THE COSTS OF ORDINARY LITIGATION

David M. Trubek*
Austin Sarat**
William L.F. Felstiner†
Herbert M. Kritzer††
Joel B. Grossman†††

* Professor of Law, University of Wisconsin Law School. B.A., 1957, University of Wisconsin; LL.B., 1961, Yale Law School.

** Associate Professor of Political Science, Amherst College. B.A., 1969, Providence College; M.A., 1970, Ph.D., 1973, University of Wisconsin.

† Senior Social Scientist, Institute for Civil Justice, The Rand Corporation. B.A., 1951, Yale College; LL.B., 1958, Yale Law School.

†† Associate Professor of Political Science, University of Wisconsin. B.A., 1969, Haverford College; Ph.D., 1974, University of North Carolina-Chapel Hill.

††† Professor of Political Science, University of Wisconsin. B.A., 1957, Queens College, Flushing, New York; M.A., 1960, Ph.D., 1963, University of Iowa.

This Article was prepared for the National Conference on the Lawyer's Changing Role in Resolving Disputes, October 1982, at Harvard Law School. Support for this Article and funding for the Conference were provided by the American Bar Association and its Section on Litigation, Charles E. Culpepper Foundation (Harvard Law School Program in Dispute Settlement), National Institute for Dispute Resolution, Control Data Corporation, General Motors Corporation and the Gillette Company. A revised version of this Article will appear in the volume of conference papers and comments to be published by Law and Business, Inc., Harcourt Brace Jovanovich, in 1984. Permission to publish this Article is gratefully acknowledged.

This Article reports some of the principal findings of the Civil Litigation Research Project (CLRP). CLRP was funded under United States Department of Justice Contract JAOIA-79-0040 and National Institute for Justice Contract J-LEAA-003-82 with supplemental support from the University of Wisconsin Law and Graduate Schools.

The results of this study are set forth in D. Trubek, W. Felstiner, J. Grossman, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report (Mar. 1983) (University of Wisconsin Law School). The entire report consists of a summary and three volumes. Volume I is entitled Studying the Civil Litigation Process: The CLRP Experience; Volume II is entitled Civil Litigation as the Investment of Lawyer Time, and Volume III is entitled Other Studies of Civil Litigation and Dispute Processing. This Article summarizes aspects of the report, principally those in Volume II. The views contained herein are those of the authors and do not necessarily represent the official views or policy of the United States Department of Justice. The authors acknowledge the contribution of the entire CLRP staff in all phases of the work reported on, but wish especially to thank Elizabeth McNichol for her assistance in data analysis, Jeanette Holz for typing, and Richard Miller, Stephen McDougal, Robert Sikorski, Kristin Bumiller, Laura Guy and James McLaughlin for research assistance.

TABLE OF CONTENTS

INTRODUCTION

It is widely believed that the costs of litigation are rising and that these costs are an important public problem. In professional and policy discourse, the "costs" discussion focuses on the amount of money clients must spend to use courts for processing disputes. Rising costs are seen as a barrier to some and a problem for all litigants.[1] The debate over "costs" merges with a broader range of

1. The most visible discussion of costs at present concerns the relation of costs and delay. Delay, viewed as the result of excessive resort to procedural technicalities, is thought to raise the economic costs of using the system. *See* Weller, Ruhnka & Martin, *American Experiments for Reducing Civil Trial Costs and Delay*, 1 CIV. JUST. Q. 151 (1982). Economic costs breed other costs: "There is sound evidence that the expense of litigating—for both defendants and plaintiffs—warps the substantive law, contorts the face of justice, and, in some cases, essentially bars the courthouse door." Rosenberg, Rient & Rowe, *Expenses: The Roadblock to Justice*, JUDGES' J., Summer, 1981, at 16, 17. *See also* Kastenmeier & Remington, *Court Reform and Access to Justice: A Legislative Perspective*, 16 HARV. J. ON LEGIS. 301, 303 (1979) ("The sad fact today is that the twin demons of cost and delay are asphyxiating our courts, both state and federal. This has pernicious effects on the quality of justice rendered by these courts.").

The reformers expressed concern with what are assumed to be the deleterious effects of costs. This led, in 1979, to the formation of the A.B.A. Action Commission to Reduce Court Costs and Delay. The underlying premise for the Action Commission's work was the presence of a direct relationship between the time a case requires and the amount of money a client must invest. Proceeding from this assumption, the Action Commission, together with other national and state organizations, experimented with methods to reduce the amount of time required to litigate a dispute. *See* Janofsky, *A.B.A. Attacks Delay and the High Cost of Litigation*, 65 A.B.A. J. 1323 (1979); Hufstedler, *The Future of Civil Litigation*, 1980 UTAH L. REV. 753, 760; Hufstedler & Nejelski, *A.B.A. Action Commission Challenges Litigation Cost and Delay*, 66 A.B.A. J. 965 (1980). While many of these projects appear to have some initial success in reducing the time spent in arriving at a final outcome, there is no corresponding evidence that they effectively reduce the cost of the process. McDermott, *Equal Justice at Reduced Rates*, JUDGES' J., Spr. 1981, at 16, 18–19.

Some writers blame high costs on a particular part of the litigation process. Over-lawyering, typified by excess discovery, is generally found to be the principal culprit. *See, e.g.*, Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981). Liberal discovery is thought to enhance the adversary nature of litigation. Numerous writers have noted how those lawyers who are out to match the drama of

issues about the role of courts in society and problems created by too much litigation or litigation about matters best handled outside the courts.[2]

In this Article we seek to contribute to the debate over "costs" by analyzing direct expenditures of time and money on processing disputes through litigation. We believe this analysis will help clarify the debate on litigation costs in particular and the role of courts in general. We approach this task by reporting on the result of a study conducted in five parts of the United States. In each of five federal judicial districts, we studied randomly sampled civil cases from the federal district court and at least one state court. We also surveyed the general population in these districts. These data, including over 1,600 cases and many thousands of interviews, form part of a larger data base collected by the Civil Litigation Research Project (CLRP).

This Article begins with a description of the central theme of the empirical investigation—litigation as an investment—and discusses the questions that arise as a result of viewing litigation as an investment.[3] Next, this Article provides some descriptive information about the sample of cases we have used in the analysis and the lawyers who responded to our survey.[4] Then we explain the model we used to estimate the amount of resources invested in litigation.[5] Next, we describe how much time lawyers spend on the typical civil lawsuit, what they spend their time doing, and explain what influences a lawyer to spend more or less time on a case.[6] Finally, we assess whether clients recover as much as they spend on lawsuits.[7]

---

such megacases as United States v. IBM Corp., No. 69-200 (S.D.N.Y. filed Jan 17, 1969), exceed proper limits of responsible lawyering. *See Colloquy on Complex Litigation*, 1981 B.Y.U. L. REV. 741 (comments by several prominent lawyers on the abuse of liberal procedural rules). Other writers, examining the overall or public costs of litigation, have discussed removing entire classes of cases from the courts, alleging savings for both the parties through a speedier process and the courts through reduced workloads. *See, e.g.*, Note, *Compulsory Judicial Arbitration in California: Reducing the Delay and Expense of Resolving Uncomplicated Civil Disputes*, 29 HASTINGS L.J. 475, 503 (1978).

2. *See, e.g.*, ACCESS TO JUSTICE (M. Cappelletti ed. 1978); Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1976); Bell, *The Pound Conference Follow Up: A Response From the United States Department of Justice*, 76 F.R.D. 320 (1976).

3. *See infra* text accompanying notes 8–15.

4. *See infra* text accompanying notes 16–46.

5. *See infra* text accompanying notes 47–55.

6. *See infra* text accompanying notes 56–69.

7. *See infra* text accompanying notes 71-85.

I. THE CENTRAL THEME—LITIGATION AS AN INVESTMENT PROCESS

Litigation can be examined in many ways.[8] We have chosen to conceptualize the process as the investment of scarce resources to achieve a future result. The resources to be invested include time and money; however, as it is frequently possible to translate the value of time expended on litigation into monetary terms, these may come to the same thing. The results to be achieved include recovering money (plaintiffs) or avoiding paying money (defendants), stopping something from happening or causing some act to be carried out. In theory, all results could probably be given a monetary value, but in practice this proves extremely difficult. In the empirical investigation of litigation as an investment, we have therefore distinguished between expenditures of time and of money, and between monetary and non-monetary results.

We claim no originality in our decision to conceptualize litigation as an investment. This approach has been widely used by economists, from whom we have adapted the conceptual framework that oriented our data collection and analysis.[9] We have,

---

8. Litigation costs, for instance, can be considered an explanatory factor or a factor to be explained.

9. Two economic models of litigation are current in the law and economics literature. In the "optimism" model, trial ensues when both plaintiff and defendant are excessively optimistic about their expected returns from a trial. Expressed as a formula: Trial occurs when plaintiff's expected judgment exceeds defendant's estimate by, at least, the sum of their legal (transaction) costs. *See* Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279, 285–88 (1973); Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 63 (1982). The second model employs concepts from games theory and focuses on when the bargaining process is likely to falter and trial to follow. In this "recursive" model, parties are likely to continue bargaining as long as their objective knowledge of what the other side is considering is not overwhelmed by attempts at second-guessing. Once both parties indulge in excessive second-guessing, the likelihood of mistaking the other side's intentions becomes so great that the chances for reaching a mutually agreed upon settlement fall off dramatically. *See* Cooter, Marks & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) [hereinafter cited as Cooter, *Bargaining*].

CLRP began with the "optimism" model, recognizing nevertheless that this model would not fully predict disputant decisions. An analysis was needed that included not only costs and stakes, but also a series of other variables likely to influence dispute decision making, such as those suggested by the "recursive" model. To this end, CLRP added to the optimism model a series of factors which could cause disputant behavior to deviate from those predicted by the economic model. These included variables such as (a) the existence and nature of past and future relationships between the parties; (b) "party capability"—i.e., personal and psychological characteristics of individual disputants and variation in the size and structure of organizational parties; (c) the type of lawyer used, the nature of fee arrangements, and lawyer-client relations; and (d) a series of factors related to the type of dispute itself, including areas of law, legal complexity and forum. In its surveys, CLRP attempted to elicit information relevant to these factors.

however, translated this approach into specific hypotheses that can be tested empirically with our data. In this Article we focus on two questions about the litigation investment:

(i) What determines the amount of time and money invested in a case; and

(ii) How "productive" are the investments which clients make in litigation; in other words, does the litigation investment "pay"?

A. *Investment Levels*

We begin by exploring the level of resources invested in litigating a case. We expected to find significant variation among cases in the amount of resources (time or money) committed. We hypothesized that the value of the expected result will significantly affect investment levels—*ceteris paribus*, the higher the "stakes" (positive or negative) the more resources a party will devote to the case. But if the stakes are a major factor influencing any party's investment decisions, they are not the only one. Perhaps the most obvious additional factor is the actual or expected investment by the other side. Litigation is an interactive process and one side's investment is likely to be influenced by the other side's actual or expected expenditure. Further, litigation investments, like most investments, occur under conditions of uncertainty; one cannot be sure of the outcome, the relationship between investment and result, or the other side's expenditures. Risk preferences, the willingness of a party to risk resources for uncertain outcomes, will thus influence litigation investment levels.[10]

The schematic diagram in Figure 1 explains the model set forth above. In this diagram, A makes an initial "investment decision" by considering (i) the expected return in light of A's risk preferences, and (ii) B's initial investment decision, which results from the same factors as A's. The actual investments of both parties influence returns. The model in Figure 1 is highly abstracted and fails to take account of the actual complexity of real cases. And because the model incorporates a simultaneous interaction process, it cannot be directly tested unless very stringent conditions are met.[11]

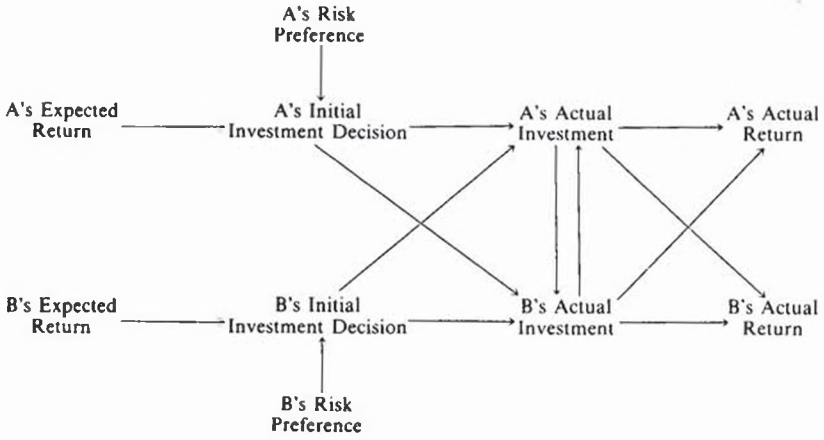
---

10. Cooter, *Bargaining*, *supra* note 9, at 237–38.

11. Statisticians describe this problem as one of "identification." As the term suggests, one must have the right types of information in order to "identify" or get estimates of the coefficients of the model. The kind of information required involves important substantive assumptions about the nature of the process underlying the model. We do not believe that such assumptions are warranted in this context, and hence we do not believe that the model is readily identifiable. For technical discussions of the identification problem, see J. JOHNSTON, ECONOMETRIC METHODS 352–56 (2d ed. 1972).

FIGURE 1

THE INVESTMENT DECISION MODEL



To examine the litigation data we collected, we developed an empirical model that is both more comprehensive, because it includes many variables not incorporated in the simplified scheme of Figure 1, and more suitable to statistical analysis, because it approaches the problem of interactive investments in an indirect way which we will describe below. We use this model to explain variation in the time lawyers spend on civil lawsuits.[12]

B. *Does Litigation Pay? Assessing Costs and Benefits*

Viewing litigation as an investment naturally raises a series of questions: Do resources invested in litigation yield acceptable benefits? How large are the gains? Do the benefits from litigation exceed the costs? Does litigation yield more than other forms of dispute processing?

