Defenses. In the Christiansburg case, the Supreme Court interpreted the federal fee shifting statutes to modify the traditional "bad faith" rule, which requires a finding of subjective bad faith for a fee award against a losing plaintiff. For cases in which prevailing plaintiffs are normally entitled to a fee award, the Court held that prevailing defendants could qualify for a fee award if the plaintiff's claim was frivolous, unreasonable, or groundless, or was pursued after it clearly became so in the course of the litigation (as by discovery), even if no subjective bad faith was found.

It may initially seem odd, since Congress has decided that it wants to use fee awards to encourage plaintiffs, for the Court to interpret the statutes so as to make it somewhat easier than usual for defendants to recover them as well. Doing so, however, makes excellent sense, for pro-plaintiff shifting gives at least some encouragement to bad claims as well as good ones. To gain a filtering effect—to counter the undesirable encouragement of bad claims—some offsetting incentive is needed. It is also important, as the Court recognized in Christiansburg, to apply the rule not only to cases of frivolous filings; a claim that was plausible when brought can turn out to be not merely a loser at trial but clearly baseless before trial. A measure that gives a defendant the leverage of a possible fee shift may enable the defendant to get the plaintiff to abandon the claim without a negotiated nuisance payment.

To deter and compensate for nuisance litigation, it is worth considering whether and how far the Christiansburg rule should be generalized beyond the contexts in which it now applies, including possible applicability to baseless defenses when a prevailing plaintiff is not otherwise entitled to a fee shift. It seems quite justified and should provide desirable incentives to relax the present bad faith rule; the result would be to make fee shifts somewhat easier when a party not only lost, but should also have known never to raise the claim or defense, or clearly should have abandoned it.

A possible complement to broadening the applicability of the Christiansburg rule is attorney liability for fees shifted under the rule. Many awards under Christiansburg have been nominal or sharply reduced because of plaintiffs' lack of means. The awards thus fail to compensate

221. Id. at 421-22.
222. See generally Edwards, supra note 47, at 902 (need for mechanisms to deal with frivolous claims); Wade, supra note 82.
defendants for much legitimate legal expense. These decisions are understandable, given that the plaintiffs could not begin to pay all of defendants’ reasonable fees. Yet this gap between fees incurred and those compensated for partly defeats a purpose of the rule: it reintroduces the possibility that plaintiffs can bargain for nuisance settlements on the basis of fees that defendants can expect not to recover. Attorney liability in such situations could intensify conflict of interest problems and would be a fairly radical step, although it has been taken recently in related and sometimes overlapping areas such as Rule 11.224 And if the standard is one of frivolousness or unreasonableness, administered so as not to penalize those who pursue plausible cases that lose, the attorneys seem to deserve little sympathy.

4. Fee Shifting for Procedural Abuse and on Discovery Motions. Much has been done in the last several years to increase the use of sanctions in general, and attorney fee awards in particular, in connection with various forms of procedural abuse. Most prominent are the parallel amendments to Federal Rules 11, 16, and 26, with their certification requirements and enhanced sanction powers. Such measures respond to the “prisoner’s dilemma” situation in discovery225 and, if successfully used, reduce one side’s ability to weaken the other’s settlement position (based on the merits) by forcing the adversary to incur substantial unreimbursable litigation costs. The main reasons for the amendments were not merely abusive pleading and motion practices and excessive discovery in some cases, but also the limited use courts had been making of their sanctioning powers.226

Rule 11, in particular, has been very heavily litigated since its amendment in 1983 and is commensurately controversial.227 Two recent, significant studies shed light on Rule 11 and find what may be surprisingly broad support for it. While recognizing problems with the Rule, they also conclude that it is serving several desirable purposes. The combination of at least some success with still limited empirical knowledge about the Rule’s effects suggests the need for further work before

