Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases
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EXPLORING ECONOMIC AND DEMOCRATIC THEORIES OF CIVIL LITIGATION: DIFFERENCES BETWEEN INDIVIDUAL AND ORGANIZATIONAL LITIGANTS IN THE DISPOSITION OF FEDERAL CIVIL CASES

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INTRODUCTION

The legal system in modern market democracies performs multiple functions. It secures public order and protects against violence. It provides a mechanism for the peaceful resolution of disputes among family members, neighbors and communities. It structures democratic political institutions and protects the civil rights of citizens. It provides a means for monitoring and controlling the exercise of public power. It promotes the achievement of collective moral goals, be they protection of the environment or the right to marry. It structures and regulates the operation of markets and commercial enterprises. It protects the autonomy of private individuals; the responsibilities of private individuals. It coordinates and administers the collection of tax revenues and their expenditure on public goods and benefits.

As a democratic market society, our objectives for the operation of the legal system in these various functions are also different. When the legal system is securing the contractual commitments and property rights that undergird market exchange, our objective is largely to achieve efficiency and prosperity. When the legal system is securing civil rights or controlling the exercise of state power, our objective is to achieve democratically chosen ends of equality, dignity, autonomy and fundamental fairness. When the legal system is administering our welfare system, our objective is efficacy and fidelity to the goals of the system as established through democratic means. When the legal system is securing public order, our goal is the reduction of violence and harm without compromising democratic constraints on state power. When the legal system is responding to disputes among family members, neighbors and fellow citizens, our goal is peaceful resolution and the creation of incentives for appropriate levels of care and respect in our dealings with one another.

But despite the substantial differentiation in the functions of our legal system, as a profession and as scholars we have largely approached the increasingly urgent question of how the legal system is changing, how it needs to change, and how private alternatives to public judicial process can and should be promoted, as if law were an undifferentiated whole. As if what is happening and what is appropriate in one sphere of the system is the same as what is happening and what is appropriate in every other sphere. We differentiate civil from criminal justice, but not much more.

On the descriptive side, for example, recent efforts to assess whether or not the trial is "vanishing" from the civil justice system[1], have thus far generally

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters*

not drawn distinctions between cases in which commercial enterprises are contesting contract terms and cases in which individuals are seeking to protect their civil rights. We assume that what is happening on average is happening in the same way for all types of cases. As Marc Galanter famously set out thirty years ago in his seminal work on why the "haves" come out ahead, however, we should expect that there are significant differences in how corporations, organizations, governments and private individuals fare in our legal system: these different entities bring different resources to bear, they face different "repeat" versus "one-shot" incentives.[2] As I have explored elsewhere, the legal services retained by organizations differ fundamentally from those retained by individuals, as we would predict from the economics of the market for lawyers[3] and as has been documented by empirical studies of the legal profession.[4] If trials are diminishing due to increased incentives to settle to avoid litigation costs or increased capacity among defendants to marshal effective arguments to support summary judgment, we should expect these incentives to differ across different types of litigants and types of cases, and hence for trial rates to be adjusting differently; indeed, if our hypotheses are correct about the causes of diminished trial rates, we should be able to explain differences across different litigant types. The existing empirical literature on the legal system, however—thin as it is—devotes next to no attention to drawing out the differences between litigant types.[5]

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in Federal and State Courts, 1 J. EMP. L. STUD. 459 (2004); Gillian K. Hadfield, *Where Have All The Trials Gone? Settlements, Non-Trial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. L. STUD. 705 (2004).

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

3. Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

4. JOHN P. HEINZ & EDWARD LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982); John P. Heinz et al., *The Changing Character of Lawyers' Work: Chicago in 1975 and 1995*, 32 LAW & SOC'Y REV. 751 (1998); Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 LAW & SOC. INQUIRY 431 (1989).

5. Historical studies have examined changes in the appearance and success of individual, government and corporate entities in state and federal trial courts, but most of these studies examine data prior to 1970. *See, e.g.*, Stanton Wheeler Bliss et al., *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts*, 1870-1970, 21 LAW & SOC'Y REV. 403 (1987); Craig Wanner, *The Public Ordering of Private Relations: Part One: Initiating Civil Cases in Urban Trial Courts*, 8 LAW & SOC'Y REV. 421 (1974). For a survey of this literature and an analysis of more recent data in federal civil cases involving big business (although not taking into account problems in the federal civil database, as discussed infra), see Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971-1991*, 21 LAW & SOC. INQUIRY 497 (1996). More recent empirical work assessing Galanter's "party capacity" theory has focused on appellate courts at the state and federal level and sometimes particularly focused on the relatively small subset of cases involving amici curiae. *See* Paul Brace & Melinda Gann Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393 (2001); Kevin M. Clermont & Theordore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ*

On the normative side, we also fail to differentiate among the functions of the legal system in our assessments of the changing disposition of civil cases and the rapid developments in alternative dispute resolution. Concerns that heightened standards for surviving summary judgment and concerns about crowded dockets are "eroding our day in court and jury trial commitments,"[6] for example, do not distinguish between commercial cases—in which parties may not seek jury trials—and tort or civil rights cases in which individuals seek their day in court to challenge corporate or official misconduct.[7] Criticisms of federal judicial policy favoring settlement and the increased use of private alternative dispute resolution[8] emphasize the loss of public adjudication of "rights" and the expression of public "values" as if these rights and values have the same salience when we are talking about a corporation's right to cancel a contract as when we are talking about a person's right to collect disability benefits or to vote. Concerns about the use of judicial case management to restrict rights focus, indeed, on cases in which individual rights vis-à-vis the

From Negotiable Instruments, 2002 U. ILL. L. REV. 947 (2002); Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMP. L. STUD. 659 (2004); Donald Songer, Ashlyn Kuersten & Erin Kaheny, *Why the "Haves" Don't Always Come Out Ahead: Repeat Players Meet Amici Curiae for the Disadvantaged*, 53 POL. RES. Q. 537 (2000) Donald R. Songer & Reginald S. Sheehan, *Who Wins on Appeal? Upperdogs and Underdogs in the United States Courts of Appeal*, 36 AM. J. OF POL. SCI. 235 (1992);. Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. OF ECON. S92 (1997) [hereinafter *The Litigious Plaintiff Hypothesis*] and Theodore Eisenberg & Henry Farber, *The Government as Litigant: Further Tests of the Case Selection Model*, 5 AM. L. & ECON. REV. 94 (2003) [hereinafter *The Government as Litigant*] are among the few studies of federal litigation to specifically address issues of whether individual or organizational plaintiffs, for example, are more or less likely to end up in trials and prevail.

6. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion" "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L. REV. 982 (2003) (discussing the "trilogy" of cases, especially Celotex v. Catrett, 477 U.S. 317 (1986), in which the U.S. Supreme Court arguably raised the burden on plaintiffs for surviving summary judgment motions). For an example of a case in which courts appeal overtly to the federal caseload in reviewing summary judgment decisions, see Anthony v. BTR Automotive Sealing Systems, Inc., 339 F.3d 506, 517 (6th Cir. 2003) ("We cannot say that the district court's granting summary judgment four days before trial was an abuse of discretion, considering the heavy caseloads under which the district courts labor."). For an example of a court adverting to the temptation to use summary judgment as a mechanism for handling an overburdened docket (and warning against giving in to this temptation) see Door Systems, Inc. v. Pro-Line Door Systems, Inc., 83 F.3d. 169, 172 (7th Cir. 1996); a year later, in Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1397 (7th Cir. 1997), then Chief-Judge Posner of the Seventh Circuit observed that:

> [t]he expanding federal caseload has contributed to a drift in many areas of federal litigation toward substituting summary judgment for trial. The drift is understandable, given caseload pressures that in combination with the Speedy Trial Act sometimes make it difficult to find time for civil trials in the busier federal districts. But it must be resisted unless and until Rule 56 is modified. . . .

7. *See, e.g.*, Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMP. L. STUD. 627 (2004).

8. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619 (1995).

state are at stake.[9] Economic analyses of suit, settlement and trial, on the other hand, conceive of the only values at stake in the choice of a dispute resolution mechanism as being the private costs of litigation compared to settlement,[10] an assumption that is tenable in the context of commercial disputes but inadequate in the context of disputes that invoke public commitments to democratic values.