At the theoretical level, these questions are complex. In the first place, from whose viewpoint should we assess the "yield" from litigation investments? We have to look separately at whether litigation pays for clients, for lawyers, and for society as a whole. As Earl Johnson has suggested, litigation investments that may be highly lucrative for lawyers may not be optimal for clients, and vice versa.[13] Moreover, even if both lawyers and clients gain from litigation, it does not follow that litigation is a cost-effective process for society. The simple fact that taxpayers rather than liti-

12. See *infra* text accompanying note 47 for a discussion of why we chose to explain expenditures of lawyer time rather than client dollars.

13. Johnson, *Lawyers' Choice: A Theoretical Appraisal of Litigation Investment Decisions*, 15 LAW & SOC'Y REV. 567, 575–76 (1980-1981).

gants pay the cost of operating the courts shows why calculations of social and private costs must diverge.

A second issue is whether one can analyze litigation investments in isolation. If one says "litigation pays" (or doesn't pay), the question arises: Compared to what? CLRP was designed, in part, to permit comparative analysis of the costs of litigation and alternative approaches to resolution of disputes, and to determine if clients did "better," objectively and subjectively, in litigation or in other processes available for dispute resolution. For this reason, we collected data on cases in "alternative institutions," such as arbitration, administrative agencies and mediation programs, and on disputes that were "resolved" by negotiation without third party intervention.[14]

A third issue is whether monetary indicators of gains and costs are, by themselves, adequate to assess whether litigation "pays." A client, for example, might secure a substantial net recovery after paying lawyer's fees and other costs, and still be considered in a worse position if one took into account the non-monetary costs of the litigation experience.[15] In theory, the "investment" approach does not inherently limit analysis to monetary costs and benefits. But methodological problems, complex as they are when one limits the focus to monetary factors, become formidable when one seeks to go beyond this dimension.

A complete analysis of the costs of litigation would examine private and social costs, study the relative cost of litigation and other dispute processing modes, and in some way incorporate non-monetary costs and benefits. We are not, however, able to deal with all these facets of the problem. Although we have collected data from alternative institutions and "bilateral disputes," we have not yet analyzed them, and can only report findings on litigation. Further, for methodological reasons, we have restricted our analysis to monetary (or easily translated to monetary terms) costs and benefits of litigation. Finally, we focus on whether litigation, examined in isolation, "pays off" in monetary terms for plaintiffs and defendants. We discuss some of the monetary costs of litigation not borne by litigants, using the limited data avail-

14. Kritzer, *Studying Disputes: Learning from the CLRP Experience*, 15 LAW & SOC'Y REV. 503 (1980-1981) [hereinafter cited as Kritzer, *Studying Disputes*]; Trubek, *Studying Courts in Context*, 15 LAW & SOC'Y REV. 485 (1980-1981) [hereinafter cited as Trubek, *Studying Courts*]; D. Trubek, W. Felstiner, J. Grossman, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report, Volume I: Studying the Civil Litigation Process: The CLRP Experience (Mar. 1983) (University of Wisconsin Law School) [hereinafter cited as D. Trubek, Studying the Civil Litigation Process].

15. D. Trubek, W. Felstiner, J. Grossman, H. Kritzer & A. Sarat, Civil Litigation Research Project: Final Report, Volume II: Civil Litigation as the Investment of Lawyer Time (Mar. 1983) (University of Wisconsin Law School) [hereinafter cited as D. Trubek, Investment of Lawyer Time].

able, but do not reach any overall conclusions from a social, as opposed to a private, point of view.

Before turning to the analysis, we present some descriptive information on the sample of cases we have used and the lawyers who responded to our survey. These data provide a picture of important dimensions of the world of civil litigation in the United States, a picture which may help correct some distortions in the way we think about litigation in general and its costs in particular.

II. THE WORLD OF LITIGATION—THE CASES AND THE LAWYERS

A. *Source of Data*

Our analysis of litigation investment is based primarily on a survey of lawyers throughout the country. We asked lawyers participating in selected cases about the case, its costs, and their background. For the principal analysis reported here, we have added information about the cases from court records. We also draw, to a lesser degree, on data from a parallel survey of the clients and a general household survey.

These sources are part of an even larger data base collected by CLRP under a contract from the United States Department of Justice. The primary source of data for CLRP was a sample of civil cases from state and federal courts and from "alternative institutions" like commercial arbitration. We supplemented this case sample by a set of "bilateral disputes" which never reached third parties. The case sample was drawn on a random basis in five federal judicial districts: Eastern Wisconsin, Eastern Pennsylvania, Central California, South Carolina and New Mexico. In each district we sampled terminated cases from the records of the federal district court and one or more representative state courts, and from a series of "alternative" institutions. We coded the data from these institutional records and then sought to interview clients and lawyers in each case. In addition, we conducted surveys of households and private organizations in each district to locate "bilateral disputes." Data from these surveys were integrated into our overall base, and some are reported here.[16]

We designed a sampling scheme to limit our data to what we call the "middle range" of civil disputes. We excluded disputes in which the initial claim was under $1,000, and dropped a few

16. For a complete description of the data base, see Kritzer, *Studying Disputes*, *supra* note 14, and D. Trubek, Studying the Civil Litigation Process, *supra* note 14. The raw data are available from the Interuniversity Consortium for Political and Social Research, University of Michigan.

"megacases" from the sample.[17] As a result, the sample excludes small claims and slightly underweighs the very large civil lawsuit.

We selected 1,649 civil lawsuits from court records; the court sample is about evenly divided between state and federal cases. We then tried to interview parties and attorneys of record in all these cases. Our most successful survey was of the attorneys. We interviewed 1,812 lawyers from these cases.[18] In the analysis which follows, we rely primarily on a subset of the responses—the 1,387 attorneys who took an hour or more to answer our full questionnaire.

In considering the results we report, the reader must appreciate the strengths and weaknesses of our data. While our original selection of cases from five districts was designed to be as representative of civil cases in the United States as possible, no sample limited to only five of the ninety-five federal judicial districts can be fully representative. We selected the cases at random from all cases that had terminated in 1978. We excluded certain types of civil cases, such as those which did not involve "disputes," as we defined this term.[19] For the types of cases included, however, our sample is basically representative of civil litigation in each district.[20] By including an equal number of federal and state cases in the sample, we substantially oversampled federal cases, since the latter probably comprise less than 3% of all civil cases filed in courts of general jurisdiction in the United States.[21] For this reason, we usually report federal and state court data separately.

---

17. Overall, 37 cases initially included in our sample were excluded as "too big" to be handled within the scope of the research.

18. We completed an additional 270 lawyer interviews involving cases that were not taken to federal or state courts. (These cases were processed by institutions like the American Arbitration Association.) Only 17.4% of the lawyers we contacted declined to be interviewed, though a number professed to have had little or no involvement with the case (even though their names appeared in the court files as the attorney of record). We believe that most of these low involvement cases indicate little expenditure of lawyer effort, so that the data we report tend to overestimate the level of lawyer involvement in the court cases.

19. *See infra* text accompanying note 37.

20. For specifics on which kinds of cases were excluded, see Kritzer, *Studying Disputes*, *supra* note 14, at 512. In addition to exclusions, we specifically limited divorce cases to a maximum of 20% of the cases from any general jurisdiction court that handled such cases.

21. While accurate figures exist on the number of federal court cases, comparable figures for state courts are difficult to acquire. Lieberman suggests that there may be as many as 350 to 500 times as many state court cases filed as federal court cases. This figure includes both courts of general and limited jurisdiction. He feels that about 20% of state cases are in courts of general jurisdiction. J. Lieberman, The Public Processing of America's Disputes: The Capacities and Capabilities of Our Courts and Other Formal Public Dispute Resolution Institutions 12–18 (Oct. 1982) (paper presented at National Conference on the Lawyer's Changing Role in Resolving Disputes, Harvard Law School). This would mean, then, that about 70 to 100 times as many state general jurisdiction cases as federal cases are filed each year.

Readers concerned with a statistical profile of all middle range civil cases in the United States should treat our state data as most representative. The reader should also bear in mind that we have not included cases from small claims courts or other specialized courts; this is a sample of cases that involve genuine disputes in state courts of general jurisdiction and the federal courts.

The main source for the data reported here was telephone interviews with attorneys. Conducted in 1981, these interviews lasted about an hour and covered all aspects of the case. We contacted the attorneys in advance and asked them to review their records prior to the interview. In many cases, since the events in question might have occurred some years before, it is inevitable that there were problems with selective memory ("recall bias"). Nonetheless, our data base is the best (indeed, probably the only) source of information on litigation costs and their effects currently available. The reader, aware of the limits of our data, will have to assess the plausibility of our conclusions and the policy results our findings suggest.

B. *Extraordinary and Ordinary Litigation*

One advantage of our data base is that it allows us to focus on what might be called the "typical" civil lawsuit. Much of the discussion of litigation in general and the "costs of litigation" in particular deals with the extreme ends of the range of litigation phenomena, not with what statisticians would call the central tendencies.[22] Three themes dominate the literature. First, the public hears a lot about the very large, complex case, usually involving major businesses, in which legal titans clash in forests thick with briefs, motions, discovery and endless trials.[23] Second, the unusual or problematic subjects for litigation are well publicized, with commentators questioning if the courts are not unwisely intruding into complex public policy issues[24] or privileged spheres of private life.[25] Finally, researchers have paid a good deal of attention to the minor dispute, where the conflict is too small to justify the investment of lawyer time and for which the existing court system

22. *See, e.g.*, Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RESEARCH J. 219; Janofsky, *Facing the Crisis of Court Costs and Delay*, B. LEADER, Jan.-Feb. 1982, at 22, 35.

23. *See, e.g.*, *Symposium on Judicial Administration*, 1981 B.Y.U. L. REV. 443. For a critical assessment of this literature, see 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) [hereinafter cited as Galanter, *Reading the Landscape*].

24. *See, e.g.*, Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975).

25. *See, e.g.*, Galanter, *Reading the Landscape*, *supra* note 23, at 10–11, 46–48.

may be either too costly or ineffective or both.[26]

Large cases and small claims raise important policy issues. But the large case is a rare phenomenon in our civil courts of general jurisdiction, and small claims do not reach these courts. Before we assess the "costs" of litigation in the United States or discuss the need for reform, it is important to examine the ordinary and typical cases. The CLRP data represent the bulk of what is going on in the courts. The "middle range" civil disputes we studied mostly involve routine legal business; many are standard tort and contract suits so familiar to the litigating bar and the bench, yet rarely discussed in the media or by proponents of reform.[27]

These data portray an image which varies from the picture of litigation projected in much popular and some professional discussions of the dispute resolution "problem." A casual reader of the literature on courts and court reform in the United States might conclude that Americans litigate with great frequency, and that the typical lawsuit is complex, costly, and time-consuming. Further, the reader might think that litigation involves the unconstrained exercise of adversary skills by legions of lawyers who devote many hours to such "lawyerly" activities as preparing motions, conducting discovery, writing briefs and conducting trials. All this effort might appear to impose a vast burden on judges who must rule on numerous motions, supervise extended discovery, conduct lengthy trials and render difficult judgments. Finally, it might seem that clients pay an exorbitant cost for services rendered in litigation and that fees eat up a substantial portion of recoveries.[28] While all this occurs, and probably occurs with some frequency, the typical case, as we observed it, is very different.

To reduce our data to a single, composite case that might be considered typical is difficult. But if we were to do this, we would describe the "typical" case as follows: first, the very fact that a dispute has reached the court and not been settled without litigation makes it unusual. Viewed against the baseline of potential lawsuits, litigation is not frequent, since for every dispute in the court records there are nine others that never even reach the filing

26. *See, e.g.*, D. McGillis & J. Mullen, Neighborhood Justice Centers: An Analysis of Potential Models (Oct. 1977) (report by Office of Development, Testing and Dissemination, United States Department of Justice); NO ACCESS TO LAW 58 (L. Nader ed. 1980).

27. Over two-thirds of the cases about which we interviewed lawyers involved either a tort or a contract issue (or both). Over 80% of the state court cases fell into this category. Because we deliberately undersampled divorce cases, these appear less frequently in our sample than might be expected. *See* Kritzer, *Studying Disputes*, *supra* note 14, at 512.

28. See Galanter, *Reading the Landscape*, *supra* note 23, for a complete review of the literature on the excesses of litigation.

stage.[29] Second, the 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. Third, the typical 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. The average plaintiff will recover some portion of the amount claimed, and the amount recovered will significantly exceed the money and the value of time spent on the case. Even the defendants can be said to have "gained" from the litigation, at least in the sense that their litigation expenditures are less than the amount by which plaintiff's claim was reduced during litigation.

This composite picture of ordinary litigation helps correct biases in discussions which focus on the extraordinary lawsuit or the very small claim. But these findings do not mean we question the need for reform in the civil justice system; indeed, quite the contrary is true. First, even if ordinary litigation is less problematic than the extraordinary case, cost-related problems still exist in this area, especially in the smaller or middle range claims where costs may exceed benefits. Second, even if the typical case is less problematic than the statistically unusual ones, at least six million civil cases are annually filed in the United States,[30] so that, even if only 5% are "extraordinary," these cases could consume substantial resources. Third, while our data do not deal with the small claim, what data we have confirm the view that litigation in conventional courts is not a cost-effective way to deal with many minor disputes.[31] Fourth, we show that litigation "pays" in the sense of yielding net monetary benefits. But we cannot say if these gains are wiped out by negative non-monetary features of the litigation experience. Moreover, we are not saying litigation clients do as well as they might if the system were changed. In the first place, our data provide some support for the view that lawyers appropriate some of the gains that might otherwise accrue to clients under more competitive market conditions.[32] Second, we cannot say

29. *See infra* text accompanying note 37.

30. Lieberman, *supra* note 21, at 14.

31. There is substantial evidence that many minor disputes have amounts in dispute less than would be the cost of a lawyer's time to process them. *See, e.g.*, Macaulay, *Lawyers and Consumer Protection Laws*, 14 LAW & SOC'Y REV. 115, 129–30 (1979); NO ACCESS TO LAW 58 (L. Nader ed. 1980); Silbey, *Case Processing: Consumer Protection in an Attorney General's Office*, 15 LAW & SOC'Y REV. 849, 865, 875–76 (1980-1981).