224. See also Note, supra note 198 (proposing two-way fee shifting with attorney liability for cases of low-income litigants).
225. See supra note 160 and accompanying text.
considering any major revisions. One of the studies, by Thomas Willging for the Federal Judicial Center (FJC), was based on judge and attorney interviews and on published and database sources. It found widespread if qualified support for Rule 11, major satellite litigation occurring primarily when courts impose large compensatory sanctions as opposed to modest deterrent ones, and modest sanctions facilitating settlement. It also reported little chilling effect on creative advocacy or unpopular causes, and some success in deterring frivolous filings.\textsuperscript{228}

The other study, by a Third Circuit task force for which Professor Stephen Burbank of the University of Pennsylvania served as Reporter, gathered extensive data on unreported as well as reported Rule 11 cases in the Third Circuit, and considered published literature and case law nationwide. It corroborated the FJC study's findings on significant benefits including contribution to settlement and the general lack of serious chilling effects on zealous advocacy. It did, however, find disproportionate imposition of sanctions on plaintiff's side in general and civil rights plaintiffs and counsel in particular.\textsuperscript{229} The study calls for similar work in a circuit with different approaches to Rule 11 sanctions.\textsuperscript{230}

Among the main conclusions to be drawn from these studies appear to be, first, that repeal or major overhaul of amended Rule 11 would be premature. Second, to avoid costly satellite litigation and chilling of zealous advocacy while retaining sanctions' desirable deterrent effects, courts should be wary of making large compensatory awards. Finally, the Third Circuit study should be promptly replicated elsewhere.

B. \textit{Incentive-Based Approaches to Calculating Attorney Fee Awards.}

One of the greater problems with attorney fee shifting is the collateral litigation it engenders over the amounts to be awarded. Indeed, perhaps the strongest single argument for keeping the American rule against fee shifting comes down to the question, "Is fee shifting worth it?"; at least based on experience so far, the transaction costs of awarding fees have been quite high. If the system hopes to rely on more fee awards as one reform measure in finding a "better way," then it must deal effectively with the problems of how to reckon them without usually facing costly, extensive second rounds on fees.

Here, the approach of trying to use advance incentives for desired behavior seems potentially quite fruitful. A first example comes from

\begin{itemize}
\item\textsuperscript{228} See T. Willging, \textit{The Rule 11 Sanctioning Process} 1-2 (1988).
\item\textsuperscript{230} See id. at xiv-xv.
\end{itemize}
Professor John Leubsdorf’s proposal for a fixed risk contingency multiplier, which would involve a single ratio (such as 1.5 or 2) set in advance to govern all cases of a certain type. The frequent practice until recently, of setting multipliers after the fact on a case-by-case basis, somewhat perversely paid handsome rewards for rare success in making a silk purse out of what prospectively looked like a sow’s ear. It thus assessed the stiffest awards against defendants whose resistance, at least in advance, seemed most reasonable. A less egregious, but probably more insidious, defect of the case-by-case approach is that it fails to exploit the possibility of giving attorneys incentives to take cases down to but not below a certain level of likely success, which a fixed ratio would accomplish. The Leubsdorf proposal also should reduce transaction costs by permitting courts to avoid litigation over the exact amount of the multiplier after the merits have been settled or decided.

Another measure, suggested by such commentators as Professors Kevin Clermont and John Coffee, is to depart at least to some extent from the rate-times-hours “lodestar” approach for calculating fees. Although recently strongly endorsed by the Supreme Court, the lodestar method engenders much litigation over the applicable rates and number of hours reasonably spent. Among other problems, it provides attorneys with an incentive to spend too many hours on a case and then in effect calls on the court to sanction the attorney for bill-padding by disallowing hours, a process that is inevitably contentious. Assuming the lodestar remains the dominant approach—which it must for such situations as most claims for injunctive or declaratory relief, and fee awards to

---

231. See Leubsdorf, supra note 157, at 501-04.

A majority of the Supreme Court appears to have concluded that contingency multipliers are permissible in some circumstances under present federal attorney fee statutes. Pennsylvania v. Delaware Valley Citizens’ Council, 483 U.S. 711, 735-53 (1987) (Blackmun, J., joined by Brennan, Marshall, and Stevens, JJ., dissenting); id. at 742 n.7 (noting agreement of concurring Justice O’Connor with dissenters’ view on permissibility of contingency enhancements). The ruling, however, is one of statutory interpretation only; the adoption of any fixed multiplier scheme would presumably have to come by Act of Congress in any event.