Even in our developing statutory and common law of alternative dispute resolution, there is relatively little attention paid to differences among the various types of cases in which ADR might be pursued. Interpretive canons that favor the finding of an agreement to arbitrate a matter are applied equally to sophisticated and heavily negotiated commercial contracts and adhesive standard form consumer contracts.[11] Under US Supreme Court cases interpreting the Federal Arbitration Act, commercial entities will be compelled to arbitrate statutory claims under the antitrust laws against their competitors for the same reasons and in the same way as employees are compelled to arbitrate statutory claims under the civil rights laws against employers. Moreover, the FAA is read to preempt state efforts to regulate categories of contracts, such as particular consumer contracts, on the basis of federal policy clearly enacted in order to support the efforts of large commercial trade associations to obtain enforcement of their private dispute resolution systems.[12] Evidentiary rules and privileges protecting the confidentiality of mediation are applied across the board, whether to the resolution of disputes between divorcing spouses or disputes between citizens and the state.[13] The capacity to keep settlement agreements secret is largely the same whether the agreement pertains to a unique commercial dispute or a mass tort.[14] Statutory provisions governing the obligations of arbitrators apply equally to consumer arbitration

9. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 274 (1984); Judith Resnik, *Procedure's Projects*, 23 CIV. JUST. Q. 273-308

10. Lucian Arye Bebchuk, *Litigation and Settlement Under Imperfect Information*, 15 RAND J. ECON. 404-15 (1984); Daniel Kessler et al., *Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233 (1996); George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Steven Shavell, *The Social Versus the Private Incentive to Bring Suit in a Costly Legal System*, 10 J. LEGAL STUD. 333-39 (1982); Kathryn E. Spier, *Settlement Bargaining and the Design of Damage Awards*, 10 J. L. ECON. & ORG. 84-95 (1994).. A recent exception is Xinyu Hua & Kathryn E. Spier, *Information and Externalities in Sequential Litigation*, Working Paper, Kellogg School of Management (2004) (available at www.ssrn.com) in which the authors explicitly take into account the public value of information about risks in achieving optimal levels of accident prevention.

11. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (holding that any doubts about the scope of arbitration agreed to should be resolved in favor of arbitration).

12.Jean Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637 (1996).

13.Cal.Evid. Code s. 703.5, 1119, 1121.

14. South Carolina U.S. District Courts have prohibited the filing of settlement agreements under seal. SC R USDCT CIV Civ 5.03

and large complex commercial arbitration.[15] Whether seeking to promote alternatives to litigation to resolve a family dispute over custody[16] or resolve a dispute arising under a commercial construction contract courts speak the same language, emphasizing overburdened dockets and the merits of private problem-solving.

The issues at stake in our understanding of what is happening to civil cases and the efforts to craft alternatives to traditional civil litigation, however, absolutely require that we differentiate between litigants, between legal functions, and between the different goals of our legal system. It may be that the disappearance of public civil trials to resolve commercial contract disputes is of no consequence; indeed it may be an efficient response to the increasing cost of the public system. The same cannot be said of the disappearance—if it is a real phenomenon—of public adjudication of civil rights or the claims of individuals about the misconduct of public or corporate actors. Private dispute resolution may be perfectly appropriate and something to be promoted in the resolution of family disputes, whereas it may be inappropriate in the resolution of patent disputes in which two corporations may bargain over the division of monopoly rents or in the resolution of disputes between the state and citizens about how electoral districts are determined. If judicial resources are strained by caseloads, which litigants are flooding in—corporate or individual? And if rationing is required, if an attempt to reduce the number of cases to which judges and courts devote their efforts is required, which cases should be diverted into private dispute resolution and which should be retained for public adjudication?

In this paper I present preliminary data on the differences between individual and organizational litigants in the disposition of federal civil cases. This paper follows on an earlier paper in which I developed a methodology for increasing the value of the database created by the Administrative Office of the US Courts.[17] Here I endeavor to show the differences between individual and organizational litigants in the rate at which cases are abandoned, defaulted, adjudicated without a trial, adjudicated with a trial, or settled.

The results show substantial differences in cases based, primarily, on plaintiff rather than defendant type. I find individual plaintiff cases are substantially more likely to be determined by an adjudication—especially a non-trial adjudication—than are organizational plaintiff cases. I also find evidence that organizational plaintiffs—against either individual or organizational defendants—are substantially more likely to settle their cases rather than to have them decided either by trial or non-trial adjudication.

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15. See Cal. Code Civ. Pro. Title 9.

16. See e.g., Howard v Drapkin, 222 Cal.App.3d 843, 857 (1990)

17. Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMP. L. STUD. 705 (2004).

I. THE DATA: TERMINATED FEDERAL CIVIL CASES

One of the major obstacles to a careful assessment of what is happening in civil litigation is the paucity of reliable data on how our legal system works in fact. (As one colleague recently remarked to me, we know more about the on-base averages of baseball players in the 19th century than we do about our civil justice system.[18]) As a profession we spend a lot of time arguing about whether too many or too few cases are going to trial, settling, being thrown out on pre-trial motions, being diverted into arbitration, etc. but we do not in fact know in detail how many are going to trial, settling, being thrown out on pre-trial motions, or being diverted into arbitration.

There are two principal longitudinal data sources about litigation in the U.S. The first is based on data collected in individual state courts. The Civil Trial Court Network, a joint project of the National Center for State Courts and the Bureau of Justice Statistics, has since 1992 conducted surveys of tort, property and contract cases every four years in a sample of forty-five of the seventy-five most populous counties in the country. In 1992, the survey collected data on civil cases disposed of in any manner; in 1996 and 2001, the survey was restricted to cases decided in a trial. In this series there is data on the nature of the claim, the type of parties (individuals, businesses, government, etc.) the amounts awarded and the time to completion.[19] Although an important window into state court litigation, where approximately 98% of all litigation takes place, the data are far from comprehensive, covering only these three common law claims and providing information since 1992 only about cases that ended in trial.

The other source of data is the federal data collected by individual district courts and the Administrative Office (AO) of the U.S. Courts and assembled by the Federal Judicial Center. This is a tantalizingly complete long-term data set, albeit on the small fraction of litigation that takes place in federal court. The data is available for 1970 and then continuously from 1979, and it is presented at the individual case level for all cases of all types terminated in the federal courts. Detailed, individual, case-level data is provided including the names of the parties, the court in which the case was filed and terminated, the nature of the claim, the method of disposition, the nature of any judgment reached and amount awarded, the time from filing to termination and so on. Most empirical researchers of the legal system turn to this database to test hypotheses about settlement and litigation incentives, win rates at trial, and the relative success of

18. For example, John McGraw set the single season record in 1899 (.548) for the period 1871 – 1901. Double Switch, *at* http://venus.lunarpages.com/~double2/History/mvpint4.html#ob (last visited Jan. 27 2005).

19. For a more complete description of these data see Eisenberg et al *Litigation Outcomes in State and Federal Courts: A Statistical Portrait* 19 Seattle L. Rev. 433, 435-436 (1996). The data are available from the Inter-University Consortium for Political and Social Research at www.icpsr.org and, for 1992, in a convenient statistical inquiry courtesy of Ted Eisenberg , *at* http://teddy.law.cornell.edu:8090/questata.htm.

government and businesses in court.[20]

Although questions about the reliability of the AO civil cases data have been raised informally for many years only relatively recently has a systematic study of the reliability of the data become feasible through docket sheets made available by the internet-accessible PACER system.[21] This system allows the comparison of the AO data with the information available directly from individual district courts. Eisenberg and Schlanger conducted the first systematic assessment of the reliability of the AO data on judgments (who won? how much?) in tort and prisoner cases.[22] They determined that the data were very reliable in reporting who the prevailing party was, but unreliable in reporting the amounts awarded. In what I believe is the only other paper to systematically assess the reliability of the AO data, I presented evidence about the reliability of several disposition codes, in particular those of interest for answering the question: are fewer cases going to trial today than thirty years ago and if so, is this because settlement rates are increasing or non-trial adjudication rates are increasing?[23] I discovered that there were substantial rates of error.[24] I was, however, able to offer corrected estimates for the 2000 data, using the results of my PACER audits to adjust the reported aggregate frequencies of settlements, non-trial adjudications, etc. to give a more accurate estimate of the incidence of different methods of disposition. I suggested the need to extend this exercise to the much more labor intensive effort of paper auditing of earlier years—years in which easy access to dockets over the internet is not available. I did so by showing that under the assumption that the

20. Eisenberg and Farber (1997) and (2003) (supra n. 5), Waldfogel, Joel "Reconciling Asymmetric Information and Divergent Expectations Theories of Litigation" 41 J. Law and Economics 451 (1998); Joel Waldfogel "The Selection Hypothesis and the Relationship between Trial and Plaintiff Victory" 103 J, Siegelman, Peter and Joel Waldfogel, "Toward A Taxonomy of Disputes: New Evidence Through the Prism of the Priest/Klein Model." 28 J. Legal Studies 101 (1999) Political Economy 229 (1995); Johnston, Jason Scott and Joel Waldfogel, "Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation" 31 J. Legal Stud. 39 (2002) T Dunworth and J Rogers, *Corporations in Court:* Big Business Litigation in U.S. Federal Courts, 21 J of L and Social Inquiry 497 (1996) (supra n. 5).. For a more extensive listing of studies relying on the federal AO data, see Eisenberg, Theodore and Margo Schlanger " The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis." 78 Notre Dame Law Review 1455 (2003)

21. Access to PACER is available *at* www.pacer.psc.uscourts.gov.

22. Theodore Eisenberg and Margo Schlanger (supra n. 22)

23. Hadfield, *supra* note 17.

24 By error, I mean a high likelihood that researchers would be led astray if they relied on the disposition codes to be exhaustive and mutually exclusive such that all settlements appeared coded as settlements and all cases decided on a pre-trial motion appeared coded as judgment on motion before trial.