32. Johnson, *supra* note 13, at 575–77.

whether or not the clients of the lawyers we studied would have been even better off if their disputes had been handled in some other way.

C. *Some Dimensions of Litigation*

In this section we describe five "dimensions" of litigation: frequency, stakes, activities, lawyer time and costs. Within the limits of our sample of middle range civil disputes from five parts of the United States, we seek to give some idea of how often people in disputes actually use the courts, how much money is involved in those cases in which the basic dispute can be treated as a conflict over money, what actually occurs once a lawsuit is filed, what lawyers spend their time doing, and how much money is spent by litigants.

1. The Frequency of Litigation

Is litigation a frequent response to the disputes that arise in society? Some would say yes, arguing that Americans are unusually prone to resort to the courts when problems arise.[33] Marc Galanter has analyzed this view, which he calls "hyperlexology," and demonstrates that the view that Americans are unusually litigious is based more on myth than careful analysis of the data.[34] Our contribution to this debate is based on the survey we conducted of over 5,000 households in the five judicial districts studied. Our data cannot answer the question of whether we are litigating "too much," but it can suggest how frequently litigation occurs.[35]

Any empirical discussion of the frequency of litigation must employ a baseline—some measure of the number of opportunities to use the courts against which actual filing rates can be com-

33. *See, e.g.*, Barton, *Behind the Legal Explosion*, 27 STAN. L. REV. 567 (1975); Glazer, *Towards an Imperial Judiciary?*, 41 PUB. INTEREST 104 (1975); Manning, *Hyperlexis: Our National Disease*, 71 NW. U.L. REV. 767 (1977).

34. Galanter, *Reading the Landscape*, *supra* note 23, at 61–71.

35. Comparative disputing data, when available, could help us assess our own litigation rate. Jeffrey FitzGerald, a legal sociologist at LaTrobe University in Australia, recently completed the first phase of a comparative study of disputing in Australia and the United States. Using data from the CLRP household survey and a parallel survey in Australia, FitzGerald found that overall levels of disputing are remarkably similar for the two countries. However, although Australians appear more likely to recognize a grievance and to complain to a responsible party, they are somewhat less likely than are Americans to invoke the courts. J. FitzGerald, A Comparative Empirical Study of Potential Disputes in Australia and the United States 26, 49, 75 (1982) (working paper from University of Wisconsin-Madison Law School, Disputes Processing Research Program).

pared.[36] The litigation baseline is the number of transactions of a particular type which might ultimately lead to lawsuits. In studying medical malpractice litigation, for example, noting an increase in the number of cases filed is inadequate. This increase must be compared to rates of professional contacts which might generate lawsuits. Thus, one might employ for a baseline the number of visits to doctors, the number which result in injury or the number which result in perceived grievances. The frequency of malpractice litigation would then be a percentage of the number of visits, injuries or grievances.

Our baseline was the incidence of disputes which occurred in eight selected general areas—tort, consumer, debt, discrimination, property, government, post-divorce and landlord-tenant. A "dispute," for our purposes, occurs when an individual perceives a grievance, seeks redress and is at least initially rebuffed by the other party. To determine litigation frequency, we compared the number of "disputes" with the number of complaints filed in federal or state courts by disputants. (Note that by using filing as our measure of litigation, rather than some index of substantial court activity, we are overstating the rate at which disputes lead to judicial intervention.) We measured the incidence of both disputes and litigation by randomly sampling the general population in each of five geographic areas. This study provides a rough estimate of the frequency of litigation involving *individuals* in the United States.[37]

Overall, we found that 71.8% of individuals with grievances complained to the offending party, and that a dispute arose in 63.0% of these situations. Of these disputes, 11.2% resulted in a court filing. Figure 2 shows the overall disputing pyramid that emerges.

These figures show that lawsuits are filed in just over 10% of the disputes involving individuals where $1,000 or more is at issue. Approximately 90% of the cases were settled or abandoned without a court filing. When one realizes that in many lawsuits little or nothing occurs except filing the complaint, an 11.2% litigation rate does not seem particularly high compared to the potential baseline. Of course, in a country as large as the United States,

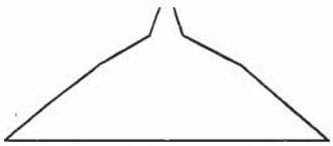
36. Lempert, *More Tales of Two Courts: Exploring Changes in the "Dispute Settlement Function" of Trial Courts*, 13 LAW & SOC'Y REV. 91, 95 (1978).

37. See Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525 (1980-1981), for a full description of the methodology used to measure the frequency of litigation by individuals and the overall results of the household survey. We also conducted a survey of organizations. For a full account of the organization survey, see D. Trubek, Studying the Civil Litigation Process, *supra* note 14, at 105–08.

FIGURE 2

A DISPUTE PYRAMID: THE GENERAL PATTERN
NO. PER 1,000 GRIEVANCES

Court Filings	50
Lawyers	103
Disputes	449
Claims	718
Grievances	1,000



even at such a rate there will be numerous lawsuits which will involve substantial judicial activity. Nevertheless, it is clear that litigation, even in the limited sense of starting a lawsuit, is by no means the most common response to disputes. As Table 1 shows, the lowest litigation rate is in the consumer area, a field in which the amount at stake is often comparatively small. The post-divorce disputes (e.g., adjustments in custody and support) have the highest litigation rate. This rate in part reflects the fact that many times even consensual arrangements must be ratified by the court.[38]

TABLE 1

LITIGATION AS A PERCENTAGE OF DISPUTES

All Disputes	11.2%
Post-Divorce	59.0%
Torts	18.7%
Property	13.4%
Government	11.9%
Debt	7.6%
Landlord	7.3%
Discrimination	3.9%
Consumer	3.0%

Note: Detailed description of these categories can be found in Miller & Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 566 (1980-1981).

We now turn to describing what goes on in the ordinary lawsuit once it is filed. These data are from two sources: the lawyer survey and the court records.

2. Stakes

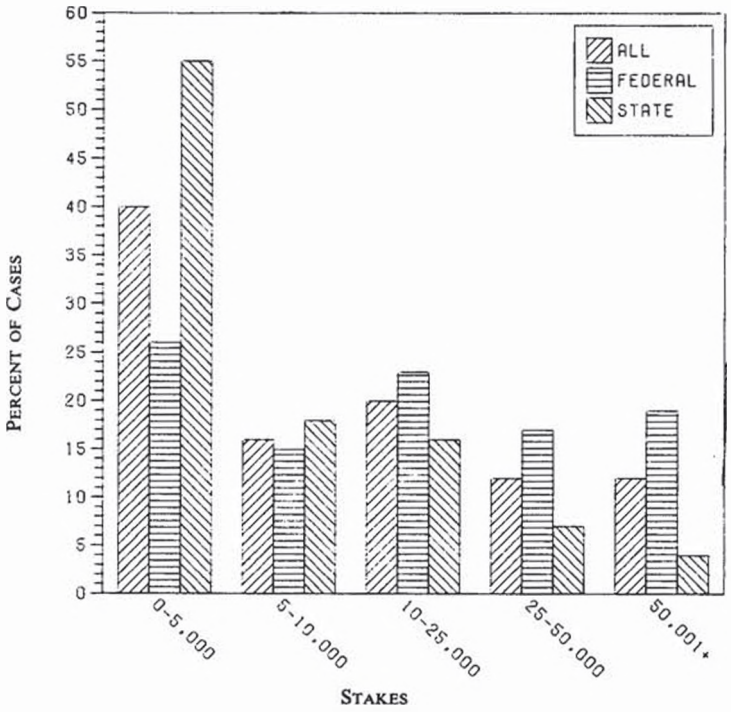
We first sought to estimate the amount of money the litigants thought was in dispute during the life of the lawsuit. To measure this, we used the lawyers' estimate of how much their client would

38. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 270 (1976).

have accepted or paid to settle the case. By using this variable, we tried to capture as accurately as possible the amount that the parties considered in controversy as they made decisions about investments in litigation. We preferred settlement amount to actual economic loss or potential exposure since we believe that lawyers, at least, in calculating case value in practice discount both loss and exposure for risk and transaction costs. We call this measure the "stakes" in the case, and report the highest figure if the attorney's view changed during the case.[39] In some of our cases the

FIGURE 3

DISTRIBUTION OF LAWYER'S PERCEPTION OF STAKES



39. We obtained our operational definition of stakes by asking the lawyers involved in the cases we studied the following question:

> Now, I'd like to ask some questions about what you thought your client(s) should take or do to settle the case. In these questions we are interested in *your view of the stakes in the case*, not in actual negotiations . . . . Did you ever form an opinion about what the case was worth *in terms of what your client(s) would be willing to take or do to settle the case?*

If so, we asked:

> Based on that opinion, what did you think at that time should have been done to settle the problem?

Lawyers who mentioned something other than money were asked:

attorneys could not give a monetary estimate of the stakes, but we did get monetary figures in 859 of our attorney interviews.

Figure 3 shows the distribution of stakes for the cases in our sample. Overall, 56% of the cases involved $10,000 or less. Only 12% of our cases involved stakes of $50,000 or more. Not surprisingly, state court cases tend to be "smaller" than cases filed in the federal courts. For state cases the median stakes is $4,500; for federal cases, $15,000. Most often courts do not manage cases in which vast amounts of money are involved. While the prospect of transferring 5, 10, 15, or 20 thousand dollars is by no means trivial, it does not convey an image of a court system overwhelmed with blockbuster, megacases.

3. Activities

What happens in ordinary litigation? There is a popular image that litigation involves extensive pretrial activity and protracted trials.[40] Our data suggest the contrary. Trials are rare, pretrial activity modest, and most cases terminate through settlement negotiations.

Less than 8% of the cases in our sample went to trial. In another 22.5%, the judge dismissed the complaint or rendered judgment on the merits without a trial.[41] The most frequent mode of termination is voluntary agreement between the parties, which occured in over 50% of the cases. Our data suggest civil judges and juries provide final, authoritative third party dispute processing in less than a third of the cases. More often, the courts serve as the background for bargaining between the parties. Bargaining occurs "in the shadow of the law," but is conducted primarily, if not exclusively, by the parties and their lawyers.[42]

Pretrial activity is much more common than trials, but modest nonetheless. Discovery, for example, is widely thought to be a cause of delay and spiraling costs.[43] Our data, however, suggest

---

> Suppose there could have been a settlement . . . which involved only a lump sum payment of money. What would you think it should have been?

40. Galanter, *Reading the Landscape*, *supra* note 23, at 10, 61–62.

41. In the 1649 court cases whose records we studied, there were ninety-one trials by the court and forty-three jury trials. Less than 10% of the cases terminated by a summary or default judgment. The judge dismissed the complaint in 12.2% of the cases and ordered the cases removed or remanded in .6%.

42. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 952–56 (1979).

43. *See, e.g.*, Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295, 1296 (1978); Brazil, *Civil Discovery: How Bad Are the Problems?*, 67 A.B.A. J. 450 (1981); R. Ellington, A Study of Sanctions for Discovery Abuse (May 1979) (Federal Justice Research Program, United

that relatively little discovery occurs in the ordinary lawsuit. We found no evidence of discovery in over half our cases. Rarely did the records reveal more than five separate discovery events. While our data are limited to the court records, these findings confirm the conclusion of an earlier study that even in federal courts discovery is used intensively only in a small fraction of civil lawsuits.[44]

4. Lawyer Time

The third dimension of litigated cases we measured was the time lawyers spent on cases and the way they allocated that time. Once again, these data demonstrate the differences between ordinary and extraordinary litigation. Our data show that a typical case involves relatively few lawyer hours and that attorneys spend almost half of this time in conferences with clients, factual investigation other than discovery, and settlement negotiation.

We asked all lawyers to estimate the number of hours they and other lawyers in their firm spent working on the cases which we were studying. The number of hours spent per case by each attorney varied from eight or fewer (our lowest category) to 2,200 hours. In the median case the lawyer spent 30.4 hours, while the mean for all cases (total hours in all cases divided by the number of cases) is 72.9. The distribution is set forth in Table 2.[45]

TABLE 2

DISTRIBUTION OF LAWYER HOURS PER CASE (ALL LAWYERS)

Total Hours	Percent of Cases
0 - 8	13
9 - 24	28
25 - 40	19
41 - 80	19
81 - 120	9
over 120	12
	100
Median: 30.4	N = 719

States Department of Justice); Lacy, *Discovery Costs in State Court Litigation*, 57 OR. L. REV. 289 (1978).

44. *See* P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 29 (June 1978) (Federal Judicial Center publication).

45. The figures shown in Tables 2 and 3 are based on the subsample of lawyer respondents we used in the explanatory analysis of lawyer time discussed below; this subsample was limited to lawyers who were paid on an hourly, flat or contingent fee basis, and who provided information about the monetary value of stakes.

Sixty percent of the lawyers (or firms) spent less than one person-week on the cases we asked them about. In 13% of the cases they devoted eight or fewer hours to the case.

In addition to asking for the total number of hours lawyers spent, we sought to determine how time was allocated among a series of different litigation activities. We asked the lawyers in our sample to indicate the percentage of time they spent in that case on each of nine separate activities, such as pleadings, discovery and settlement discussions. We then determined the average percentage for each activity for all the lawyers in our sample. Table 3 sets forth these percentages.

TABLE 3

AVERAGE PERCENTAGE OF LAWYER TIME DEVOTED TO ACTIVITIES

Activity	% of Time Spent
Conferring with Client	16.0
Discovery	16.7
Factual Investigation	12.8
Settlement Discussions	15.1
Pleadings	14.3
Legal Research	10.1
Trials and Hearings	8.6
Appeals and Enforcement	.9
Other	5.5
	100.0
	N = 704

The lawyers in our sample on average spent a relatively small portion of their time on legal research and formal procedural matters. They devoted less than 10% of the time in the case to trials or hearings, and more time to settlement negotiation than to legal research.