232. If the idea were, say, to encourage claims down to those with two-thirds apparent probability of success, the multiplier would be set at 1.5, or a fifty percent increase. If the legislature wanted to encourage some types of claims more than others, the multiplier could be set in advance at different levels for different types of cases. The five Justices endorsing contingency enhancements in Delaware Valley II appear to have subscribed to the idea of general as opposed to case-by-case contingency enhancements, but without settling on any specific ratio. See Delaware Valley II, 483 U.S. at 745-47, 751-53 (Blackmun, J., dissenting); id. at 731, 734 (O’Connor, J., concurring in part and concurring in judgment) (compensation for contingency must rest on treatment of cases as a class, not on risks peculiar to individual case).


defendants—it might at least profit from some standardization, such as regularized hourly rates, prescribed fee application forms, and handling of all claims by a single magistrate serving like the English “taxing master.”

One alternative to the lodestar, at least in cases involving money recovery, would be to base the fee award (which can come either from the recovery, as in some common fund or class action cases, or from the adversary) in part or entirely on the amount recovered. The theoretical microeconomics of such arguments quickly get highly complex, but the Clermont proposal for a hybrid contingent and hourly fee can illustrate the general idea. If a lawyer were to receive a fee based on a combination of an hourly rate and a lower-than-normal contingent share, then in the aggregate (including losing cases) the lawyer would be adequately but not excessively compensated—yet in any individual case the lawyer would be wasting time to run up hours when the chances that more effort would increase the recovery were small. But the formula also should counteract the temptation to accept a modest settlement too soon when more effort might well benefit the client significantly. This approach could both align the interests of attorney and client and, if extended to the means of calculating a shifted fee, give the adversary some protection against running up of hours by the plaintiff's lawyer. If those incentives generally worked well, trust in them could permit much less intensive review of the justifiability of hours spent.\(^{236}\)

A further issue in connection with the calculation of fee awards is the possibility of legislatively capping them at a certain rate. High fee awards, particularly against governments, have led to much critical reaction and to proposals for caps at such figures as $75 per hour.\(^{237}\) The topic provokes much controversy; governments recoil at what they see as their taxpayers having to enrich high-priced lawyers. At the same time, defenders of market-rate awards see rate cap proposals as an effort to reduce the enforcement of the rights of the impoverished, by making their representation less economically competitive with regular commercial practice than it already is. The incentive-based proposals discussed above could reduce the problems that lead to calls for legislative caps, by

\(^{236}\) Cf. Coffee, supra note 137, at 724 ("If one wishes to economize on the judicial time that is today invested in monitoring class and derivative litigation, the highest priority should be given to those reforms that restrict collusion and are essentially self-policing. The percentage of the recovery fee award formula is such a 'deregulatory' reform because it relies on incentives rather than costly monitoring.").

eliminating large multipliers and at least partially shifting the focus from
hours to recovery while still not compromising the enforcement of rights.

C. Offers of Settlement Affecting Fee Liability.

If attorney fee rate caps could be controversial, offers of settlement
as one possible path to a "better way" certainly will arouse disagreement.
The Civil Rules Advisory Committee's proposals to amend Federal Rule
68 in 1983 and 1984 drew much criticism,238 and the Committee has
apparently shelved the topic at least for the time being.239

While use of offer devices raises many problems, and the criticisms
are significant, the benefits that such rules might achieve could prove
substantial. They can "smoke out" realistic settlement offers early by
giving parties a positive benefit (possible fee recovery, or canceling fee
liability) from making such offers rather than the detriment of appearing
weak in negotiations.240 They give parties with strong claims or defenses,
who otherwise might have to yield more in negotiations than the merits
seem to warrant (because of the threat of unrecoverable fees of their own
or liability for the other side's), an effective way of countering groundless
opposition.241 And they hold out the possibility, without adopting the
English loser-pays rule and incurring its negative effects, of affording vir-
tually full compensation: a party with a strong claim who makes a rea-
sonable, early demand will likely get either a good settlement without
large investment of lawyer time, or a judgment including a fee award.