1970 data were coded with the same type of errors as the 2000 data, we would have to conclude that settlement rates in federal courts have not increased, as many have thought. Therefore, the primary shift in litigation over the past three decades has been from bench trials to non-trial adjudications.

In this study, I turn to a different form of auditing to begin the effort of assessing the differences between individual and organizational litigants using the 2000 AO data to. Specifically, I addressed the question of whether the frequencies of trial, settlement and non-trial adjudication are the same across all litigant types. I adopted a simple technique for identifying whether a litigant (the AO data lists the first plaintiff and first defendant) was an individual or an organization. I assumed individuals were identified with one word (for example, "Smith") and organizations were identified either by multiple words ("Smith Inc.") or by the separate coding the AO provides when the US is either plaintiff or defendant in the case.[25] I then reviewed these to correct for some obvious shortcomings in this approach (for example, "Smith et al" "In re Smith") and removed districts that apparently deviated from the otherwise widespread practice of using only an individual's last name (for example, "Tom Smith" "T.E. Smith").[26] I then audited this coding, in connection with the audits I describe below of the disposition codes, for each of the four possible casetypes: Individual versus Individual, Individual versus Organization, Organization versus Individual, and Organization versus Organization. As I discuss in more detail in Section II, this coding was highly accurate (less than 5% error in the first plaintiff or defendant) in all but two cases: defendants are incorrectly coded in approximately 20% to 35% of cases originally coded as "I v. I" and in approximately 10 to 15% of cases originally coded as "O v. I." That is, my technique overcounts individual defendants. In the analysis I present below, I correct for this overcount.

For each case type, based on the configuration of litigant types, I audited random samples of between 150 and 400 cases in which the AO data coded disposition as one of the 8 codes that are of interest to an assessment of whether cases are tried, settled, or disposed of through non-trial adjudication and which are potentially subject to significant amounts of error. These codes are:

Disposition 7	Judgment on jury verdict
Disposition 8	Judgment on directed verdict
Disposition 9	Judgment on court trial
Disposition 6	Judgment on motion before trial

25. An initial effort to identify other governments separately from the US proved excessively labor intensive and inaccurate because it requires specifically identifying ex ante a list of all state and municipal entities. I did correct for a few repeat errors, such as "DC." In the audits I discuss below, I found few government entities other than the US among the entities coded as organizations.

26. The removed districts were Southern Indiana, Western Wisconsin, Alaska, Central California, and Nevada.

Disposition 17	Judgment on Other
Disposition 12	Dismissed: Voluntary
Disposition 13	Dismissed: Settled
Disposition 14	Dismissed: Other

In addition, I am interested in cases in which the disposition is coded for abandonment (dismissed for want of prosecution), default, consent, confirmation of arbitration awards, and appeals from magistrates. Both because these codes are a much smaller fraction of total final dispositions and because cursory review suggests they are accurate, I have assumed they are accurate for purposes of this paper. [27]

II. 1970 TO 2000: THE CHANGING COMPOSITION OF FEDERAL CIVIL CASES

A. *1970 to 2000: Three Decades of Change*

The last three decades have seen substantial change in the markets for legal services in the United States. During this period, law firms began to grow at great rates and the large corporate law firm emerged. While the largest law firms in 1970 had a few hundred lawyers, by 2000 the largest had thousands of lawyers in multiple states and countries. Also during this period, legal work became increasingly specialized.[28] Most importantly, the divergence between the two "hemispheres" of the profession, first identified by Heinz and Laumann (to their surprise) in their landmark study of Chicago lawyers in 1975,[29] expanded dramatically. Whereas in 1975 legal effort devoted to corporate and organization clients comprised 53% of all legal effort, by 1995 this figure had risen to 64%.[30] Legal effort devoted to what they termed "personal plight"—meaning family, employment, criminal defense, personal injury, and so on—had fallen from 21% to 16%.

The Chicago surveys also emphasize that the legal resources that Chicago's corporate and organizational clients capture differ in important ways from those obtained by individuals. As a group, Chicago lawyers serving corporate and organizational clients graduate from higher-ranked law schools, work in larger firms, and are more specialized than lawyers serving individual clients. Overall, we know that lawyers serving individual clients tend to work in solo and small

27. The other codes are various kinds of non-final dispositions: transfers, remands, bankruptcy stays, dismissals for lack of jurisdiction, and administrative and statistical closures. For purposes of this study, I have assumed these codes are accurate. While it is important to audit these codes in the future, it was not possible to do so for this project due to time and funding constraints.

28. *See* Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 SUP.CT. L.REV. 1003 (1994); Heinz et al., *supra* note 4.

29. HEINZ & LAUMANN, *supra* note 4.

30. Heinz et al., *supra* note 4 at 756-57.

firm practice settings while those serving organizations and corporations either work within the organization itself as in-house counsel or in large, often multi-state if not multi-national, law firms. These differences in the scale of practice have significant implications for the resources organizations and individuals bring to bear on litigation. Increased scale supports increased human and organizational capital investments. Moreover, the differences in the networks in which lawyers operate[31] suggest that lawyers representing different types of clients have different types of social capital on which to draw; the Chicago Lawyers survey, for example, emphasizes that lawyers with corporate and organizational clients also tend to have higher levels of influence and prestige within the profession. Indeed, "prestige" is arguably defined within the legal profession as distance from serving individual clients.[32]

Thus when Galanter first wrote his seminal piece on the differences in the legal resources and incentives facing "one-shotters" and "repeat players" in 1974, he was in many ways anticipating the accelerating differences between the lawyers serving individual and organizational litigants over the coming three decades. Our study of the changes in civil litigation over this period must clearly be conducted in light of the dramatic changes in the market for legal services and the increasing polarization between individual litigants and corporate and organizational litigants. Indeed, we should be exploring the hypothesis that the *differential* changes we are observing are not merely correlated with, but indeed caused by, the underlying transformation of the market for legal services.[33] Are more cases brought by individuals against organizations being decided on pre-trial motions because of the increasing disparity in the resources available to individual and organizational litigants? Is an increase in inter-organizational litigation, through its access to elite legal resources and influence, responsible for the shift to increased facilitation of settlement and the avoidance of costly trials? Is the pressure to divert cases involving "personal plight" into alternative dispute resolution part of the same "prestige" dynamic at work in the profession more generally? Are the increasingly specialized legal resources available to corporate and organizational clients especially responsible for changes to legal standards such as those governing summary judgment? Only with a picture of what is happening to civil litigation that is attentive to the differences in cases and litigants can we begin to explore these important hypotheses.

31. *Id*.

32. *See* Rebecca L. Sandefur, *Work and Honor in the Law: Prestige and the Division of Lawyers' Labor*, 66 AM. SOC. REV. 382 (2001).

33. For a discussion of the market for legal services and in particular the differential between organizational and individual litigants in their participation in this market, see Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953 (2000).

B. *The Changing Distribution of "Nature of Suit"*

When someone files a federal suit in district court, he or she fills out a "Civil Cover Sheet" which collects much of the information that is reported in the AO data base, including the names of the first plaintiff and defendant, the basis for jurisdiction, and the "nature of suit" filed. The sheet lists about 100 codes with case descriptions such as "negotiable instruments," "airplane personal injury," and "agricultural acts."[34] The "NOS" (nature of suit) code that appears in the AO database, therefore, is subject to only two kinds of error: error by the plaintiff or her representative who is filling in the form and transcription error. There is no error arising from an interpretation or ambiguity in the complaint or docket by a clerk. I, therefore, treat these codes as accurate and turn to a comparison of the types of cases filed in 1970 and 2000.