5. Monetary Costs

We secured information from clients and lawyers about the expenditures of time and money the clients make on litigation. Clients reported that the bulk of their expenditures were payments made to lawyers to cover fees and expenses. Payments to lawyers constituted 99% of out-of-pocket litigation expenditures for individual clients and 98% for organizations. Even when we add in the monetary value of the time clients spend on cases, fees and related expenses equal 88% of the median individual's costs. (For organizations, the comparable figure is 72%.) We found that ex-

penses,[46] as distinguished from fees, make up a very small percentage of the total bill for most lawyers, and probably are closely correlated to the fees. We chose, therefore, to concentrate description and analysis on legal fees as a reasonable proxy for total monetary cost.

The data in Table 4 reveal that legal fees in the world of ordinary litigation are modest. In almost half the cases we studied, the fees were under $1,000. In only 8% of the cases were fees over $10,000. Not surprisingly, fees are lower in state cases than in the federal courts. Twenty-five percent of the lawyers in our federal sample reported fees over $5,000, while lawyers in only 6% of the state cases received this level of compensation.

TABLE 4

TOTAL LEGAL FEES
(PERCENTAGES)

	All Cases	Federal	State
$0-1,000	46	34	59
$1,001-2,500	24	23	25
$2,501-5,000	14	18	10
$5,001-10,000	8	12	4
$10,000+	8	13	2

6. The Litigators

In addition to examining these dimensions of litigation activity, we sought information on the litigators. We wanted to get some idea of the settings in which they practice, their experience, specialization, and income. We report data only on private attorneys, house counsel and legal services lawyers. Government at-

TABLE 5

SIZE OF FIRMS FOR LAWYERS PRACTICING IN FIRMS

Number of Lawyers	N	Percent	Cumulative Percent
2	132	12.4	12
3-4	261	24.5	37
5-9	312	29.3	66
10-19	170	16.0	82
20-49	129	12.1	94
50+	61	5.7	100
	1065	100.0	

46. Expenses include such items as expert witness fees, stenographic costs and travel.

torneys were surveyed separately, but this data has not yet been analyzed.

Seventy-eight percent of the lawyers practice with firms (2 or more lawyers); the modal size firm is 5-9 lawyers. The distribution by firm size is shown in Table 5. In addition, 17% of the sample are solo practitioners, 3% are house counsel and 2% work for a legal services or legal aid program.

Some lawyers in our sample had practiced less than one year, and some had been at the bar over fifty years. Thirty-four percent had practiced less than five years, and well over half (58%) had been in practice ten years or less.

Our indicators point to a young but specialized litigating bar. The lawyers surveyed spent most of their time on litigation: the average was 75%. Twenty percent (274) of the lawyers devoted 95% or more of their time to litigation and only 2% reported spending less than 10% of their professional time litigating. The lawyers also tend to specialize in one area of law. The average lawyer reported spending half her time on the type of case we were interviewing her about. Over half the lawyers reported having already handled at least 200 such cases before. When asked to evaluate their own expertise in the field in question, 78% said they were "expert" or "somewhat expert."

Lawyers in the sample were asked about their average annual income from practicing law for the three years preceding the 1980 interview. The median lawyer's income from practice was $45,000. Most lawyers (60%) earned between $25,000 and $75,000. Only 5% reported incomes above $100,000 and only 3% made $15,000 or less.

TABLE 6

INCOME FROM PRACTICING LAW

Amount	N	Percent	Cumulative Percent
$0-15,000	32	3	3
$16-25,000	201	17	20
$26-40,000	313	28	48
$41-50,000	175	15	63
$51-75,000	221	19	82
$76-100,000	143	13	95
$100,000+	61	5	100
	1146	100	

Mean $53,000
Median $45,000

III. Investment Levels: Explaining the Expenditure of Lawyer Time

What explains the amount of resources invested in lawsuits? We focused on the number of hours the lawyer spends, rather than the dollars the client pays. We had three reasons for this choice. First, we accepted Johnson's[47] theory that lawyers are principal decision makers in litigation investment decisions, and one of the decisions they make is how much time to spend on the case. Second, the patterns of our data dictated a focus on hours. Seventy-one percent of all our plaintiff lawyers and 41% of all lawyers surveyed were paid on a contingent fee basis. Since fees in these cases were determined exclusively by the amount recovered, they were not a good measure of the resource investment decisions we wanted to study. Finally, in a national study like this, we can more easily compare hours than fees, as fees vary on a regional basis.

A. *The Model of Lawyer Time Investment*

The number of hours spent per case ranged from less than eight to over 2,000. This figure served as our dependent variable—the factor to be explained. To explain hours, we constructed a model of the investment process. This model consists of a number of independent variables, which we thought should increase or decrease the number of hours a lawyer will spend on any case, and can be seen as a series of related hypotheses about what will influence investments. We tested these hypotheses against our data by a statistical technique called multiple regression analysis. By using this method, we can both determine how well the whole model (all the independent variables) explains variation in hours, and assess the relative importance of specific variables.

1. Factors and Variables

The dependent variable in the model is the number of hours the lawyers reported they or their firm spent on the case in question. To explain variation in hours, we selected 29 independent variables which we could measure and which we had reason to believe would explain variation in time spent on the case. For exposition and analysis, we have grouped these variables into five major factors. These factors are: (a) *characteristics* of the "case" itself, such as stakes, complexity and duration; (b) the procedural *events* which occur; (c) the *participants*; (d) the *goals* of the participants, including the lawyers; and (e) certain strategic choices

47. Johnson, *supra* note 13, at 568–69.

made in case *processing and management*. The factors and the detailed indicators used to measure them are explained below.

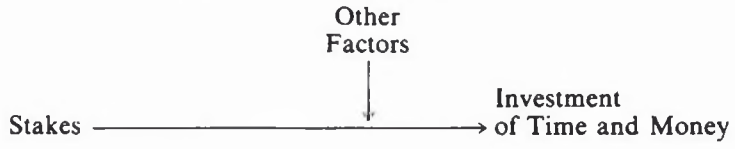
a. *Case characteristics*. We reasoned that the amount of money (or monetary equivalent) involved in the case, its overall complexity, and the length of time it took to process would have a significant impact on hours spent. These factors are related more to the nature of the "case" itself than to choices made in processing it, such as procedural events and management decisions, or to characteristics of the participants in it, such as client motivation, lawyer's goals, abilities and background.

We considered *stakes* to be one of the most important determinants of time investment. If litigation is the process of investing time to secure an expected "return," "stakes" is the measure, for plaintiffs, of what they could realistically gain by litigation expenditures, and for defendants, of what they expected they might lose from an adverse outcome. We reasoned that the higher the stakes, the more time parties would invest in the case.

When we began our work we expected to find that stakes would be the primary factor that would determine the amount of time spent on cases. At the same time, we recognized that factors other than stakes were likely to influence litigation investment decisions. We conceived of these factors as *modifying* an investment of time or money that would primarily be determined by stakes.[48] Some of these modifying factors, like those which measured lawyer expertise and planning, would reduce the time needed because they increased the productivity of the service. Others, however, like the legal complexity of the case, would increase the amount of time. But as Figure 4 suggests, in our original conception the modifying factors would increase or reduce an investment amount primarily determined by estimates of stakes.

FIGURE 4

INITIAL
STAKES MODEL OF INVESTMENT



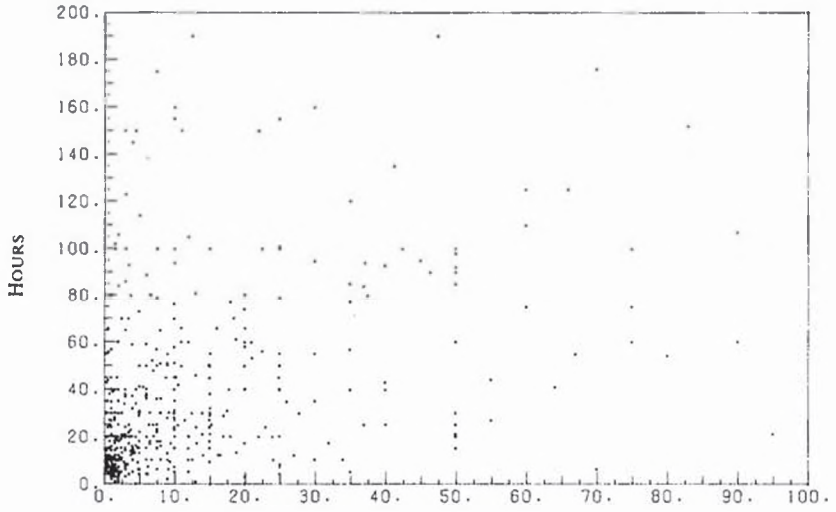
Early analysis of our data made clear that the stakes model, at least in the simple form that we had envisioned it, was an inaccurate picture of the litigation investment process. In constructing the model shown in Figure 4, we thought of stakes as "driving"

48. Trubek, *Studying Courts*, *supra* note 14, at 498–99.

the investment process. We quickly realized that stakes do not drive the investment process, but merely put a "cap" on the level of investment that will occur. This can be seen in the information displayed in Figure 5, a "scatterplot" of lawyers' hours and stakes. The vertical axis of the figures shows the number of hours spent on a case and the horizontal axis shows the stakes. Each point represents the hours-stakes combination for one case in our sample of lawyers. (Figure 5 includes all cases in which stakes were less than $100,000 and hours were less than 200.) While the figure shows a general rise in the level of investment as the stakes increase, the rise primarily occurs in the upper limits of time spent on the case; that is, the range of investment level increases as stakes rise, but there are still many cases with high stakes for which the level of investment is very low. The stakes set the upper limit on the hours a lawyer will spend, but other variables are more important in determining the actual hours that are invested.[49]

FIGURE 5

HOURS BY STAKES, CASES UNDER $100,000



STAKES (IN $1,000)

Some cases involve simple and clear-cut issues of law and easy questions of proof. In others, the law or facts may be complicated or unclear. The more complex the law involved, or the more difficult the problems of proof, the more time it should take

49. If we look only at cases under $10,000, the pattern is even clearer—that scatterplot shows almost no direct relation between stakes and hours.

to conduct the litigation. Our measure of *complexity* was based on the lawyer's evaluation.

Much of the discussion of the "costs" of litigation is in terms of "delay." We hypothesized that the length of time a case takes from filing to termination would have an independent effect on the number of hours worked by lawyers. If, for example, the case stretched over a long period of time, the lawyer would periodically refresh her memory of the case, or "find" things to do. We measured *duration* simply as the number of days elapsed from filing the case to its termination, whether by settlement, adjudication or abandonment.

b. *Events in the case*. A lawyer's time will be influenced by the "events" that occur in a case. Is there substantial pretrial activity? Does the case go to trial? By using the cluster of "events" variables, we sought to measure the relationship between the presence of several "events" and the number of hours attorneys spend on cases.[50] The cluster includes the number of (i) *pleadings*, (ii) non-discovery *motions and briefs* and (iii) *discovery* related events, including depositions, interrogatories, requests for admissions, medical exams and the like, plus discovery related motions. In addition, we examined whether there was a *trial* and whether there were *settlement negotiations*.

c. *Nature of participants*. The participants in the case are the lawyers and the clients. We classified clients as *individuals* or *organizations* because the literature[51] suggested that organizations would devote more resources to litigation than individuals.

With respect to lawyers, our classification was more complex. We created six separate indicators designed to measure variation in *lawyer characteristics*. *Specialization* measures whether the case in our sample fell within the lawyer's specialty or not. *Law school performance* is the lawyer's self-report of performance as a law student. Amount of *general experience* is the number of years the lawyer had been practicing law. *Litigation experience* is the proportion of the lawyer's time devoted to litigation. *Personal capacity* is a measure of the lawyer's feelings of efficacy based on a standard measure. Lastly, *craftsmanship* is the likelihood (self-reported) of spending extra time to make marginal improvements on legal documents; the more likely this was, the higher the "craftsmanship" score.

---

50. The inclusion of events in the model is meant, in large part, to take into account the interaction process in litigation. That is, events can be looked upon as an indicator of the level of the action-reaction process that is the heart of litigation. *See infra* notes 63 and 64 and accompanying text.

51. *See generally* Galanter *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974).

We expected that the first five variables, which measure ability and self-confidence, would be inversely related to the amount of time lawyers spend on cases. We reasoned that a more experienced, specialized, and confident lawyer would not have to spend as much time on a case as would an attorney who was newer to the field of law, to the courtroom, or to practice in general. We expected the *craftsmanship* variable to work the other way; that is, lawyers who were more oriented toward "craftsmanship" would spend more time on their cases, other things being equal.

d. *Participant goals*. We measured participant goals for both lawyers and clients by using data from the lawyers. We asked lawyers what they thought their *client's goals* were in the case. The "goals" variable, in a sense, modifies the "stakes" variable. We asked lawyers if they thought their clients were seeking as much money as possible, or just a "fair amount" (for defendants, to pay the least or pay a fair amount). We expected to find that the lawyer whose clients wanted to get the most (or pay the least) to put in more time on a case than the lawyer in an otherwise identical case whose client only wanted "fairness." We assumed that those clients (about 24% of our respondents' clients) who wanted to neither "get most/pay least" nor "get fair/pay fair" were primarily concerned with goals other than money.[52]

To get information on *lawyer goals*, we asked our respondents why they had taken the case in question. We reasoned that lawyers may have motives independent of their clients' which would affect the amount of time they spend on cases. From the answers, we constructed five lawyer goal variables designed to measure the predominance of different factors in the lawyer's decision to take the case. These are:

challenge—did the case present a challenge; was it intellectually interesting?

public service—did the case provide an opportunity for service to the public; was it taken because of sympathy for the client?

professional visibility—would the case increase the attorney's community standing, improve her position in the firm, create publicity for the firm?

making money—was the case taken primarily for the amount of money the lawyer would earn?