This list of benefits, however, must not obscure the possible difficul-
ties arising from formal offer of settlement devices that affect liability for
post-offer fees. First, once the device has "smoked out" a reasonable
offer, the offeror in some cases may have reason to "dig in" and not be
forthcoming in further negotiations. It is attractive to make a formal
offer because it improves the offeror's expected outcome from trial—she
gets fee recovery, or does not owe the other side's post-offer fees, if the
adversary rejects the offer and does not improve on it. That very incentive
to make an offer—improving the expected results of trial—makes

238. See, e.g., Burbank, supra note 4; Simon, supra note 101, at 12-19. Among the objections
urged most strongly were that the proposed changes were too severe in their likely effects on plainti-
fiffs, that they ran counter to congressional policy in federal fee shifting laws, and that they exceeded

239. See Simon, supra note 101, at 24 n.142.

240. See, e.g., Cooter, Marks, & Mnookin, supra note 159, at 244-45 ("Offers to compromise in
effect tax hard strategies and subsidize soft strategies . . . . Both players will want to revise their
strategies to make more generous offers.") (footnote omitted).

In terms of some of the analytical themes developed in part VI, offer rules use transaction cost
incentives to reduce the transaction costs from extended bargaining and litigation; they strengthen
each side's reasons not to engage in strategic behavior that could lead to a negative-sum outcome.

241. See Rowe, supra note 92, at 169.
trial relatively more attractive compared to settlement than if the offer was never made, thus reducing the chances of settlement if the offer is not accepted.\textsuperscript{242} Second, offers can be a powerful weapon against the risk averse, because they introduce the possibility of substantial loss where none existed before. An insurance company, for example, can "low-ball" a claimant with an ungenerous offer; then, even the fairly small chance of having a verdict that comes in below the offer more than eaten up by the high fees of company counsel might drive underfinanced claimants to accept much less than the likely fruits of trial.\textsuperscript{243} Third, offers may undercut the purposes of congressional fee award statutes by reducing the encouragement Congress meant to give plaintiffs.

These problems should be at least partly soluble, and the potential value of offer devices may be great enough to warrant trying to work out the best forms they might take. The "dig-in" effect might be reduced by providing that an offer would begin to affect fee liability only a certain time \textit{after} the offer was made. The impact on the risk averse could be lessened by allowing fee-affecting offers only after first-round arbitration awards, which serve to reduce uncertainty about likely second-round trial verdicts; by disallowing adverse shifts against parties who were willing to accept such first-round awards; by saying that failure to improve on an unaccepted offer can reduce a plaintiff's recovery to zero but not below; and by other means that retain but temper the device's effects.\textsuperscript{244} And offer rules can be harmonized with congressional purposes in fee shifting statutes by the approach taken in some lower federal courts since the Supreme Court's \textit{Marek} decision: the effect of failure to improve on an offer, at least unless the rejection was baseless under \textit{Christiansburg} standards, can be limited to denying post-offer fees to a plaintiff rather than extended to making the plaintiff liable for defendant's fees.\textsuperscript{245}

\textbf{D. Substantial Court User Fees?}

User fees present difficult questions. They represent an attempt to deal straightforwardly and efficiently with problems resulting from the availability of public adjudication services at much below cost, which can result in overuse and queueing. At the same time they may fail to account adequately for external benefits of fairly free access to courts (for example, deterrence, creating precedents, preventing self-help), pose