I have divided the NOS codes into categories that have normative significance for our evaluation of the different functions of the legal system and the implications of any differential in the rates at which cases are tried, settled, or adjudicated without a trial. These categories are presented in Figure 1, together with the frequency of each in 1970, 1980, 1990, and 2000.[35]

There are several things to notice about Figure 1. First, "criminal" cases on the federal civil docket have grown significantly, being the most frequent by 2000. These cases are primarily prisoner petitions, alleging violations of civil rights, prison conditions, habeas corpus, and other claims; a small percentage are deportations and seizures or forfeitures of assets related to criminal activity. The flood of prisoner petitions has been extensively discussed elsewhere[36] and, from the perspective of my study, has the potential to distort our understanding of "ordinary" civil litigation because of the frequency with which this category involves pro se plaintiffs, motions to file in forma pauperis, and special statutory provisions governing dismissal of these claims in summary fashion as frivolous.[37] I exclude these "criminal" cases from the analysis in the remainder of the paper.

Another category that shows substantial growth, and has been noted by others,[38] falls under what I have termed "Tax and Revenue." The growth here, an increase of over 700% between 1970 and 1980 and over 1100% between 1970 and 2000, comes from the federal government's use of the federal courts to collect on defaulted student loans and, to a lesser extent, to recover overpayments of various benefits such as Medicare and veterans benefits. The

34. For the complete list, see the Appendix.

35. See the Appendix for a full listing of the codes for 1970 and 2000 and the categorization I have applied.

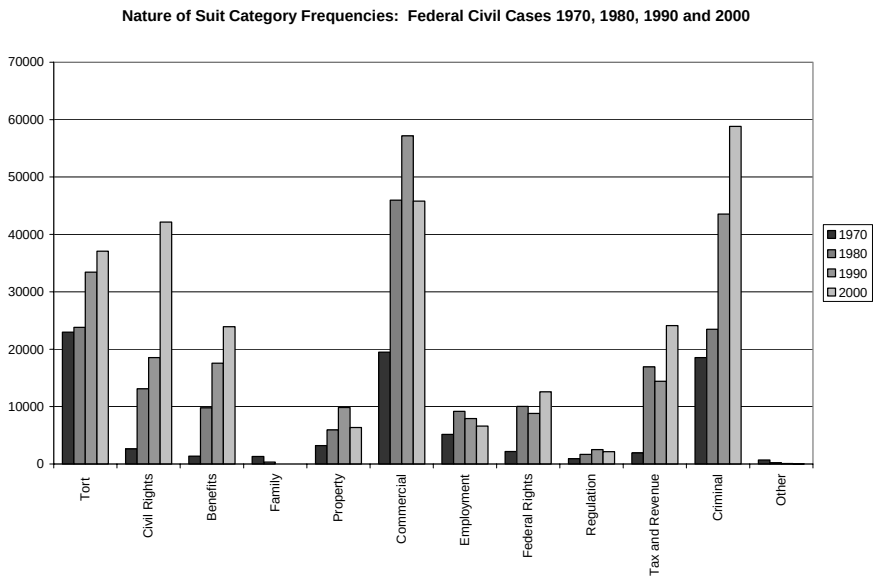
36. See Margo Schlanger *Inmate Litigation*, 116 Harv. L. Rev. 1555 (2003).

37. 28 U.S.C. § 1915 (2002).

38. See Marc Galanter, *The Life and Times of the Big Six; Or, The Federal Courts Since the Good Old Days*, 1988 Wisconsin L. Rev. 921, 928-29, Theodore Eisenberg and Stewart Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, n.124.

sheer size of this category and the fact that these cases are so frequently disposed of in administrative fashion through default judgments makes them another source of potential distortion in our effort to improve our understanding of "ordinary" civil litigation. I have also excluded the student loan and recovery of overpayments (but not tax) cases from the analysis in the remainder of the paper.

Figure 1



Source: Federal Judicial Center, Integrated Data Base

Of the remaining categories, commercial categories clearly dominate. In 1970 they are less frequent than tort cases (some of which should properly be classified as commercial because they involve product liability or property damage claims between businesses), but they grow faster than tort cases. By 1980, and continuing into 1990, commercial cases account for almost 40% of (non-criminal, non-student loan) cases. This percentage drops in 2000 to 25%, but the category is still the most numerous. In contrast, the cases targeted by tort reform proponents—personal injury[39]—show a significantly slower rate of growth, particularly between 1970 and 1990, the period during which the "litigation explosion" in federal courts began to capture widespread attention.[40] Between 1970 and 1990, tort cases grew by approximately 50% (the population grew by approximately 25% during this period,[41] GNP grew by approximately 90%[42]) while commercial cases grew by approximately 180%. During this period, a substantial majority of both types of cases were diversity cases, meaning that they faced the same jurisdictional minimum for access to federal court; moreover, for most of the 1970-1990 period, the jurisdictional barrier to

39. In all years, personal injury appears to account for 90% to 95% of all federal tort cases.

40. *See, e.g.*, POSNER, FEDERAL COURTS: CRISIS AND REFORM (1985).

41. CENTERS FOR DISEASE CONTROL & PREVENTION, HEALTH, UNITED STATES, 2003 95, *available at* http://www.cdc.gov/nchs/data/hus/tables/2003/03hus001.pdf (last visited Jan. 29, 2005).

42. FEDERAL RESERVE BANK OF DALLAS, U.S. ECONOMIC DATA, *available at*, http://www.dallasfed.org/data/data/gnpcw.tab.htm

diversity cases was falling in real terms.[43] Between 1990 and 2000, tort cases continued to grow but relatively slowly—a rate of 10% (slower than the rate of population growth)—while commercial cases fell in absolute numbers back to their 1980 level. Most of this commercial drop off, as others have noted[44], comes from a decline in contracts cases of about 30%. During this same time period, however, intellectual property cases have increased by about 50% and now account for almost 20% of all commercial litigation in federal courts (compared with 10% in 1990). Overall, intellectual property cases have increased by 320% between 1970 and 2000. It may be small wonder, then, that the American Trial Lawyers Association's response to the "silly lawsuits" claims of tort reform proponents—a list of "really frivolous lawsuits" between businesses—is dominated by intellectual property cases: Mattel suing an artist for $1.2 billion after he made $2000 on his "Exorcist Barbie," "Tonya Harding Barbie," and "Drag Queen Barbie;" Walt Disney suing the Academy of Motion Picture Arts and Sciences for an "unflattering" representation of Snow White in the opening sequence of the 1989 Academy Awards; Kellogg suing Exxon for the risk that consumers will confuse the Exxon tiger logo for Tony the Tiger, beloved champion of Frosted Flakes.[45]

We could also include "regulation" cases in our "commercial" category, for this is where we find cases under the many statutes that organize markets and correct for market failures: agriculture, antitrust, food and drug, railways, airlines, and so on. This category, however, is remarkably small and not showing substantial growth. Much regulation litigation, of course, takes place within agencies, but it is important to see that the emphasis on the growth of regulation over the past three decades—often summarized by an appeal to the number of pages published in the Code of Federal Regulations—is not a cause of expanded federal litigation.

Where growth has been the greatest in percentage terms has been in terms of new rights created by Congress. Civil rights cases—which include job, accommodation, welfare and other cases—have, of course, increased dramatically since 1970 with the passage of new civil rights statutes and the expansion of remedies and access to the courts (through attorney fee provisions and damages). They are now second only to commercial cases in absolute frequency and, as of 2000, had outstripped the total number of tort cases. Benefits cases—which are largely review of agency determinations of disability benefits—have also increased dramatically in percentage terms as federal benefit programs have expanded, and these cases are now the fourth most frequent type of case (excluding prisoner and student loan cases) in

43. The jurisdictional minimum was increased from $10,000 to $50,000 in 1988. 28 U.S.C. § 1332(a). Ten thousand dollars in 1970 dollars was equivalent to approximately $30,500 in 1988. http://www.bls.gov/cpi/home.htm.

44. Galanter, "Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation" 2001 Wisc. L. Rev. 577.

45. http://www.atla.org/homepage/bizvsbiz.aspx.

federal court. I have included in this category ERISA litigation, which accounted for approximately 45% of benefits cases in 1990 and 40% in 2000. ERISA, which was enacted in 1974, accounted for only 700 cases in 1980; by 1990 this number had increased by a factor of more than 10 to 7,700 cases. All other federal statutory rights not otherwise captured in the category of "regulation", by comparison, have grown only marginally since 1980, after an initial jump from 1970 levels; we cannot say much about the nature of these actions based on the nature of the suit's code, as now 85% of these cases are coded "other statutory actions." Interestingly, constitutional challenges to state statutes have been largely unchanged in total number (300 annually) over the past three decades, emphasizing how tiny a role activist efforts to create new rights through the courts plays in the growth of federal litigation.