---

52. Prompted by the literature, *see, e.g.*, Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963), our litigant questionnaire inquired in detail about the impact of continuing relations on dispute processing behavior. The responses that we received suggested that between 20% and 25% of respondents experienced "very important" prior relationships or expected such contacts with the opposing party in the future. Unfortunately, low response rates in these surveys make detailed analysis of the effect of these relationships on litigation behavior difficult.

service to regular client—did the lawyer take the case simply to service a regular client? While we felt variations in these goals were likely to affect hours, we did not have strong expectations concerning the nature of all these effects. For example, we thought that the professional visibility and challenge goals might influence a laywer to spend more hours than the making money goal, but we were not sure what effect "public service" would have.

e. *Processing and management*. Since we thought that differences in procedures, judges, administration, etc., between state and federal courts might have an independent effect on the amount of time lawyers would spend, we included a *court type* (federal or state) variable. We did not have any expectations about the direction of this effect. We thought lawyers might vary in the *case management* techniques used and this would affect hours. We used three indicators: standard operating procedures, plans, and client control. We thought that the lawyers who developed standard operating procedures (*SOPs*) for estimating *case worth* and *pretrial* activity would be able to reduce the number of hours spent on a case, other things being equal. Explicit planning should also increase lawyer efficiency and thus decrease time spent. The variables *plans for motions*, *plans for settlement*, and *plans for discovery* measure if planning occurred or not.

We expected to find that *client control and participation* would influence hours spent, but the effect would differ for hourly fee lawyers and non-hourly fee lawyers. We measured the client control variable by using data provided by lawyers on (1) reporting procedures to the client and (2) the client's participation in key decisions in the case. We felt fee arrangements would affect the incentives of lawyers. Hourly fee lawyers, who can pass their time costs on to the client, would be more likely to spend time than would contingent fee lawyers. Further, following Johnson,[53] we thought that it would often be in the client's interest to reduce the hours spent by the hourly fee lawyers and try to increase the time spent by those on contingent fees. For these reasons we expected that a high level of client control for hourly fee lawyers would reduce the number of hours those lawyers worked on a case. In contrast, we expected that for non-hourly fee lawyers (most of whom were paid by contingent fees) high client control would lead to an increase in the number of hours the lawyer would work in the case.[54]

53. Johnson, *supra* note 13, at 607.

54. *See, e.g.*, D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? (1974).

2. Expected Results

Our complete model includes the dependent variable "hours" and the five major factors we expected would explain variation in hours. We measured these factors by 29 independent variables organized in eight clusters. We have suggested the reasons these variables were included and the nature of the effects we expected.

TABLE 7

COMPLETE MODEL-VARIABLES, CLUSTERS, EXPECTED DIRECTION

Factor	Cluster	Individual Variables	Expected Effect on Hours
I *Case Characteristics*		Stakes	+
		Complexity	+
		Duration	+
II *Events in the Case*		Pleadings Factor	+
		Motions Factor	+
		Discovery Factor	+
		Presence of Trial	+
		Presence of Settlement Discussion	−
III Nature of Participants			
	Client Type	Organization	+
	Lawyer Characteristics	Specialization	−
		Law School Performance	−
		General Experience	−
		Litigation Experience	−
		Personal Capacity	−
		Craftsmanship	+
IV Participant Goals			
	Client Goals	Get Most/Pay Least	+
		Get Fair/Pay Fair	−
	Lawyer Goals	Challenge	+
		Public Service	0
		Professional Visibility	+
		Make Money	−
		Service to Regular Client	0
V Processing and Management			
	Court Type	State/Federal	0
	Case Management	Pretrial Events SOP	−
		Estimating Case Value SOP	−
		Plan for Motions	−
		Plan for Settlement	−
		Plan for Discovery	−
		Client Control and Participation	+ or −

In the process of constructing this model we relied on "empirical feel" as well as on existing theory; the theory we had was partial and largely untested. Thus, we were prepared to find—as we did—that some of our variables had no effect, and others had effects opposite to the ones we anticipated.

Table 7 sets forth the complete model, including all the individual variables. The signs in the table show the expected direction; "zero" designates variables we thought would have an effect, but for which we could not predict if the effect on hours would be positive or negative. For analytic purposes, we divided some of the factors into "clusters" of related individual variables, and tested the relative importance of the cluster. Thus Factors I and II were each treated as a cluster, but Factors III-V were each subdivided into two clusters. There are therefore eight clusters, which are italicized in the table.

3. Fee Arrangements

A key variable—fee arrangements—is excluded from the model as presented. One would expect fee arrangements to influence lawyer hours. Why then did we exclude this variable?

The answer is based on the nature of the data. The economic incentives for hourly fee lawyers, who charge fixed sums per hour whether they win, lose or draw, are very different from those for contingent fee lawyers, who are paid an agreed proportion of the recovery if they win and nothing except expenses if they lose. Because economic incentives appear to differ, theorists argue that in comparable cases the hourly lawyer will spend more time than the contingent fee lawyer.[55] These considerations would suggest that fee arrangements should be included among the variables which influence hours. But at an early stage we saw that our model "worked" differently for non-hourly (contingent fee) and hourly lawyers. Early tests showed that, overall, very different factors explain hourly fee lawyer investment than those which govern the contingent fee attorney's decisions. The patterns were so different that we chose to analyze these categories separately.

B. *Findings*

We tested the model against our data, using techniques which permit us to measure three things:

---

55. *See generally* Johnson, *supra* note 13; D. ROSENTHAL, *supra* note 54; T. Rowe, Attorney Fee Arrangements and Dispute Resolution 25 (Oct. 1982) (paper presented at National Conference on The Lawyer's Changing Role in Resolving Disputes, Harvard Law School).

TABLE 8

FINDINGS: EFFECT OF INDEPENDENT VARIABLES AND CLUSTERS

Cluster	Actual Effect of Variable		Relative Importance of Cluster	
	Hourly	Non-Hourly	Hourly	Non-Hourly
Case Characteristics			5	2
Stakes	+	+		
Complexity	+	+		
Duration	0	0		
Events in the Case			1	1
Pleadings Factor	0	+		
Motions Factor	+	+		
Discovery Factor	+	+		
Presence of Trial	0	0		
Presence of Settlement Discussion	0	0		
Nature of Participants				
Client Type			8	0
Organization	0	−[a]		
Lawyer Characteristics			7	0
Specialization	0	0		
Law School Performance	0	0		
General Experience	0	0		
Litigation Experience	0	0		
Personal Capacity	0	0		
Craftsmanship	+	0		
Participant Goals				
Client Goals			3	0
Get Most/Pay Least	−[a]	0		
Get Fair/Pay Fair	−	0		
Lawyer Goals			4	0
Challenge	0	0		
Public Service	−	0		
Professional Visibility	+	0		
Make Money	0	0		
Service to Regular Client	0	0		
Processing and Management				
Court Type			2	0
Federal	+	0		
Case Management			6	0
Pretrial Events SOP	+[a]	0		
Estimating Case Value SOP	0	0		
Plan for Motions	0	0		
Plan for Settlement	−	0		
Plan for Discovery	+[a]	0		
Client Control and Participation	0	0		

[a] Actual direction differs from our expectation.

(1) the extent to which the model, as a whole, explains variations in lawyer time spent;

(2) whether any individual variable, taken alone, had an effect on hours, and the direction (plus or minus) of such effect; and

(3) the relative importance of the eight variable clusters.

1. Overall

The measure for overall explanatory power is the R^2 statistic, which indicates what percentage of the actual variation in hours is explained by the variables included in our model. The relevant R^2 statistics we report are .45 for hourly and .35 for non-hourly lawyers. These results mean that we have succeeded in identifying and measuring factors that account for about half of the differences in hourly lawyer investment, and a third of the differences in non-hourly lawyer time decisions. By social science standards, R^2s of .35 to .45 are quite respectable. The difference between the R^2s suggests that we have been more successful in modeling the hourly than the non-hourly lawyer investment process.

Which variables have an effect on hours and which are most important? This information is set forth in Table 8, which contains several key items of information. First, it shows whether the variables have a statistically significant effect on hours. Significance tests measure the degree of confidence one has in inferring that data from a sample reflect actual patterns in the underlying population. Where our results for this analysis fell below the 95% confidence level we show a zero. Second, where the variable has an effect, we show whether the presence of the variable increases (+) or decreases (−) hours spent. Finally, the table shows which clusters of variables were most important; that is, which clusters had the largest overall effect on hours, plus or minus. The table separates hourly and non-hourly lawyers; almost all of the latter are paid on a contingent fee basis.[56]

Several things stand out. The first is the difference between hourly and non-hourly lawyers. Not only are the overall R^2 statistics different, but many more of our variables have a measurable influence on the hourly lawyer's time investment than on the non-hourly lawyer's time, and the relative importance of the several variable clusters is quite different. The second notable feature of the table is that many variables we thought would affect hours do not.[57] Finally, some variables had an effect, but in the opposite

56. The reader who wishes the full regression statistics on which Table 8 is based should consult the Technical Appendix.

57. An alternative explanation for the lack of observed effects is that our indicators are contaminated by measurement error. The impact of measurement error on independent variables in regression analysis is to depress the value of the estimated coefficient. *See* T. WONNACOTT & R. WONNACOTT, REGRESSION: A SECOND

direction from the one we had expected. These variables are indicated by the letter "*a*."

2. Hourly Lawyers

Some findings are not surprising. Case characteristics and events have a significant effect on hours. The higher the stakes, and the more complex the case (as reported by the lawyer), the more hours the case takes. But note that the relative importance of the case characteristics cluster is low (fifth out of eight). This confirms our initial finding that stakes do not "drive" investments. Moreover, contrary to our expectations, duration does not have a substantial effect on hours.

Events are obviously important; this cluster has the highest relative score. Looking at the individual variables, we find, not surprisingly, that the more motions filed and discovery conducted, the more hours spent. But the trial variable did not have a statistically significant influence on hours. This finding may at first seem to be counter-intuitive. But trials are rare and when one occurs it typically takes a short time. Our data indicate that a trial will add, on average, 6.7 hours to the time lawyers spend on a case.

None of the lawyer characteristic-variables, with the exception of craftsmanship, has any statistically significant effect on hours. The other five lawyer variables were introduced into the model to test lawyer "productivity." We thought that more specialized, qualified and experienced lawyers would be able to do a task more quickly, and, *ceteris paribus*, these variables would reduce hours. Our expectation was not confirmed; these variables have no significant effect on hours, one way or the other. One explanation of this result is that increased capacity can cut two ways: better lawyers do things faster, but can also think of more things to do. Another purely statistical explanation is that there is not enough variation in our sample to catch the effect which lawyer experience and specialization actually have on hours.[58]

The impact of the lawyer's own goals is interesting. We found that two of the lawyers' goals had an effect on hours. The lawyers who said they took the case for public service reasons de-

---

COURSE IN STATISTICS 293–96 (1981). This in turn leads to conclusions that variables have no impact when in fact they do have an effect on the variable to be explained. Thus, it may be that future research, using improved indicators or better measurement techniques, will show that variables we found not to be significant predictors of lawyer hours do account for some of the variation in that variable.

58. Most of the cases in our sample are small, rather routine, and involve a relatively small amount of "lawyering." On the other hand, most of the lawyers in our sample are relatively specialized and experienced. Thus there may not be any room for the small differences in our lawyer characteristics variables to show up on reduction of hours.

voted fewer hours to the case. In contrast, lawyers who included among their goals enhancing their own or their firm's reputation put in more hours than they would have in an otherwise similar case. Moreover, this cluster was one of the more important ones in explaining overall variation in hours. Full assessment of these findings would require us to compare billings in these cases with the amount charged clients in other cases. But if the hourly lawyer who spends more time on cases that advance the lawyer's own career also charges the client for these hours, our findings would confirm Johnson's theories about the divergence of lawyer and client interests in the litigation situation, and his view that lawyers are able to charge for time that provides little benefit to the client.[59]

A related finding, albeit a negative one, is that client control and participation in a case has no effect, one way or the other, on the amount of time the lawyer spends. We hypothesized that the more control the client exercised on decisions, the fewer hours the hourly lawyer, and the more the non-hourly lawyer, would spend on the case. Quite to the contrary, the data show that client control and participation, at least as we measure it, have no effect whatsoever on the number of hours invested in a case.[60]

A noteworthy element in Table 8 is the independent significance of court type. We found that after controlling for all the other variables in the model, including stakes, complexity of the case, and type and number of events, hourly fee lawyers spent about 13 more hours on a case litigated in federal court than on an "essentially similar" case in the state courts.[61]

We sought to determine whether this effect could be explained by the formal rules of procedure in the two types of courts. We found, however, that cases in state courts which use the Federal Rules of Civil Procedure take less time than similar federal cases. This led us to wonder if variations in practice, rather than the formal rules, account for the court effect. Perhaps systematic variation in what the judges expect from the lawyers, or how lawyers treat their federal as opposed to state cases, explains why federal cases take more time. Do federal judges demand more work from lawyers? Do lawyers look at the federal case as the "big time" and invest more time in case preparation? We have not yet tested these propositions statistically, but there is

59. Johnson, *supra* note 13.

60. It is important to recognize that for this analysis we used the lawyer's evaluation of the degree of client control, not the client's. For further analysis of this question, see *infra* note 64.

61. We thought that the court effect might be the result of the fact that federal cases involve, on the average, higher stakes. We tested this hypothesis and found that the "court effect" remains even after controlling for this difference.

anecdotal information to support them. Our field coding staff reported that not only were the federal courts more likely to require briefs (or, in New Mexico, a written statement that a brief would not be filed), but that federal court cases were generally more complex. "Reading a federal court file was like reading a story," one coder reported; "there was a discernible 'plot' and a conclusion." Reading a state court file, on the other hand, "was like reading a recipe."[62]

We have already noted that the events cluster is the most important in explaining the number of hours lawyers invest in a case. While this finding may seem tautological, since an "event" is something that takes time, we think it has an independent meaning and is quite important. In the first place, no more than half the time lawyers spend on cases can be attributed to these procedural "events." Second, detailed analysis of the data shows that the amount of time per "event" varies significantly among our cases.[63] Thus, there is no one-to-one correlation between events and hours.