\textsuperscript{242} See id. at 166-68.
\textsuperscript{243} See id. at 168-69.
\textsuperscript{244} See \textit{generally} J. \textsc{Shapard}, \textit{The Influence of Rules Respecting Recovery of Attorneys' Fees on Settlement of Civil Cases} (1984).
many practical problems, discriminate against plaintiffs, and encounter some serious constitutional objections. Judge Posner advocates user fees to influence forum choices and reduce federal court overloads;\(^{246}\) former Solicitor General Rex Lee, asking why court access should be favored among ways the government spends money to help the poor, urges user fees on a fairly general basis;\(^{247}\) Professor Alschuler suggests them only for cases in which a party rejects, and fails at trial to improve on, the result of a less formal first-stage adjudication.\(^{248}\)

Under the English practice in which costs (including attorney fees) "follow the event," court user charges simply increase the burden of costs that losers normally bear. In this country, where losers do not generally pay substantially beyond judgments on the merits, more-than-token user fees would raise several issues. When would the fees have to be paid—in advance, which might limit access too much, be too anti-plaintiff, and raise problems of eligibility for and litigation over waivers? How would user fees be affected by the outcome of the case—shifted in case of plaintiffs' success, which would charge defendants more heavily than we do now, or unshifted, which would deny full compensation and probably be too anti-plaintiff for many? Or would both sides have to bear some user fee in any event—and would that be too anti-defendant, especially when the claim was frivolous? Raising these questions is not to imply that an efficient, just user fee system would be impossible to devise, but rather to point out some of the problems that must be considered in making the effort.

In dealing with these issues it seems useful to identify the legitimate purposes behind user fee proposals and, given their problems and the benefits of free access, to ask whether user fees or other means are the best way to serve the ends. The goals include discouraging frivolous claims, reducing backlog problems from overuse of a service priced below cost, and raising money to help support the courts. Some of the measures already mentioned could help achieve these aims, particularly fee shifting targeted against frivolous claims and ADR diversion to reduce backlog.\(^{249}\) Since court funding requires small enough amounts compared to other services, and legislatures could reduce other court appropriations, judicial budgets might not in the end get much net help from user fees. In brief, the goals behind user fee suggestions are legitimate, but ones that often can be served by other means.

\(^{246}\) See R. Posner, supra note 46, at 132-34.
\(^{247}\) Lee, supra note 193.
\(^{248}\) Alschuler, supra note 31, at 1853.
\(^{249}\) Required use of ADR before judicial trial also amounts to a substitute user fee of a sort—making the user go through another and sometimes costly process instead of paying fees.
Yet even if broad user fee suggestions deserve to be rejected, some use of substantial fees might be quite warranted in specific types of cases. One use would be to punish and deter serious litigation misconduct; just because other incentives, such as attorney fee shifting, exist and deter some abuses, that does not require abandoning stronger measures when the fee incentives are not strong enough.\textsuperscript{250} Similarly, user fees may be warranted when well-financed adversaries try big cases that take especially large amounts of court time, and in connection with two-tier systems when a party dissatisfied with the first-round result fails to do better after demanding trial.

E. The Uses and Misuses of Alternative Dispute Resolution.

The forms, purposes, benefits, and issues of alternative dispute resolution are many. It appears both as a true voluntary “alternative” outside the official system and as a more or less formal adjunct to court or agency proceedings. In several ways, however, ADR fits with the concerns and approaches this paper has stressed: it can facilitate settlement on terms related to the merits by giving early previews of a case and its likely outcome. It also appears that ADR hearings can, in a sense, enrich settlements. Although participants in court-annexed ADR must usually settle eventually to avoid trial, arbitration hearings may at least partially supplement bilateral lawyer-to-lawyer settlement negotiations. This increased litigant participation may contribute to more favorable reactions to the process.\textsuperscript{251} Thus in some instances (especially routine moderate-scale disputes) ADR may provide—depending on the outcome of much present experience and research\textsuperscript{252}—a “better way” that is cheaper than regular adjudication and high in user satisfaction, while also avoiding some of the strains of protracted litigation.\textsuperscript{253}

\textsuperscript{250} Cases in which courts have levied user fees, not just attorney fees, for frivolous litigation include Edwards v. Marsh, 644 F. Supp. 1564, 1571-73 (E.D. Mich. 1986) (modest user fees against both lawyer and client under Rule 11); Robinson v. Moses, 644 F. Supp. 975, 982-83 (N.D. Ind. 1986) (substantial user fees as Rule 11 sanction against pro se litigant). \textit{See also}, e.g., Cannon v. Loyola Univ., 116 F.R.D. 244, 245-46 (N.D. Ill. 1987) (threatening to impose Rule 11 sanctions payable to court for waste of judicial resources, and citing other cases).