Overall, the picture of civil litigation in federal court over the past three decades demonstrates the importance of paying attention to the underlying function of litigation. Most importantly, we can see that much of the growth in federal litigation—which has been the primary impetus for changes in both law and process, refocusing judicial efforts on settlement and alternative dispute resolution—has come in the commercial sphere of the legal system, in particular in areas where there has been little change in the underlying available causes of action. This is consistent with earlier studies of the federal system[46] and the study of Chicago Lawyers, which found that the most dramatic change in the pattern of legal work in Chicago between 1975 and 1995 was a substantial increase in the share of effort devoted to business litigation. And business litigation, of course, is largely responsible for the growth in the corporate sphere of practice.[47] In this sphere, then, we should be looking for changes in the incentives to use litigation to achieve commercial objectives, and we should be evaluating any changes in the way in which these uses of the legal system are resolved—trial, settlement, alternative dispute resolution—in terms of their underlying public purpose, namely, efficiency and the creation of wealth. The substantial growth in civil rights litigation, on the other hand, reflects significant statutory changes over the last three decades: litigants in this category are showing up in federal court much more frequently because that is what the democratic process decided should happen. These are clearly the cases in which the concerns raised by ADR critics, about the loss of public adjudication and the expression of public values, are potentially powerful. We need to know, then, whether these cases are undergoing changes in disposition. Are they in fact going to trial less often, settling privately more often, being adjudicated without a trial more often? Are these litigants facing more or fewer barriers to access?

The slower rate of growth in tort cases is also an important counter to the public perception that personal injury lawyers and juries run amok are

46. Dunworth & Rogers, *supra* note 5.

47. Heinz et al., *supra* note 4.

responsible for "clogging" our courts. Although most such cases are in state and not federal court, the federal data in Figure 1 are nonetheless helpful because they allow us to compare, as I've discussed, changes in tort cases with changes in contracts cases, which are also mostly heard in state courts. The political response to September 11, 2001, in terms of the potential for litigation, is an interesting case in point. Barely 10 days after the attacks, Congress passed the Airline Safety and System Stabilization Act which created the Victim's Compensation Fund, a fund intended to divert victims' families out of the legal system and into an administrative regime for compensation overseen by a single Special Master (Kenneth Feinberg) who would make non-reviewable allocations from the fund to compensate for economic and non-economic losses. Senator John McCain was particularly vocal about the need for such a mechanism to keep personal injury and wrongful death cases out of the courts. He cited "[t]he vast uncertainty of our litigation system," "the arbitrary, wildly divergent awards that sometimes come from our deeply flawed tort system-awards from which up to one third or more of the victims' award is often taken by attorneys," and "the tangle of lawsuits that will ensue" in support of passage of the Victims' Compensation Fund provisions of the Act.[48] He ended his remarks on the bill (debate on the bill was limited to one hour in the Senate) with the observation that "[i]t is regrettable, but perhaps inevitable, that the unity that this terrorist attack has wrought will devolve in the courts to massive legal wrangling and assignment of blame among our corporate citizens."[49] Senator Hatch in his remarks on the VCF commented on the need to "limit outrageous jury awards of punitive damages."[50] Nowhere in this debate or subsequent legislation, however, do we see similar concern about the *commercial* litigation the attacks were likely to (and did) precipitate: mega-lawsuits over insurance policies, business interruption claims, property damage claims, *force majeure* clauses, airline bankruptcies and so on.[51] As a RAND study in 1996 showed, however, most punitive damages awards are entered in

48.147 Cong. Rec. S9589-01, 2001 WL 1703925 (Cong. Rec.)

49. *Id*.

50. *Id*.

51. As of November 2004, approximately forty cases had produced written opinions on Westlaw (a small sub-set of all suits filed); some of these have thus far produced multiple opinions, see, e.g., SR Intern. Business Ins. Co. Ltd. v. World Trade Center Properties LLC, 2003 WL 554768, S.D.N.Y., Feb 26, 2003 and related opinions, and one is a large consolidated case addressing the question of whether the impact at the World Trade Center was one or two events for purposes of applying insurance policy limits. Approximately twenty-one insurance companies, all with separate counsel, are included in this litigation. *In re* September 11th Liability Ins. Coverage Cases, 333 F.Supp.2d 111, S.D.N.Y., Mar. 1, 2004. The cases that were avoided by the Victim Compensation Fund (VCF) have all been consolidated in a single case in the Southern District of New York, In re *September 11 Litigation*. For further discussion of the VCF as a response to perceived problems with litigation, see Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy"* (forthcoming).

business litigation.[52]

III. CODING LITIGANT TYPE; AUDITS, COMPARING 1970 AND 2000

A. *Background: The Theoretical Significance of Litigant Type and Existing Empirical Tests*

The "nature of suit" analysis in Part II gives us an important perspective on how changes in federal civil litigation differ across different categories of cases and functions of the legal system. Most of our economic and democratic theories of litigation, however, depend more fundamentally not on the nature of the suit brought but on the nature of the litigants in the suit. Economic theories of suit, settlement, and trial, for example, predict litigation behavior and outcomes on the basis of the parties' litigation costs and stakes.[53] Theories of litigation informed by democratic principles evaluate legal outcomes in light of the rights of citizens to access courts for the protection of rights or the redress of harms.[54] The right to jury trial is a constitutional right, grounded in American conceptions of democracy. The economics of litigation differ for individual litigants and organizational litigants; so too do the democratic issues raised about access to the courts and public adjudication. It is thus important to look not merely to the types of cases in the federal system, but more fundamentally to who is bringing and defending these cases.

The state data collected by the National Center for State Courts and the Bureau of Justice Statistics for 1992, 1996, and 2000 include data about the type of litigant: individual, business, government, or hospital. These data, however, do not cover a sufficiently long period of time, covers\ only those matters that end in trial in 1996 and 2000, and cover only property, tort, and contract cases. Thus while they are one possible source for an investigation of differences between individual and organizational litigants, they are incomplete if we are looking to assess the changing disposition of cases across time. The federal civil cases data include information about litigant type for diversity cases, that is, for the common law cases that the state data consider, namely (primarily) tort,[55] contract, and property.

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52. Eisenberg et al *The Predictability of Punitive Damages*, 26 J. Leg. Stud. 623, 636 (1997).

53. *See generally* Priest & Klein, *supra* note 10; Shavell, *supra* note 10.

54. *See* David Luban, *Political Legitimacy and the Right to Legal Services*, 4 BUSINESS AND PROFESSIONAL ETHICS 43 (1985); Fiss, *supra* note 8]; Luban, *supra* note 8 at ; Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II*, 1974 DUKE L.J. 536 (1974);. *See also* Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHILOSOPHY AND PUBLIC AFFAIRS 303 (1988) (presenting a philosophical defense of the need to equalize resources among litigants based on distributive justice and fairness concerns.)

55. Note, however, that Eisenberg and Farber removed personal injury cases from the tort cases because they were evaluating differences within case types between corporate and

Farber and Eisenberg have studied this subset of the data for differences between individual, government, and corporate litigants in terms of win rates.[56] They find that whereas plaintiffs in same-type cases (corporate v. corporate or individual v. individual) win 72% to 75% of the time, corporate plaintiffs suing individuals win 91% of the time, and individuals suing corporate plaintiffs win only 50% of the time.[57] They also find that individual plaintiffs are more likely to go to trial; their model predicts this as a consequence of lower average litigation costs for the set of individuals who choose to file suit in the first place.[58] Their regression analysis does control for the effect of case type. However, Farber and Eisenberg find that plaintiff type has a bigger effect on trial and win rates than defendant type. This is a prediction of their case selection model and not a prediction of a model that emphasizes the differential resources available to individual and organizational plaintiffs. Ultimately they find that individual defendants do worse than corporate defendants, which is what a "have-nots" model would predict.

Dunworth and Rogers have also studied the differences between individuals and what they call the "Fortune 2000" in a labor-intensive effort to use the party name data in the federal civil cases database to identify big business plaintiffs and defendants. Also looking at diversity cases where there is an entry of judgment for either plaintiff or defendant, they find that over the period 1971 to 1991 Fortune 2000 companies have win rates (against all types of parties) of 71% as plaintiffs and 61% as defendants, whereas non-business parties succeed only 64% of the time as plaintiffs and a mere 28% of the time as defendants.