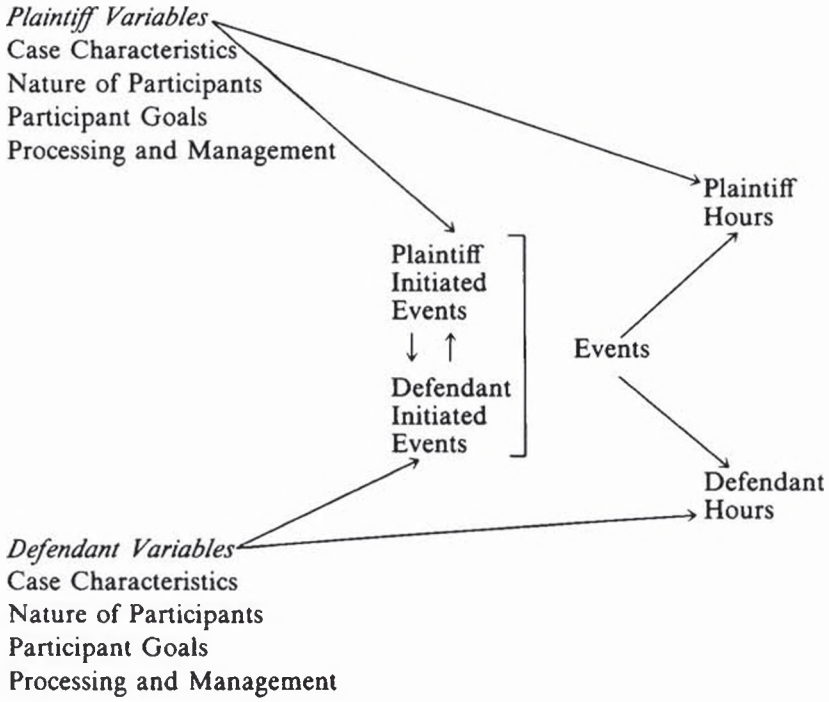
Rather than seeing events as a reflection of hours, we view this variable as a surrogate for the effect of *strategic interaction* in litigation. It seems obvious that one of the factors that influences how much time a lawyer spends on a case is what the other side chooses to do in the case. If one side takes a deposition, the other usually attends and participates. If one side moves for summary judgment, the other will have to respond or risk an adverse ruling on the merits. Our events variables come from the court records, so they include events initiated by either party. We see the relative strength the events cluster has in the explanation of hours as reflecting, in part, the effect on the lawyer of strategic moves made

62. One last explanation for the court effect which we can advance at this time concerns differences between the state and federal bars. In our analysis of the impact of the Federal Rules, we observed that the smallest difference between a state and federal court was in South Carolina, our smallest district with, at least arguably, the least differentiated bar. Could it be that there are very different groups of lawyers who practice in state and federal courts, respectively, and that the federal group has different work habits which increase the time they spend on cases? We do find that there are some differences between lawyers in our state and federal cases—primarily that federal court lawyers are more likely to practice in large firms. But this difference is not adequate fully to explain the court effect. A more detailed analysis of the court effect can be found in H. Kritzer, J. Grossman, E. McNichol, D. Trubek, A. Sarat, & W. Felstiner, Courts and Litigation Investment: Why Do the Federal Courts Take More? (June 3–5, 1983) (paper presented at the Annual Meeting of the Law and Society Association, Denver, Colorado).

63. For example, in looking at cases where there was one or more discovery event, such as a deposition, interrogatories, or a discovery-related motion, we found that lawyers who reported using a plan for discovery spent an average of two hours per discovery event while those lawyers who said that they did not have a plan for discovery spent an average of only twenty minutes per discovery event.

FIGURE 6

A CAUSAL MODEL OF LITIGATION INVESTMENT



by the other side.[64]

Figure 6 reflects this understanding of the dynamics of litigation and summarizes the causal model of litigation investment which emerges from our analysis. Causal relations are shown by arrows. Note that we show two types of causal influence. For

64. A revised analysis of our data, recently completed, adds further support to the argument that the events variables represent strategic interaction in the litigation process. The revised model included as predictors of lawyer time only those pleadings, motions, briefs, and discovery-related events that were filed by the opposing side. All other variables in the model were unchanged. The results of the revised analysis were virtually identical to the analysis reported above. The revised analysis did find that duration had a statistically significant effect on hours, but the effect was so small (about four hours for every year that the case went on) that it is not of substantive importance. The other change was that we found that client control did reduce, in a statistically significant way, the amount of time that hourly fee lawyers spent on a case. For details of the revised analysis, see H. Kritzer, W. Felstiner, A. Sarat, D. Trubek, J. Grossman, K. Bumiller & E. McNichol, The Quest for Civil Justice Reform: Toward a Better Understanding of the Cost Issue (Apr. 28–May 1, 1982) (paper presented at Meetings of the Midwest Political Science Association, Milwaukee, Wisconsin).

each party, the general variables directly affect the hours invested and influence the events initiated by that side. But the events initiated by the other side also influence the other's events and thus the total hours.

3. Non-Hourly Lawyers

We have already stated that the factors explaining non-hourly lawyer decisions seem to be quite different from those which influence the hourly lawyer.[65] (Only our case characteristic and events clusters were statistically significant for the non-hourly lawyer.) Johnson[66] and others[67] have hypothesized that the non-hourly lawyer would spend less time on a case, other things being equal. We conducted independent tests to see if this difference appeared in our cases.

Our findings are ambiguous. We found that the median hourly lawyer spent slightly more time on a case than the median non-hourly lawyer, but the difference is not statistically significant. We calculated ratios of hours per event and hours per dollar of stakes in the case. In both cases the results were higher, not lower, for the non-hourly lawyer. That is, the hourly lawyer spent fewer hours per event and less time per dollar of stakes. These findings are not statistically significant. The data are summarized in Table 9.

TABLE 9

HOURS BY FEE ARRANGEMENT

	Hourly (123)	Non-Hourly (300)
Median Hours	37.0	35.1
Hours/Events Ratio	2.00	2.38
Hours/Stakes Ratio	.002	.003

Note: None of the hourly/non-hourly differences are statistically significant.

One important question is what happens if one moves away from the median case to look at other situations. The problem this question presents is what variables should we shift off the median. In another paper, we explored the implications of the stakes involved in the case for the hypothesis that hourly fee lawyers will

65. *See supra* text accompanying notes 56–57.

66. Johnson, *supra* note 13.

67. *See, e.g.*, Clermont & Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978); Schwartz & Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125 (1970).

overinvest while the contingent fee lawyers will underinvest.[68] That analysis found that for the relatively modest case (i.e., involving $6,000 or less) the contingent fee lawyer spends significantly less time than the hourly fee lawyer, though neither lawyer would spend very much time on a case of this size; the differential ranges between seven and twelve hours. In the balance of the range we examined ($7,000 through $100,000), we found no statistically significant differences in the amount of time lawyers paid on contingent and hourly fee bases devote to cases. The evidence suggests that, if anything, as the case gets larger, the contingent fee lawyer will spend more time than the hourly fee lawyer (this switch occurs at around $15,000).

Our findings indicate a need to reexamine the conventional models. These models assume that non-hourly lawyers are highly rational profit maximizers unaffected by norms of professional responsibility and able to calculate the precise point at which further time investments fail to increase their (as opposed to their clients') net return from litigation. The data, on the other hand, suggest that the behavior of hourly or contingent fee lawyers or both is more complicated and subject to more and shifting influences than the model assumes.[69]

IV. Does Litigation Pay? Assessing Costs and Benefits

The second question generated by the investment approach to civil litigation is whether litigation investments pay off. We focused on a relatively narrow issue: do the monetary returns from litigation exceed the time and money which clients invest in the process? While we recognize that an answer to this question will not resolve the debate over the cost-effectiveness of litigation as a social process for resolving disputes, nevertheless an understanding of the economics of litigation from the parties' perspectives is central to the whole issue.

Overall, we conclude that litigation "pays" for the parties who engage in it. By and large, plaintiffs recover more than they

68. *See* H. Kritzer, A. Sarat, W. Felstiner & D. Trubek, Economic Incentives and Lawyer Behavior: The Impact of Fee Arrangement on Lawyer Effort (1983) (University of Wisconsin, Department of Political Science).

69. Even if the data had supported the model assumptions, the lawyers' motives may be different than assumed by the model's adherence. For instance, hourly lawyers may overinvest in cases which are litigated in order to build credibility for negotiating other claims that never go to court. Non-hourly lawyers may overinvest as a reaction to the behavior of hourly lawyers. In this sense the incentives of the hourly lawyer may establish a standard to which the non-hourly lawyer must conform. Finally, if lawyers paid by contingent fee work most of the time for such an arrangement and have lower opportunity costs than hourly lawyers, they might invest more time than would otherwise be predicted by fee arrangement.

invest in litigation. Further, we can say that in a certain sense the same results hold for a substantial proportion of defendants.[70] Naturally, the assessment of "returns" to defendants of litigation investments, even in money cases, is more complex than for plaintiffs. But the measures we use show positive net returns for many defendants as well.

A. *Methodological Issues*

We encountered a series of methodological problems in these analyses. To permit calculation of net results, we had to restrict our measures of benefits and costs to monetary factors. For reasons already discussed,[71] we used the fees paid to lawyers as our primary estimate of the monetary costs of litigation. Measuring monetary benefits proved more complex. We used the dollar amount plaintiffs recover as their gross benefits. But what measure should we use for defendants? We conceived of the defendant's benefits as the reduction of a potential cost. Measuring the true "exposure" of a defendant in a case, and thus the difference between what was paid and what might have been paid, proved extremely difficult. We explain below how we dealt with these issues.[72]

B. *Plaintiffs*

Plaintiffs usually recover something in a lawsuit, but in the world of ordinary litigation recoveries are modest. In the total sample for which we have translated figures for recoveries into monetary terms (N = 398), plaintiffs received something in 89% of the cases, but in 59% of the cases recoveries in monetary terms were less than $10,000.

1. Recovery to Fees Ratios

To assess the relationship between costs and benefits for plaintiffs, we use two measures. The first is the ratio of recovery to fees, which gives an overall picture of whether the dollars plaintiffs recovered in lawsuits exceed the dollars they paid out.[73]

---

70. Given the pattern of responses to our survey, these plaintiffs and defendants tend not to have been involved in the same cases.

71. *See supra* text accompanying note 46.

72. *See infra* text accompanying note 81.

73. This analysis assumes that the difference between no recovery at all and recovery is the product of the plaintiff's lawyer's efforts. There are conceptual and empirical problems with this assumption. The defendant may have made an offer to the plaintiff before the lawyer was hired, or after the lawyer was hired but before the case was filed. We have no information on the former, but we do know that only 18% of 1,538 lawyers interviewed reported that they conducted any negotiations before the case was filed. If offers made to unrepresented plaintiffs lead us to overestimate the

While we use fees alone as our cost indicator, as we shall show,[74] the results would not change substantially if we used more complete data on plaintiff costs.

a. *Overall results*. The amounts plaintiffs receive usually exceed the fees they pay. This finding, however, is hardly surprising, since 71% of the plaintiffs in our sample were represented by lawyers paid on a contingent fee basis. Since most contingent fee cases lead to some recovery, the overall results are quite positive: plaintiffs secured net benefits in 89% of all our cases, and in 86% of the cases in federal courts. Even plaintiffs who paid their lawyers on an hourly basis secured recoveries at least equal to fees in 78% of the cases.

Table 10 provides more detailed data. We report the recovery ratio for three percentiles—the 25th, 50th, and 75th. These are the ratios at those points in the overall distribution of fees to recovery ratios. The range of ratios is quite large. Of the plaintiffs who were represented by hourly lawyers and recovered less than $10,000, 25% had recovery to fees ratios of zero or less (fees greater than recovery), 25% had ratios of 6.00 or higher, and the median ratio was 2.15. Table 10 breaks down the ratios by the amount recovered, the court, and the fee arrangement.

The table shows that for hourly lawyers, the larger the case, the higher the ratio of recovery to fees. Specifically, for cases

TABLE 10

RATIO OF RECOVERY TO FEES—PLAINTIFFS BY FEE TYPE

	HOURLY LAWYERS					
		RECOVERY ($000s)			COURT	
Percentiles	<10	10-50	50+	Federal	State	All
25	0.00	3.75	10.50	.31	2.15	1.75
50	2.15	7.03	18.00	3.65	4.94	4.19
75	6.00	26.01	82.30	18.65	14.40	18.00
(N)	(44)	(18)	(14)	(42)	(34)	(76)
	CONTINGENT FEE LAWYERS					
		RECOVERY ($000s)			COURT	
Percentiles	<10	10-50	50+	Federal	State	All
25	2.27	2.82	2.92	2.32	2.50	2.48
50	2.80	3.04	3.10	2.99	2.88	2.93
75	3.18	4.29	3.72	3.60	3.55	3.56
(N)	(181)	(86)	(24)	(124)	(167)	(291)

returns from litigation, the shadow effect of the threat of litigation on negotiations conducted before lawyers are hired works in the opposite direction. The net result is that the recovery to fee comparison is always an approximation.

74. *See infra* text accompanying notes 75-79.

under $10,000 the median ratio is 2.15; for cases from $10,000–50,000, it is 7.03. Overall, plaintiffs with hourly lawyers did better in state courts than in federal courts: the median ratio for federal cases is 3.65 compared with 4.94 in state courts. The patterns for contingent fee lawyers are what one would expect: recovery to fee ratios are about 3 to 1. Interestingly, even for contingent fee lawyers the ratios increase as the amount recovered goes up, although the change is small.

In some cases plaintiffs pay their lawyers more than they recover. Twenty-two percent of all plaintiffs with hourly fee lawyers fell in this category. As the first line in Table 10 (25th percentile for hourly lawyers) indicates, this is most likely to occur when the recovery is under $10,000. Nonetheless, plaintiffs as a whole are mostly net gainers. Even when we add to fees the other monetary costs of litigation, such as out-of-pocket costs plus the monetary value of the plaintiff's time, we estimate that 88% of all our plaintiffs recovered more than they paid out.[75]

b. *Measuring the "yield" of litigation investments: other factors influencing recovery/fee ratios*. Our data can be read as indicating that the average dollar invested in a large claim yields more than the same dollar spent on a smaller claim. We find that the larger the recovery, the higher the ratio of dollars recovered to fees paid the lawyer. Especially in light of the fact that plaintiff recoveries and stakes are closely correlated (plaintiffs' stakes as reported were about 120% of their recovery), this finding suggests that "investors" get more for their money in the larger cases. Following this same line of reasoning, we used the recovery to fees ratio to test the effect of other factors on the relative yield of dollars invested in litigation. Some of the results are striking.