\textsuperscript{252} \textit{See}, e.g., \textit{Federal Judicial Center}, 1987 \textit{Annual Report} 20-21 (mentioning studies under way of several federal districts’ court-annexed arbitration programs).

\textsuperscript{253} For a critique of participant satisfaction as a criterion of quality in evaluating ADR mechanisms, see Luban, \textit{The Quality of Justice}, 66 Den. U.L. Rev. 381, 403-07 (1989). Luban argues that using participant satisfaction as a measure overlooks externalities, “sour grapes” attitude changes, problems with interpersonal utility comparisons, and substantive values. Partly, these criticisms can be met by the structure of the ADR system itself (as by excluding types of cases with significant externalities). Moreover, dispute processing characteristics that lead to high participant satisfaction may also tend to produce results viewed as accurate. \textit{See supra} text accompanying notes 88-89.
To the extent that it aids settlement, ADR could complement (and even precede) offer devices; for it seems that to get reluctant parties to bargain seriously around realistic levels early on, what is needed is either third party intervention or a device that makes especially clear the benefits (especially, saved litigation costs) from early settlement. And in their possible use for mid-sized disputes, ADR mechanisms may turn out to provide the "tracking" approach that best spares such controversies from the threats of excessive formality, cost, delay, and harsh antagonism that many see in regular litigation. In both these respects, ADR has the purpose or effect of dealing with the problems of "negative-sum" situations.

Several ADR devices that are not final and binding serve the purpose of providing an early outside evaluation and thus aid settlement in a relatively noncoercive way. Examples include voluntary mini-trials, "summary" (advisory) jury trials, "early neutral evaluation," and court-annexed arbitration. The evaluation results so far have been generally favorable. Yet despite these mostly positive user responses, it is a commonly noted paradox that voluntary ADR programs have


255. Further research might confirm an impression that in significant respects, American and West German systems are converging from different directions on something like Professor Alschuler's suggested "two-tier" trial system. See Alschuler, supra note 31, at 1845-46. American reforms often introduce some sort of relatively quick neutral evaluation before our extensive pretrial discovery, preserving the right to regular court trial if the parties do not accept the preliminary award or settle. The Germans, trying to move toward American-style single event trials, see supra note 109, but lacking our pretrial procedures, temper the danger of trial results skewed by surprise with an "appeal" that can involve de novo factfinding. See R. Trott, supra note 109, at 58-59 (although recent West German reforms have tried to reduce the introduction of new facts and issues on appeal).

The result in both systems seems to be a fairly rough-and-ready first hearing that is likely to suffice for many disputes, with the backstop of a more formal proceeding that builds on the first round. If this convergence is indeed taking place, and particularly if anything similar is also happening in other industrialized democracies, that may suggest that Alschuler's idea proposes a valuable general model for ordinary civil dispute resolution processes in mass societies. Cf. von Mehren, supra note 109, at 623-26 (noting other recent tendencies toward convergence in American and West German civil justice reform, including increases in managerial judging in both systems, lower discontinuous trials in Germany, and rising emphasis on efficiency).

256. The literature on evaluation of ADR programs is voluminous. For a concise survey of results as of 1986, see Hensler, What We Know and Don't Know About Court-Administered Arbitration, 69 Judicature 270 (1986). For a critical survey with an exhaustive bibliography, see Eszer, Evaluations of Dispute Processing: We Do Not Know What We Think and We Do Not Think What We Know, 66 Den. U.L. Rev. 499 (1989). Eszer argues that the analytical frameworks underlying most evaluation work are themselves in need of critical reevaluation in many respects.