I attempt to correct for two issues raised by these earlier efforts to distinguish between individual and organizational or corporate litigants and their experiences in federal civil litigation. First, as described in Part I, I develop a method for assigning litigant type to all cases, unrestricted to

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individual plaintiffs and few personal injury lawsuits have corporate plaintiffs. *See* Eisenberg & Farber, *The Litigious Plaintiff*, *supra* note 5 at S99. As I indicated above, in 2000 personal injury cases were over 90% of all tort cases in federal court.

56. Eisenberg & Farber, *The Litigious Plaintiff Hypothesis*, *supra* note 5.

57. *Id.* at 107-09. Some caution is in order in interpreting these win rates. Eisenberg and Farber calculate a "win" based on whether a judgment was entered for either plaintiff or defendant. However, as I discuss elsewhere, the "judgment for" variable (although Eisenberg and Schlanger, supra n 22. suggest it is reliable, is not generally entered in cases that are disposed of with a "dismissal" code. *See* Hadfield *Where Have All the Trials Gone?* Supra n. – at 707. These cases include large numbers of non-trial adjudications in which it can be definitively said that one or the other party won. The "judgment for" variable is thus an incomplete picture of actual case outcomes.

58. Eisenberg and Farber assume that individuals, unlike corporations, may have a taste for litigation and hence there will be greater variability in litigation "costs" (offset by benefits) among individual plaintiffs than is the case among organizational plaintiffs. *See* Eisenberg & Farber, *The Litigious Plaintiff Hypothesis*, *supra* note 5 at S98. This greater variability implies that the individual plaintiffs who choose to file lawsuits will have lower than average litigation costs and hence will bring suits that are less likely to be winners. Organizations, on the other hand, are unlikely to bring low expected value suits.

diversity cases. Second, I investigate and audit the disposition codes in order to assess the nature of litigation outcomes for different types of litigants. This will also allow a more extensive assessment of success among different litigant types because it allows us to count not only those cases in which a judgment is entered for plaintiff or defendant, but also cases in which a defendant obtains an adjudicated dismissal. This greater coverage and detail, however, does come at a loss. As I will discuss below, my audits of the coding method for litigant type reveal that the defendant is incorrectly coded as an individual in a significant number of cases. I cannot correct this at the individual case level; I can only adjust the overall proportions and estimate the disposition rates across the population of litigant types. This means I do not control for the nature of suit, and I cannot perform regression analysis to investigate what I call the casetype (the pairing of plaintiff and defendant). The relatively low error in the method of identifying the plaintiff type, however, does suggest that future researchers could use this method to test hypotheses concerning the impact of plaintiff type on litigation outcomes.[59]

B. *Audits of Casetype*

I described my technique for assigning casetype above. Essentially, the technique was to code a litigant as an individual if the party name was one word (for example, "Smith") and as an organization if the party name was more than one word (for example, "Smith Inc.") or if the "basis of jurisdiction" variable indicated that the plaintiff or defendant was the United States. I then audited this coding to assess its accuracy, drawing samples of the four casetypes created by this coding for each of the disposition codes that I audited.

The process of auditing this coding raises questions that prove to have important theoretical significance. These are questions about how to code individuals who are sued in connection with their position in an organization. In some cases, the docket sheet states that Fred Jones, Chief of Police, for example, has been sued in his official capacity; I code that as a suit against an organizational defendant. Sometimes the docket sheet states that Fred Jones, Chief of Police, has been sued in his individual capacity. How should this case be coded? Suppose Fred Jones has to hire his own lawyer and defend himself. Then it seems clear this case should be coded as having an individual defendant. But what if the docket sheet indicates that Fred Jones is being defended by the City Attorneys office? Here, our coding choice will depend on which theory of litigation we are interested in exploring. To assess the empirical evidence for an economic theory that focuses on litigation costs as a predictor of litigation outcomes, or a "have-nots" framework that predicts systematic bias against those with fewer resources and one-shot incentives, we should code the case as having an organizational defendant: the cost of this

59. Eisenberg and Farber indicate that plaintiff type is independently important in predicting case type. Eisenberg & Farber, *The Litigious Plaintiff Hypothesis*, *supra* note 5.

litigation and the nature of the legal services available to marshal a defense are organizational. But if we are interested in exploring democratic theories about the functioning of the courts as an institution that is available for the protection of rights, due process, and the public expression of values, or if we're interested in exploring (as Eisenberg and Farber do within an economic model) the ways in which individuals and organizations may differ in their assessment of the "cost" of litigation (because individuals may attach value to the process of litigation or trial itself), then what is important about Fred Jones, Chief of Police, is that he has been sued as an individual, as a citizen. It is his reputation and moral standing that is on the line and that he may wish to defend in court. He may be personally liable for damages (if he is not indemnified by his employer). The plaintiff chose to identify *him*, as an individual who should be held accountable through adjudication, and not (only) the city or the police force.[60] From a democratic perspective, a function of the legal system in this case is to provide a public institution for the resolution of this dispute between citizens, and for the public to participate—perhaps through a jury, or perhaps through publication of what transpires in an open court—in the assessment and evaluation of what is "right" and what is "wrong." Similar considerations arise for any individual who is insured for damages and/or for the legal costs of bringing a claim or putting on a defense, and particularly one who is represented by his or her insurer, as in most motor vehicle cases. From the perspective of evaluating the performance of courts in their democratic function, we may want to evaluate the case as one with an individual litigant. Or we may want to evaluate the case as having a litigant with some more complex characterization, treating "corporateness" as something on a continuum, rather than a dichotomous variable. The "coding" we use, however, will be fundamentally affected by the theory of litigation, and in particular the function of litigation, that we are exploring.

Another type of case that raises similar questions is the case of the unincorporated business, particularly sole proprietorships and cases that regularly appear in the docket sheets in which, for example, Mary Smith sues or is sued "dba" (doing business as) "Mary's Books." Cases involving law partners who sue or are sued individually, rather than as a partnership, or doctors who sue or are sued individually rather than as a medical practice, would also raise this question. Again, our interest in the "individual" or "organizational" status of these litigants depends on the theory or framework of litigation that we are interested in exploring. If we are exploring predictions about litigation behavior based on an economic model, we may want to code

60. Under the Civil Rights Act, 42 U.S.C. § 1983, for example, a person acting in his or her official capacity may nonetheless also be held personally liable. Hafer v. Melo, 502 U.S. 21 (1991). Pam Karlan has suggested to me, however, that in many cases even officials who are sued in their individual capacity under § 1983 may not experience the lawsuit as one against them personally. This emphasizes the complexity of identifying litigant type and the degree of "corporateness" in these cases.

these litigants as organizations: they are drawing on organizational resources to pay for their litigation expenses and will be treated as such, for example, by the Tax Code, which allows the deduction of legal expenses for businesses but not individuals. If we are exploring the performance of the courts in handling business-related disputes, in which efficiency may be the only criterion of legal performance that is of public interest, then again we may want to treat these litigants as organizations. But if we are exploring democratic concerns about the functioning of the courts, we may, as with the Chief of Police, be interested in the fact that these individuals are personally on the line, in terms of the moral and social implications of adjudication, and in terms of their wealth.

Note that we face similar questions when we are dealing with how to *interpret* the unambiguous cases in which a litigant is an organization: From an economic or "have nots" perspective, it may be appropriate to distinguish the organization from the individual. But from a democratic perspective, it may not be. For example, the public may have a stake in the process of how a product liability challenge to an organization is resolved (publicly or privately; through trial or through settlement), but not in the process (as opposed to the efficiency implications) of how a business-to-business contract dispute is resolved. But these are questions of interpretation and theory based on empirical data; they do not enter in at the coding stage. The issues I raised above, however, present questions for coding and the presentation of empirical data.