We first examined the effect of case and processing factors. Using our duration variable, we found that the longer a case lasts, the lower the ratio of recovery to fees. Remember that we already found that the duration of the case has little or no effect on the number of hours a lawyer spends on it.[76] Therefore, either hourly fee lawyers charge more in cases that last a long time, or recov-

75. As we have indicated, these figures use fees instead of total costs, since we do not have total cost figures on a case-by-case basis. However, we do have estimates of total costs, such as fees and out-of-pocket costs plus monetary value of plaintiff's time, for all our plaintiffs, and these can be used to adjust the findings derived from the fee data. The median ratio of lawyers' fees to total costs for individual plaintiffs is .88 and for organization plaintiffs is .72. If we use these medians to estimate total cost, it follows that in a case in which an individual's recovery to fee ratio is above 1.14, and an organization's ratio is above 1.39, the litigant has secured a net economic gain from litigation. Applying these ratios to the distribution of recovery to fee ratios, we find 88.3% of our plaintiffs were likely net gainers.

76. *See supra* text accompanying notes 57–58.

eries are relatively lower in such cases. We also found that plaintiffs who settled before trial had somewhat higher recovery to fee ratios than those who went to trial: the median recovery to fees ratio for cases that were settled was 2.99 while that for cases tried was 2.73.

We also examined the effect of various lawyer activities on the recovery to fees ratios. Recall that we asked the lawyers to indicate how they allocated their time among different activities, including client conferences, discovery, other fact investigation, settlement discussion, pleadings and motions, and legal research.[77] For each of these activities we then divided the lawyers into two groups: those who spent more than the median amount of time on the activity and those who spent less. For each of these two groups we calculated the recovery to fee ratios for their cases.

The results strengthen the impression that plaintiffs get a higher return from a strategy oriented to settlement than from one geared toward formal adjudication. Thus the recovery to fee ratio is higher when the attorney spends relatively more time on settlement discussions, but is lower when he devotes relatively more time to legal research. Spending relatively more time on discovery also decreases the ratio of recovery to fees.

We also looked at the effect of some of our lawyer productivity variables. Recall that we found that factors like lawyer experience and specialization did not affect the number of hours the lawyers spent on cases.[78] We have already noted that this finding, by itself, did not prove that clients do not secure productivity gains in litigation. We reasoned that more experienced and expert lawyers could provide benefits to clients even if they spent the same number of hours on the case as novice lawyers, since the specialist might think of more things to do to further the client's cause. If this were the case, however, we would expect that clients with more specialized lawyers would secure higher recoveries in relation to fees paid. When we tested our experience and specialization variables against recovery to fee ratios, we found no evidence that these factors increase the client's "yield." Neither greater experience nor higher degrees of specialization had a statistically significant effect on the recovery to fee ratio. We recognize that this negative finding may be a statistical artifact, since the range of experience and specialization in our sample is modest. But the finding may also suggest that whatever gains that do accrue from greater specialization are not passed on to the clients, but are absorbed by the higher fees which older and more special-

77. *See supra* text accompanying note 45.

78. *See supra* text accompanying note 58.

ized lawyers tend to charge.[79]

2. Plaintiff "Success"—Net Recovery to Stakes Ratios

Recovery to fee ratios provide one way to assess the relationship between the costs and the benefits of litigation for plaintiffs. There are other ways to measure results that may yield additional insights. One such measure is the ratio of net recovery (actual recovery less fees) to *stakes*. We thought that the use of the recovery to fee ratio could overestimate net benefits in some cases (because the client recovered much less than predicted) and underestimate them in others (because the lawyer managed to secure a recovery higher than predicted). As a consequence, we also analyzed net recovery to stakes ratios. We call this measure "success," since it assesses net returns in light of an expected goal (stakes). The formula used is:

$$\text{Plaintiff success} = \frac{\text{Recovery} - \text{Fees}}{\text{Plaintiff's Highest Stakes Estimate}}$$

The higher this ratio, the better the plaintiff has done in relation to expectations. Since the stakes question elicited the amount of money the case should settle for, not what the client should get after paying the attorney, success ratios above 1.0 would be exceptional. In a contingent fee case where the lawyer's fees equalled 33% of the recovery, and the recovery was exactly the same as the stakes estimate, the ratio would be two-thirds.

a. *Overall analysis*. Overall, the analysis of success confirms much of what we learned using recovery to fee ratios. Success increases as the size of recoveries go up. In some of the smaller cases the ratio is zero (fees exceed recovery). The data also show that there is a sort of threshold effect: in all cases certain costs must be incurred regardless of the stakes. This effect can be seen from the fact that success ratios increase dramatically as we move from cases under $10,000 to those in the $10,000–50,000 range, and then increase only modestly above $50,000.

These patterns can be seen clearly in Table 11. For hourly lawyers, the median success ratio is .400 for cases where recovery is less than $10,000. The ratio shoots up dramatically to .800 in the cases between $10,000 and $50,000, and then rises to .934 in the cases over $50,000.

79. D. Trubek, Investment of Lawyer Time, *supra* note 15. In using the concept of lawyer "productivity" and speculating on the possible effect of variation in lawyer expertise on the net returns to clients, we seek merely to raise questions about the operation of the market for litigation services. Although this issue is clearly important for a full understanding of the "costs" issue, we were unable to find any systematic analysis by economists of these effects. We hope our empirical findings will stimulate further work on this issue.

TABLE 11

NET RECOVERY/STAKES RATIOS—PLAINTIFFS

A) HOURLY LAWYERS

	RECOVERY ($000s)			COURT		
Percentiles	<10	10-50	50+	Federal	State	All
25	.00	.733	.682	.057	.310	.190
50	.400	.800	.934	.709	.536	.600
75	.537	.955	.998	.944	.955	.945
(N)	(32)	(13)	(12)	(30)	(27)	(57)

B) NON-HOURLY LAWYERS

	RECOVERY ($000s)			COURT		
Percentiles	<10	10-50	50+	Federal	State	All
25	.127	.305	.368	.142	.330	.231
50	.442	.580	.538	.400	.564	.493
75	.642	.724	.760	.665	.682	.668
(N)	(164)	(75)	(23)	(119)	(143)	(262)

b. *Other factors*. We repeated the tests of other factors using the success ratio. As Table 12 indicates, the results of these bivariate correlations show the same patterns we found for recovery to fee ratios. Thus, the longer the case, the lower the success ratio. Going to trial rather than settling lowers the ratio. We also found that the more events in the case, the lower the success ratio.

Lawyer activity patterns are the same as those found earlier: above average legal research and discovery reduce the success ratio; above average time spent on settlement increases "success." The results for all activities are summarized in Table 13.

Once again, we failed to find any relationship between greater lawyer experience and specialization on the one hand and increased success on the other. No matter how we measure the

TABLE 12

EFFECT OF SELECTED CASE AND PROCESSING FACTORS ON PLAINTIFF SUCCESS

Factor	Effect of Factor on Net Recovery/Stakes Ratio
1. Duration of Case	Decreases[a]
2. Number of Events	Decreases[a]
3. Going to Trial	Decreases[a]

[a] Significant at least at the .05 level.

TABLE 13

EFFECT OF LAWYER ACTIVITY ON PLAINTIFF SUCCESS

Above Average Time Devoted to:	Will Have the Following Effect on the Net Recovery/Stakes Ratio:	
1. Conferring with client		Increases
2. Factual investigation other than discovery		Increases
3. Settlement discussions		Increases[a]
4. Pleading and Motions	Increases	
5. Discovery		Decreases[a]
6. Legal Research		Decreases[a]

[a] Significant at least at the .05 level.

yield from litigation investment, it is not increased by using more experienced and specialized counsel.

C. *Defendants*

The problem of assessing whether litigation "pays" for defendants is more complex. In the first place, for this purpose it makes little sense to compare the fees defendants pay their lawyers to the amount they must pay plaintiffs (recoveries). These ratios could be, and often are, very high. Yet, defendants could (and do) still consider that their litigation investment "paid off" handsomely. Assume a case in which plaintiff expects to recover $100,000 but in the end defendant only pays $10,000 and defendant's lawyer receives a fee of $8,000. In that situation the recovery to fee ratio would be very low (1.25). Yet as long as the original claim had some merit and there was some real risk that plaintiff would have recovered a substantial portion of the claim, defendant's lawyer has been quite effective. Thus, the only sensible way to assess whether and to what extent litigation "pays" for defendants is to use the success approach. In this approach, the purpose of a defendant's investment in litigation is to reduce or eliminate an expenditure the defendant would otherwise have to incur. When presented with a claim, a defendant sees the expenditure on lawyer's fees as a way to avoid paying some or all of the amount claimed. If the lawyer's work reduces the claim by an amount greater than his fees, the defendant's investment has been successful.

The next problem is measuring the amount of the "claim" in order to measure the result of the lawyer's work. We have two possible measures—the defendant's and the plaintiff's estimates of stakes in the case. Thus, there are two possible formulae for cal-

culating results for defendants: the difference between the recovery—the amount defendant paid to plaintiff—and either

(i) what plaintiffs thought they should get (P's stakes), or
(ii) what defendants thought they might have to pay (D's stakes).

The first formula is preferable because otherwise those cases (21% of our sample) in which defendants pay more than they thought they should, but less than the plaintiff's lawyer initially estimated plaintiff should settle for, would be portrayed as unsuccessful. Such cases are, by definition, cases in which defendants' lawyers have convinced plaintiffs to lower their expectations. Therefore, if that reduction is greater than the fees paid the defendants' lawyers to achieve the reduction, these cases are appropriately regarded as successful. On this argument, the best measure of success for defendants would be the ratio of the difference between the plaintiff's expectations (P's stakes) and the amount defendant had to pay (recovery) to defendant's lawyers fees. The formula for this measure (DS_1) is:

$$\text{Defendant Success}_1 = \frac{\text{P's Stakes} - \text{P's Recovery}}{\text{D's Fees}}$$

We were unable to conduct an analysis of defendant's success using this formula, however, because we did not have the necessary data (i.e., defendants' fees, recoveries, and plaintiffs' stakes) from both sides of the same case for enough cases. To provide some idea about this aspect of the costs and benefits of litigation, we therefore decided to use the defendants' stakes, for which we did have enough data. The formula for this measure (DS_2) is:

$$\text{Defendant Success}_2 = \frac{\text{D's Stakes} - \text{P's Recovery}}{\text{D's Fees}}$$

In assessing the results of the analysis we present below, it is important to bear in mind the limitations imposed by the particular measure that we must use. It is likely that the defendant's estimate of stakes would be lower than the plaintiff's perception of stakes.[80] This in turn means the DS_2 will tend to underestimate the level of success achieved by defendants; in effect, DS_2 represents a lower bound of success. If, for example, a defendant is successful according to the DS_2 measure, it is almost certain that he was successful according to DS_1 or any similar measure that one might consider using.[81] In our discussion below we will not

80. In the 202 cases in which we have stakes estimates from both plaintiff and defense lawyers, plaintiffs' estimates are higher 69% of the time.

81. An "upper bound figure" that one could obtain from the defendant lawyer data we have is the highest amount demanded by the plaintiff during actual negotia-

seek to assess the degree of success as indicated by DS_2, but will simply focus on the *likelihood* of success (i.e., the likelihood that the difference between the defendant's estimate of stakes and the amount recovered was more than was paid to the defendant's lawyer in fees).

1. Overall Results

Table 14 shows the likelihood of defendant success for all cases, and then broken down by both amount recovered and by court.

TABLE 14

LIKELIHOOD OF SUCCESS—DEFENDANTS

		RECOVERY ($000s)			COURT	
	All Cases	<10	10-50	>50	Federal	State
Percent Successful	23.6	21.5	24.4	45.5	27.5	18.3
(N)	(191)	(135)	(45)	(11)	(109)	(82)

Note: The figures are measured by the DS_2 formula.

The first column shows that about a quarter of the defendants who invested in litigation were successful according to the conservative measure we are using. It is perhaps more interesting to look at the variations by outcome and court. While the variations are not statistically significant (which is not surprising given the weakness of the measure we are using), they do suggest that defendants are more successful in "big" cases, and in cases taken to federal courts. However, a better indicator than we have is needed to determine if either of these effects does in fact exist.

2. Other Factors

We can continue the analysis of relative degrees of success by looking at some of the other factors we examined in our discussion of plaintiffs. There is some evidence that going to trial pays for defendants; of defendants who went to trial, 24.4% were successful according to our indicator, compared with only 18.5% of those who did not go to trial. This finding is not statistically significant, but it is opposite to what we found for plaintiffs.

The suggestion that what is successful for plaintiffs may not be for defendants and vice versa is further confirmed by the analysis of the effect of variations in lawyer activity on the likelihood of

tions, though even this might underestimate the amount a jury might award if the plaintiff includes a discount for uncertainty in his demand.

TABLE 15

EFFECT OF LAWYER ACTIVITY ON DEFENDANT SUCCESS

Above Average Time Devoted to:	Will have the following effect on likelihood of success:
1. Conferring with client	increases
2. Factual investigation other than discovery	increases
3. Settlement discussions	decreases[a]
4. Pleadings and Motions	—
5. Discovery	increases
6. Legal Research	increases

[a] Statistically significant at the .05 level.

success, shown in Table 15. The pattern is very different from what was found for plaintiffs.

If the defendant's lawyer spends more than the average time in settlement negotiations, the defendant's success goes down, while if the lawyer devotes more than average time to conferring with her client, factual investigation, discovery, and legal research, the success ratio increases, though these findings are not statistically significant. The other factors have no effect. One could interpret these figures as suggesting that a defendant's lawyer secures a higher return for the client on the client's investment by a vigorous motions practice, extensive discovery and legal research and (perhaps) by insisting on going to trial. Thus, the overall pattern for the effect of defendants' time allocation on success is almost the mirror image of that for plaintiffs'.