For reports on particular programs, see, e.g., S. Clarke, supra note 251 (North Carolina state court-ordered arbitration); E. Lind, R. MacCoun, P. Ebener, W. Felstiner, D. Hensler, J. Resnik & T. Tyler, The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences (1989) (comparing litigant perceptions of fairness in trials, court-annexed arbitration, and judicial settlement conferences, and
been used less than one might expect given the evaluation findings.\textsuperscript{257} That forces us both to ask why this is and whether the system can justify requiring parties to go through ADR processes they do not elect voluntarily.\textsuperscript{258} One possible response is that adversarial attitudes, combined with the substantial user fees voluntary ADR usually requires, keep litigants from perceiving and acting upon potential gains from choosing ADR. Or, as the slowly changing nature of attitudes has been described, “Real men don’t mediate.”\textsuperscript{259} Further, voluntary ADR in practice is often final; with parties for whom that is a problem, court-annexed programs can eliminate it by preserving access to court.

Concerning ADR as a “tracking” device, proposals and experiments abound—particularly to make middle-range cases worth pursuing without excessive cost and burden to parties and the system.\textsuperscript{260} Some of the

\begin{footnotesize}


259. Thus the “Prisoner’s Dilemma” situation provides a possible justification for \textit{mandatory} ADR. \textit{See} supra note 161.

260. \textit{See}, e.g., Alschuler, supra note 31; Rosenberg, Rient, & Rowe, \textit{Expansion of ADR: The Roadblock to Justice}, JUDGES’ J., Summer 1981, at 16. Both articles urge simplified initial procedures for cases of moderate scale, assuring full court trial (but with possible cost consequences) if parties remain dissatisfied with the results of first-level adjudication. Another approach that attempts to combine the advantages of individualized treatment with the availability of various “tracks” is the “multi-door courthouse,” now being implemented in a few cities. \textit{See}, e.g., Kessler & Finkelstein, \textit{The Evolution of a Multi-Door Courthouse}, 37 CATH. U.L. REV. 577 (1988); Sander, supra note 257, at 12.

One recent proposal to encourage use of ADR has been a bill that would require lawyers in federal court civil actions to file notice of having advised clients of ADR options, with Rule 68-type fee shifting sanctions for failure to comply or for unreasonable rejection of a formal offer to engage in ADR. H.R. 473, 100th Cong., 1st Sess. (1987); S. 2038, 99th Cong., 2d Sess. (1986). The idea has received some prominent endorsements, \textit{see} Silas, \textit{Costly Lawsuits: Senate Bill Touts Alternative, A.B.A. J.}, July 1, 1986, at 19, but it made no progress in the 99th or 100th Congresses. It may suffer from intruding too much in the lawyer-client relationship, from being too gimmicky, from overemphasis on sanctions instead of positive incentives, and from driving people too rapidly toward an ADR system that is fast developing but perhaps not developed enough to handle a sudden rush of cases pushed in its direction. \textit{See also} Simon, supra note 101, at 80-81 (arguing that ADR and offers of settlement can complement each other but should not be formally linked); Comment, \textit{The Alternative Dispute Resolution Promotion Act of 1986: A Critical Analysis}, 31 ST. LOUIS U. L.J. 981, 997

\end{footnotesize}
potential benefits have been mentioned already—speed, low cost and stress, informality, user satisfaction. The dangers include adding yet another level of proceedings to complicate further an already complex process,\(^{261}\) and that rates of seeking review will be high enough that for many parties costs are greater instead of less. If court-annexed ADR works badly, it can become an added part of the problem of negative-sum situations rather than part of the solution.