I have addressed these issues by presenting the results of the litigant type audits based on a narrow interpretation of what it means to be an organizational litigant: individuals "dba" some other entity are coded as individuals, and individuals who are identified by some organizational position (for example, "chief of police," "vice-president," or "trustee of pension fund") are also coded as individuals unless they are explicitly named in their official capacity. The audit results pooled across all casetypes are shown in Table 1. N indicates the total number of a particular type of case in the population of cases for the year 2000. S indicates the size of the random sample of cases of a given casetype that were audited after excluding missing or ambiguous cases. The margins of error in these estimates are shown in parentheses and are based on a 95% confidence interval. I confirmed that pooling the audits across casetypes is valid by checking that the individual audit results by disposition code were not significantly different.[61] This is what we would expect: the coding errors for casetype are likely to be uncorrelated with the disposition of the case. The major sources of casetype coding error are individuals coded as individuals who are sued in their official capacity and a variety of individual multiword last names (for example, Van Buren, De La Cruz, or Red Owl), which are miscoded by my algorithm as organizations. Note that the following results pertain only

61. To test this, I performed a Tukey-Kramer multiple comparisons test for each casetype error across case dispositions. With a few minor exceptions, all comparisons showed no significant differences. I have chosen to ignore these exceptions in my analysis because of their low frequency (and hence their minimal effect on the results).

to the first named plaintiff or defendant.[62]

Table 1: Audit of Litigant Types, Pooled Estimates Across Audited Codes, Federal Civil Cases 2000

type as coded	Coding Error	
	P error	D error
I v. I *N=17,775* *S=1697*	2.7% (+/- 0.8%)	28.9% (+/- 2.1%)
I v. O *N =92,829* *S = 1737*	1.8% (+/- 0.6%)	0.6% (+/- 0.4%)
O v. I *N =14,584* *S = 1240*	2.6% (+/- 0.9%)	11.6% (+/- 1.8%)
O v. O *N = 30,670* *S = 1271*	2.8% (+/- 0.9%)	2.0% (+/- 0.8%)

What these audits show, overall, is that the coding procedure for distinguishing individual from organizational litigants is quite reliable with the important exception that the method overcounts individuals as defendants. It does so at a rate of approximately 30% when the plaintiff is an individual and at a rate of approximately 12% when the plaintiff is an organization.[63] This is, in and of itself, interesting, and tells us that organizations are more likely to be defendants, sufficiently so that the assumption that a litigant is an individual is more often correct when the litigant is a plaintiff than when the litigant is a defendant. What we see happening in particular on the dockets sheets is the effect of having cases in which individuals are sued in their official capacity or in which cities are identified only by their name ("Hartford"): individuals in their official capacity and cities are more likely to be defendants than plaintiffs and these are the type of cases in which the coding system breaks down.

The results of the audits in Table 1 can be used to estimate the frequency of each casetype, by using the sample errors as correction factors. I have estimated the frequency of case types in the population of all non-prisoner, non-student loan cases in 2000 by using a weighted average of the frequencies in the audited codes as a correction factor for the unaudited cases. (Again, this

62. In auditing casetype, I removed repeated cases, including cases that were consolidated or disposed of together. In particular, I removed cases involving Liberty Mutual, Owens Corning, and A-C Products Liability Trust as defendants.

63 These numbers would be substantially lower if we chose to categorize individuals sued in their official capacity as individuals, and somewhat higher (because this is a low frequency occurrence) if we chose to count "dba's" as organizations.

technique is supported by the lack of significant differences in casetype coding errors across disposition codes.) Table 2 presents these results.

Table 2: Estimated Frequency of Casetypes, Federal Civil Cases 2000

Casetype	Frequency
I v. I	9.3%
I v. O	60.5%
O v. I	7.9%
O v. O	22.3%

Excludes prisoner petitioners, forfeiture and seizure cases and student loan and overpayment recoveries.

Table 2 tells a dramatic story: in 2000, fully 60% of federal civil cases involved an individual suing an organizational defendant, 22% an organization suing another organization. Put differently, organizations are defendants in more than 80% of all federal civil litigation; individuals are plaintiffs in almost 70%. I have excluded an important category of organization versus individual litigation, namely, the United States suing for recovery of defaulted student loans. These cases constitute 71% of all federal cases brought by the United States as plaintiff; foreclosure cases are the next largest category, representing 8% of United States plaintiff cases. Note that both these types of cases are by and large resolved through default judgment—approximately 60% of the time in 2000 with another 10% resolved on consent and 15% voluntarily dismissed by the government[64]—and hence "litigation" in these cases often is largely administrative, merely the process necessary to obtain a judgment that can then be used to initiate collection procedures. Excluding them, therefore, helps to keep our picture of litigation focused on contested litigation. That is the setting, as I discuss below, in which our theories of litigation—the choice of whether to settle or litigate, the normative implications of a non-trial as opposed to a trial adjudication—are relevant. Criminal seizure and forfeiture cases are also cases brought exclusively by the United States government, generally against individuals—although the case names often identify the property rather than the claimant—and have a variety of dispositions, but their exclusion does not have a significant impact on our overall picture of federal litigation: they represent approximately 5% of all United States plaintiff cases and thus an even smaller percentage (approximately 0.5%) of all federal civil litigation.[65]

The exclusion of prisoner petitions from the picture in Table 2 re-

64. As Hadfield *Where Have All the Trials Gone*(2004) and the audits, *infra*, p. 134, of the "voluntary dismissal" code indicate, it may be that a significant fraction of these are settled; coded settlements (disposition code 13) are only about 3% of the total, however. This is likely to be a case in which any settlements are entered as consent judgments in order to generate the judgment necessary for enforcement procedures.

65. The United States was a plaintiff in approximately 12% of all federal civil litigation in 2000; as we have seen, 70% of these cases were the collection of student loans.

emphasizes the difficulty in determining, in some cases, the relevant characterization of a litigant as either organizational or individual. The vast majority (90% in 2000) of these cases are filed pro se and the defendants identified on the cover sheet as something like "Warden" or "Nurse Fredricks." Approximately 40% of these cases are habeas corpus; another 20% raise complaints about prison conditions; and 10% seek to vacate a sentence. All of these cases should properly be identified as having an organizational defendant. The remaining 25% are civil rights cases, which could include suits complaining about either official or individual conduct. In either event, if we included these cases in the picture on Table 2 (they account for 22% of all federal civil cases in 2000), we would significantly increase the representation of cases brought by individual plaintiffs against organizational defendants, and somewhat the representation of cases filed by individual plaintiffs against individual defendants. I have excluded them because they distort the picture of the type of civil litigation that we are generally thinking of when we develop our models of litigation and evaluate alternatives: they are poor cases for the application of economic theories because of the severe constraints on prisoner capacity to fund and conduct litigation; they are poor cases for evaluating alternatives to litigation and trial rates because of the very high rate at which these cases are summarily dismissed, often as frivolous.[66]

The casetype audits only assess the accuracy of the coding of the first named plaintiff and defendant; these are the only litigants identified by name in the federal civil cases database. There are many cases, however, in which there are additional litigants and sometimes these litigants are of a different type than the first named litigant. Multiple litigants on either side of a case can change the economic dynamics of a case— such cases involve a sharing of litigation costs and increased complexity in the resolution of the case. At the outside, for example, a class action (which can be separately identified in the database) pools the awards, distributes them across a large number of plaintiffs, and provides a formal mechanism for attorneys fees to be sought from that pooled award. The mere creation of a class, however, also increases legal fees by creating legal issues surrounding the certification of a class and the distribution or allocation of any award. Class actions, however, are rare in federal court: in 2000, among the non-prisoner, non-student loan cases, they account for fewer than 1% of all cases.

Much more frequent is the case in which there are simply multiple plaintiffs or defendants. Here, from an economic point of view, we are particularly interested in whether there is an organization that participates in addition to a named individual plaintiff or defendant: the presence of the organization implies the availability of the resources and the impact of the economic behavior of an organization as distinct from an individual. From a

66. For a detailed discussion of the nature of prisoner litigation, see Schlanger supra n. 39

democratic perspective, we will be particularly interested in knowing whether there are individuals who are also involved in addition to named organizational plaintiffs or defendants. Table 3 shows the frequency with which cases in my samples with first-named litigants of one type had additional litigants of the other type. The identification of the first-named litigant in these tables is based on the true type determined from the docket. For purposes of this table, I use the convention of coding as organizations those individuals who are named with an organizational affiliation and represented by either by a government attorney or the same attorney representing the organization, even if they are not explicitly named in their official capacity. In order to make this table more readable I have only included frequencies greater than 5%.