D. *Social Costs and Benefits*

The analysis so far has assessed the monetary costs and benefits of litigation from the parties' perspective. When we say that litigation "pays," we only mean that the parties often secure monetary results that exceed the fees they pay lawyers and that these results would not change if we added the value of the client's time and out-of-pocket expenditures.[82]

Because of the limited nature of the data we have and the limits of cost-benefit analysis in this area generally, no policy conclusions about the overall costs and benefits of litigation can be drawn directly from the data reported in this Article. From a policy point of view, the question whether litigation "pays" can only be answered if litigation is compared to other feasible methods of

82. *See supra* text accompanying note 46.

dispute resolution and if all costs and benefits are taken into account.

It is obvious that even if parties secure benefits from litigation in excess of the fees they must pay, litigation might still be a relatively costly way to handle some or all disputes. We collected data on the monetary costs and benefits of other dispute processing modes, but have not yet analyzed this data. Only when comparable figures of this type are available could one begin to measure the cost effectiveness of litigation in comparison with other techniques now being used to process civil disputes.

Furthermore, our analysis is limited to the monetary costs and benefits to the parties. It does not include the "external effects" of litigation, such as those costs not borne by the parties and those benefits not captured by them. We know that litigation has substantial external effects; the most obvious are the costs of operating the courts, which by far exceed the "court costs" parties must pay.[83]

Further, our analysis cannot measure non-monetary "internal" effects, such as the costs and benefits of litigation to plaintiffs and defendants which cannot easily be reduced to monetary terms. We know, for example, that litigation may have psychological costs for which no dollar figure is available.[84] Some of the interest in "alternative" dispute processing modes is based on the belief that these psychological costs are higher for parties in litigation than, say, in mediation and bargaining. We have no way to measure such factors, or to incorporate them into the overall cost-benefit analysis.

For these reasons, we offer no direct conclusions on whether litigation is a desirable mode for processing civil disputes of various kinds. We hope the general picture we have presented will help policy makers in this task, but we must underscore the limits of our, or any, cost-benefit analysis for this purpose.

One point is worth making. Our data do suggest that the smaller the case, the less likely it is that litigation will "pay." We know that the lower the amount recovered, the lower is the ratio of plaintiff recoveries to lawyer fees. If we look at hourly fee lawyers only, we find that in federal courts plaintiffs' lawyers' fees equalled over 40% of the amount recovered in cases with recoveries under $10,000, and only 5% of the recovery in cases over

83. Assessing what a case costs the public is notoriously difficult. On the problems faced in calculating court costs and court financing, see J. Kakalik & A. Robyn, Costs of the Civil Justice System, Court Expenditures for Processing Tort Cases (1982) (report by The Rand Corporation, the Institute for Civil Justice).

84. *See, e.g.*, Felstiner, *Influences of Social Organization on Dispute Processing*, 9 LAW & SOC'Y REV. 63, 80 n.23 (1974).

$50,000. (The comparable state figures are 19% and 5%, respectively.) This means that for plaintiffs, the net monetary gain is much lower in the smaller cases. Our data do not permit us to say with confidence what pattern prevails for defendants. If, however, we merely assume that defendant ratios are uniform among case sizes, then the plaintiff results would determine relative net gains. This suggests that if all other factors—external effects and nonmonetary internal effects—were constant, the smaller the case, the less likely it would be that the overall benefits of litigation would exceed overall costs.

Another finding from our study underscores the need to look closely at the economics of the small civil law suit. We tried to estimate the relationship between total fees paid to lawyers in a case and the amount of money actually recovered by plaintiffs. To do this we looked at the relatively small number of cases where we had information on hourly lawyer fees from both sides. These data are too limited to permit any firm conclusions on this question. But they 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.[85] On the other hand, in larger cases with recoveries above $10,000, total fees make up a much smaller percentage of the amounts actually recovered—the higher the recovery, the lower the ratio of fees to recovery. As limited as our data are, they do suggest that the concern expressed over the cost of litigation is justified in the smaller cases.

---

85. For cases where the recovery is less than $10,000 (hourly only), the fees to recovery ratios are:

	Ratio	(N)
Plaintiff		
Federal	.4059	(11)
State	.1850	(22)
Defendant		
Federal	.8500	(77)
State	.3277	(75)

To illustrate the point, let us construct a "typical" case using this overall data. If we use a case in state court in which the plaintiff recovers $10,000, it is likely that the plaintiff's lawyer will be paid on a contingent fee basis, so that the lawyer receives $3,300 and the client gets a net return of $6,700. In the same case, the defendant will have paid the plaintiff $10,000 and the attorney $3,300 for a total of $13,300. In this case the total paid to both lawyers ($6,600) is just about equal to the plaintiff's net recovery. A similar analysis for the federal courts yields even more discouraging results. Plaintiff's fees would be the same, but defendants pay more to their attorneys relative to outcomes, so that defendant's legal fees will equal 85% of the outcome and the total fees paid for lawyers will equal $11,800 in a case in which the net recovery is $6,700.

CONCLUSION: RHETORIC, REALITY AND THE REFORM AGENDA

We have reported on the first large-scale empirical study of litigation and its costs. Our description of the world of ordinary litigation often seems at odds with the image held by many in the public and some in the legal profession. Our conclusions are supported by Galanter's[86] careful juxtaposition of the rhetoric of court reform with available data. Because our picture of what occurs and where the problems lie is somewhat different from views commonly held, we tend to look at the question of reform, as well, in a different fashion. At this stage, we have neither a clear set of "problems" to be dealt with nor a list of reforms we wish to propose. Rather, what we can contribute is a new set of questions to be asked, and perhaps some new directions for the reform-minded to follow.

The questions we raise deal both with dispute processing and the way it is discussed. 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."

Much of the literature advocating alternatives to litigation naively assumes that what occurs in courts is adjudication, in the classical sense. Since "adjudication" by definition uses judicial time heavily, the literature deduces that increased litigation will increase court budgets dramatically. Since adjudication presents an imposed, rather than a bargained or mediated solution, many observers believe it to be ineffective for the resolution of certain kinds of disputes. Finally, if adjudication is expensive and intrusive, then what is needed, so it is argued, are cheaper, more flexible "alternatives." But if in the world of ordinary litigation judges rarely reach formal decisions on the merits, the parties negotiate, albeit "in the shadow of the law," judges actively intervene to encourage settlement,[87] and settlement is the rule, not the exception, then perhaps the whole reform debate falls wide of the mark. Perhaps the right approach is not to reach for wholly new institutional alternatives to a hypothetical process of adjudication, but to understand the non-adjudicative dimensions of litigation, to see how and why they work, and to seek to make this dimension of the litigation process even more central and effective.

---

86. Galanter, *Reading the Landscape*, *supra* note 23.

87. *See* Kritzer, *The Judge's Role in Pretrial Case Processing: Assessing the Need for Change*, 66 JUDICATURE 28 (June–July, 1982).

A similar set of questions emerges when we juxtapose our analysis of costs and the cost problem with the conventional definition of that problem. The literature on costs suggests that litigation may be too costly for litigants and society, and finds the causes of such excessive costs in the complexity of procedures, the unchecked adversarial zeal of attorneys, and the biases of existing fee structures. Our data suggest, however, that at least from the litigant's point of view, most ordinary litigation is cost-effective, although we agree that there are problems in the smaller cases that come before our courts of general jurisdiction. We are unable fully to assess the costs and benefits of litigation from a social point of view. We recognize that some classes of cases may raise problems that require further attention, but we doubt whether the system is in crisis.

Where we part company most pointedly with the conventional approach, however, is in our analysis of the factors that determine costs, whether viewed as excessive or not. In the world of ordinary litigation, lawyers spend relatively little time on problems created by the complexities of procedural rules, and engage as much in negotiation as in "legal" warfare. At the same time, we see that factors never mentioned in the reform literature, like the lawyer's own goals, tend to increase cost, while criteria which we would expect to increase the return from litigation investment, such as specialization and experience, do not. As a result, we must ask ourselves whether the costs of litigation are indeed excessive. This is a judgment we have carefully avoided making. If the costs are excessive, do the causes lie in the way the market for legal services is organized, in the failure of lawyers either to improve the productivity of the services the bar provides in both the adjudicative and non-adjudicative aspects of litigation, or in the failure to pass productivity gains on to clients? Perhaps we should spend more time figuring out how legal fees are set, how lawyers can improve the product they deliver, and how the market for lawyers works, and less tinkering with rules of procedure and techniques of court management.

Finally, we are compelled to ask how the legal profession defines problems and provides solutions in an area like litigation and dispute processing. Why is there such a wide gap between the world described in the reform rhetoric and the world we observed? This question, which takes us far beyond our data or topic, nevertheless may be the most important one to arise from our study of the world of ordinary litigation. What we have tried to do is to demonstrate the value, indeed the necessity, of extensive empirical research and careful data analysis as a prerequisite to any serious debate about the need for reforms in the way we process civil disputes.

TECHNICAL APPENDIX

REGRESSION COEFFICIENTS FOR ANALYSIS OF LAWYER HOURS—INDIVIDUAL VARIABLES AND CONTRIBUTION OF VARIABLE CLUSTERS

For the technical reader, we present the coefficents on which Table 8 in the text is based. Table A-1 reports coefficients for each of our 29 individual variables. Table A-2 reports the marginal contribution of the eight variable clusters.

In these Tables and the accompanying notes there are references to "corrected" and "uncorrected" regressions. The correction referred to adjusts for theoretically expected (and empirically identified) heteroscedasticity; heteroscedasticity is a feature of data that violates the assumption of the statistical model underlying regression analysis which requires the disturbance term to have a constant variance. Correcting for heteroscedasticity involves multiplying the data by an adjustment factor, in this case the inverse of the square root of stakes.

TABLE A-1
INDIVIDUAL REGRESSION COEFFICIENTS
COMPLETE MODEL—CORRECTED

Factor	Cluster and Individual Variables			Hourly Corrected		Non-Hourly Corrected	
				b	Standard Error	b	Standard Error
I CASE CHARACTERISTICS	A	*Case Characteristics*					
	1	Stakes		.257	.051	.152	.086
	2	Complexity		3.143	1.464	9.942	3.680
	3	Duration		(.009)	.006	(−.014)	.011
II EVENTS IN THE CASE	B	*Events in the Case*					
	4	Pleadings Factor		(−1.140)	1.975	9.706	5.021
	5	Motions Factor		18.008	2.503	37.281	6.206
	6	Discovery Factor		16.851	2.659	79.719	3.443
	7	Presence of Trial		(6.735)	5.905	(6.805)	11.956
	8	Presence of Settlement Discussion		(2.758)	6.000	(−.528)	11.967
III NATURE OF PARTICIPANTS	C	*Client Type*					
	9	Individual/Organization		(−2.613)	4.030	−16.577	8.840
	D	*Lawyer Characteristics*					
	10	Specialization		(2.817)	1.872	(1.130)	4.418
	11	Law School Performance		(3.021)	2.239	(−3.627)	5.421
	12	General Experience		(.024)	.187	(.008)	.388
	13	Courtroom Experience		(.005)	.063	(.009)	.139
	14	Personal Capacity		(−1.223)	2.463	(−2.552)	5.085
	15	Craftsmanship		5.489	2.438	(3.962)	4.551
IV PARTICIPANT GOALS	E	*Client Goals*					
	16	Get Most/Pay Least		−17.649	4.487	(4.098)	7.488
	17	Get Fair/Pay Fair		−17.446	3.867	(−6.893)	8.708
	F	*Lawyer Goals*					
	18	Challenge		(1.726)	1.981	(−3.262)	4.215

TABLE A-1 (continued)

Factor	Cluster and Individual Variables		Hourly Corrected b	Hourly Corrected Standard Error	Non-Hourly Corrected b	Non-Hourly Corrected Standard Error
	19	Public Service	−11.689	2.438	(2.814)	4.991
	20	Professional Visibility	6.712	2.136	(−1.535)	5.356
	21	Make Money	(1.543)	2.806	(6.647)	5.017
	22	Service to Regular Client	(3.895)	3.525	(2.904)	9.482
V PROCESSING AND MANAGEMENT	G	*Court Type*				
	23	State/Federal	13.240	3.537	(−4.161)	8.943
	H	*Case Management*				
	24	Pretrial Events SOP	3.701	1.527	(2.662)	3.607
	25	Estimating Case Value SOP	(1.251)	1.675	(.672)	3.059
	26	Plan for Motions	(4.423)	4.415	(−14.695)	13.836
	27	Plan for Settlement	−8.938	3.850	(.485)	7.767
	28	Plan for Discovery	14.337	3.447	(−5.883)	7.252
	29	Client Control & Participation	(−3.543)	2.293	(−.725)	4.762

Table A-2
Marginal Contributions of the Eight Variable Clusters to the Prediction of Hours

Cluster	df	Hourly F	Hourly p	Non-Hourly F	Non-Hourly p
A Case Characteristics	3	6.27	.0001	3.70	.025
R^2 Change		.0240		.0057	
B Events in the Case	5	17.49	.0001	149.76	.0001
R^2 Change		.1116		.3846	
C Client Type	1	.42	.5172	3.52	.0618
R^2 Change		.0005		.0018	
D Lawyer Characteristics	6	1.94	.0735	.27	.9501
R^2 Change		.0148		.0008	
E Client Goals	2	11.74	.0001	.99	.3719
R^2 Change		.0300		.0010	
F Lawyer Goals	5	9.78	.0001	.44	.8229
R^2 Change		.0624		.0011	
G Court Type	1	13.76	.0001	.22	.6421
R^2 Change		.0179		.0001	
H Case Management	6	5.60	.0001	.42	.8671
R^2 Change		.0429		.0013	
df denominator		371		288	
N's[a]		401		312	
R^2[b]		.43		.35	
Base for F statistic[c]		.5207		.8521	

[a] The denominator degrees of freedom (df for the F statistic shown in the body of the table is equal to N-30).

[b] This figure is derived from the uncorrected regression while the other information in this table is from the corrected regression.

[c] This figure is derived from the corrected regression (the regression program reports it as the R^2 though it is not in fact a meaningful R^2 statistic); *see* G. HILTON, INTERMEDIATE PALITOMETRICS 100 (1976). This value is used to compute the F statistic for each group:

$$F = \frac{R^2 \text{ Change}/df}{(1 - \text{Base})/df_2}$$

Where df, is the number of variables in the cluster and df_2 is the denominator degrees of freedom.