Beyond such primarily empirical issues lie many deeper disagreements about the worth and dangers of ADR. Mostly but not exclusively from the left, ADR has been criticized on many levels—for formalism in attempting to classify disputes for different kinds of treatment; for providing second-class justice to have-nots; for "cooling out" serious social grievances by diverting deprived claimants to forms of proceedings that provide effective protection neither for their rights nor against powerful adversaries; for expanding the reach of the existing power structure's social control; and for exposing ADR participants to bias by taking away the formality of full court process.\(^{262}\) These criticisms have begun to

---

\(^{261}\) (1987) (criticizing bill for not requiring early provision of information about ADR, and for vague and discretionary sanctions).

\(^{262}\) See, e.g., THE POLITICS OF INFORMAL JUSTICE (R. Abel ed. 1982); J. AUERBACH, JUSTICE WITHOUT LAW? (1983); Brunet, Questioning the Quality of Alternative Dispute Resolution, 62 TUL. L. REV. 1 (1987); Delgado, Fairness and Formality, supra note 162, at 1391-1404; Merry, supra note 33; Nader, The ADR Explosion—The Implications of Rhetoric in Legal Reform, 8 WINDSOR Y.B. ACCESS TO JUST. 269 (1988); Sarat, supra note 155; see also Nader, Disputing Without the Force of Law, 88 YALE L.J. 998, 1019-20 (1979) (footnotes omitted):

[T]he relative power between purchasers and providers is a key variable with respect to the ability of nonjudicial complaint mechanisms to resolve disputes satisfactorily. The fundamental problem that constrains the performance of alternative complaint mechanisms today derives from their inability to compensate adequately for the ineffective bargaining position of the individual who confronts large corporations and government bureaucracies.

The problem Nader raised ten years ago of imbalance favoring repeat payers, while hardly unique to ADR as opposed to regular adjudication, remains a serious concern. See, e.g., Guily & Slavin, Rush to Unfairness: The Downside of ADR, JUDGES J., Summer 1989, at 8, 10 (enumerating circumstances in which ADR may unfairly disadvantage parties with fewer resources). On the
draw responses, a major argument of which is that the skeptics compare admittedly imperfect ADR to an unrealistically ideal picture of the judicial system. For the most part, however, the critics and defenders of ADR have not really joined issue.

To a considerable extent, these disagreements may not be amenable to resolution by either argument or empirical research, because they often proceed from sharply different perspectives and value emphases. To oversimplify, those who are strongly egalitarian and inclined to stress doing substantive justice from a "system" perspective are likely to be suspicious of many forms of ADR, while those who are more market-oriented and inclined to stress litigant satisfaction from a "user" perspective will probably be more favorable. The values and perspectives, of course, are not always polar or mutually exclusive; but since a social will to provide resources for near-perfect justice in every case seems most improbable, tradeoffs become inevitable—and with them, the issue of how to approach rationally the issue of what sort of justice is good enough in different kinds of situations. Distilling and advancing thought on that problem has been a major effort of this paper.

whole, however, it does not yet appear that the disadvantaged are worse off in ADR than in traditional adjudication. Tyler, The Quality of Dispute Resolution Procedures: Measurement Problems and Possibilities, 66 DEN. U.L. REV. 419, 436 (1989). For discussion of designing dispute resolution systems to focus on interests rather than power, see W. Ury, J. BRETT, & S. GOLDBERG, GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COSTS OF CONFLICT (1988).

263. See, e.g., Goldberg, Green, & Sander, ADR Problems and Prospects: Looking to the Future, 69 JUDICATURE 291, 293 (1986); Menkel-Meadow, supra note 173.

264. For an effort to draw on social science research concerning perceptions of procedural justice to suggest considerations in designing court-annexed arbitration programs so as to minimize "second-class justice" dangers, see E. LIND & T. TYLER, supra note 89, at 124-27.

265. See Tyler, supra note 262, at 435:

Different groups have approached the purpose of alternative dispute resolution procedures from different perspectives and, from these varying perspectives, have found different issues to be of primary importance in assessing the "quality" of dispute resolution efforts. This is not only a difference of opinion about how alternative dispute resolution procedures should be evaluated, but a reflection of value differences about the goals of dispute resolution.