Table 3: Additional Litigants of Other Type

DISPOSITION CODE	ADDITIONAL LITIGANTS	FIRST NAMED LITIGANTS			
		I v. I	I v. O	O v. I	O v. O
BENCH	*Also other type P*	-	**6.0%**	-	-
	Also other type D	**50.6%**	**20.3%**	**36.9%**	**19.6%**
	Also other type P&D	**7.4%**	-	-	-
JURY	*Also other type P*	-	-	-	-
	Also other type D	**57.1%**	**30.8%**	**36.9%**	**23.3%**
	Also other type P&D	-	-	-	-
DISMISSED VOLUNTARY	*Also other type P*	-	-	-	**6.6%**
	Also other type D	**44.1%**	**3.5%**	**23.7%**	**21.2%**
	Also other type P&D	-	-	-	-
DISMISSED SETTLED	*Also other type P*	-	-	-	**7.9%**
	Also other type D	**53.9%**	**16.6%**	**32.3%**	**16.7%**
	Also other type P&D	-	-	-	-
DISMISSED OTHER	*Also other type P*	-	-	-	-
	Also other type D	**39.7%**	-	**17.4%**	**15.3%**
	Also other type P&D	-	-	-	-
JUDGMENT ON MOTION	*Also other type P*	-	-	-	**5.5%**
	Also other type D	**62.4%**	**19.5%**	**30.4%**	**17.7%**
	Also other type P&D	-	-	-	-

JUDGMENT ON OTHER	*Also other type P*				**6.5%**
	Also other type D	**40.2%**	**7.7%**	**36.8%**	**29.3%**
	Also other type P&D				

It is clear from this table that a large fraction of cases involve both types of litigants as defendants, but not as plaintiffs. This is especially true when the first-named defendant is an individual: in roughly half of such cases brought by an individual plaintiff, an organization is also named as a defendant; and in roughly one third when the case is brought by an organization. Combining the results in Tables 2 and 3 we can estimate that fewer than 10% of all federal civil (non-prisoner, non-student loan) cases involve an individual defending a case without the presence of an organizational co-defendant. Seen from a different perspective, more than 90% of all federal civil cases name an organization as defendant. Individual plaintiffs, on the other hand, rarely have organizational co-plaintiffs. The dominant case type, which pits an individual plaintiff against an organization, is thus even more dominant than Table 2 suggests. The implications of this from an economic and democratic perspective are significant: we should expect that defendants face considerable advantages in marshalling evidence and legal arguments in the great majority of cases; the impact of this on the development of legal standards such as those governing summary judgment and on doctrine that promotes alternatives to litigation is clearly an issue we need to explore.

While Tables 2 and 3 tell an important story, the analysis of the federal database is based on only one metric, that is, the number of cases. It does not tell us how intensive these cases are—how much judicial attention they receive, the impact they have on the production of law, the size of the stakes or the importance of the underlying issues. We can fill some of this in by reading Tables 2 and 3 in light of the Nature of Suit analysis discussed in Part II. A detailed breakdown of nature of suit by casetype is not possible given the method used for coding and correcting casetype here: I have corrected the casetype coding at the aggregate level, and not at the individual nature-of-suit level (the latter would require a much larger auditing effort as it would have to be based on sufficiently large samples of each of the roughly 100 nature-of-suit codes). However, as we have seen, the type of error in coding is by and large a "type 2" error, that is, when it identifies a case as I v. O or O v. O this is basically accurate but it tends to miss I v. O cases that are wrongly identified as I v. I and, to a lesser extent, O v. O cases that are wrongly identified as O v. I cases. It is reasonable, therefore, to look at the distribution of nature of suit among the I v. O and O v. O cases, based on the raw uncorrected coding, to get a picture of what 80% of federal civil suits look like.[67] Figure 2 presents this

67. Without more detailed analysis, it is not possible to say reliably what the I v. I and

data.

O v. I cases look like.

Figure 2

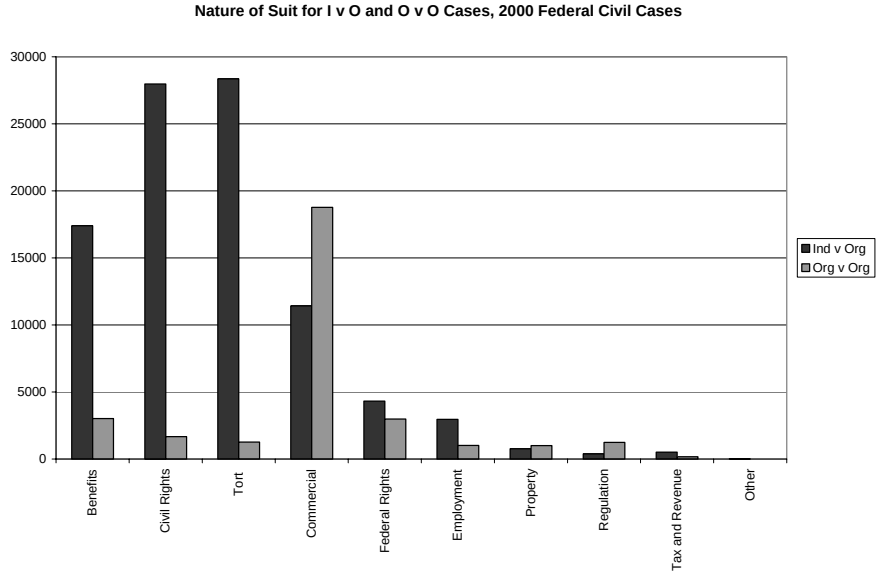

Figure 2 tells us that civil rights and torts cases brought by an individual against an organization are a large percentage of all federal non-prisoner, non-student loan cases—roughly 40%. Individuals suing organizations for benefits (principally the government, but also employers in ERISA) are roughly another 10% of cases. Commercial litigation between organizations—mostly commercial contracting cases, but also regulation cases involving both commercial and government litigants—account for roughly 12% of all cases. Commercial litigation between an individual and an organization—these are largely insurance and other contract actions—account for another 7% to 8%.

How do these numbers compare with those in 1970? Unfortunately, I can't correct the 1970 data as I have corrected the 2000 data because the 1970 cases are not available on PACER and hence audits are a much more labor-intensive project. I can, however, offer some reasonable conjectures, based on what we have learned from the 2000 audits.[68] In the 2000 data it appears that the source of the most significant error in my basic litigant type coding method is that using this method I identify as "individual defendant" individuals who are, in fact, sued in connection with their relationship to an organization, either in their official capacity (which is essentially a suit against the organization) or in their

68. Unfortunately, I cannot offer the same conjecture about the 1980 and 1990 data. A cursory review of the results of applying the basic casetype coding method to those years indicates that there is substantial error caused by a more widespread practice in those years of including the first name or initials of an individual in the party name. This is an error that it is simply too labor intensive to correct unless it is confined to a relatively small number of districts, which was the case with 1970 and 2000. I have already removed from the 2000 and 1970 data the districts for which this appears to be a problem.

individual capacity as a result of their conduct within the organization (which may be a case in which, for example, the organization defends and perhaps indemnifies the individual.) This type of error seems likely to occur primarily in civil rights cases—job discrimination, sexual harassment, police assault, for example—and, to a lesser extent, product liability and other non-motor vehicle tort cases. In 2000, civil rights cases accounted for approximately 40% of all cases with the raw (uncorrected) I v. I coding; product liability and other non-motor vehicle tort cases accounted for approximately 17% of such cases. In 1970, however, civil rights accounted for a mere 3% of cases with raw I v. I coding and non-motor vehicle tort cases accounted for a mere 6% of all I v. I cases. Thus the type of case that I conjecture is most likely to contain the type of error I identify in 2000 is far less frequent in 1970.

If I assume that all of the roughly 30% error in the I v. I coding that I identify in 2000 occurs in civil rights and non-motor vehicle tort cases, this implies that the error within those case types occurs in approximately 53% of such cases. If I then assume that these errors occurred at the same rate in the 1970 data, this would imply that approximately 9% of the I v. I cases in the 1970 data are miscoded and should be identified as I v. O cases. Using this correction factor and assuming the other casetypes are correctly coded by my basic method (although I have identified between 10% and 15% error in the coding of "O v. I" cases, I do not have a good basis for determining the source of this error and so cannot develop a reasonable conjecture about how this error might have affected the 1970 data), I obtain the following frequencies for casetypes in the 1970 data:

Table 4: Estimated Frequency of Casetypes, Federal Civil Cases 1970

Casetype	Frequency
I v. I	15.4%
I v. O	41.3%
O v. I	17.3%
O v. O	26.1%

Excludes prisoner petitioners, forfeiture and seizure cases, and student loan and overpayment recoveries.

If the assumptions going into the above calculation are reasonable, then, it is clear that over the last three decades the significant change in federal civil litigation has been an increase of some 20 percentage points in the share of cases that involve an individual suing an organization. Organizational defendants have gone from being named in approximately 68% of cases (possibly a little higher if there is some coding error in the I v. O cases) to 83%. From the perspective of Galanter's "have-nots" 1975 analysis, this is a very important shift towards "have" defendants against "have-not" plaintiffs. This has implications for both an economic theory of how this shift would affect the overall pattern of civil litigation and for a democratic evaluation of the impact

of those changes. From an economic perspective, if organizations, for example, are more likely to settle their cases because of better legal advice or fewer benefits associated with a "day in court" than individuals, then this shift would in part account for a fall in trial rates based on the change in the average incentives influencing case outcomes. Alternatively, if defendants as a group had more and better legal resources at their disposal as they became more "organizational" on average, then we might predict that they would eventually succeed in changing underlying civil procedure, such as increasing the hurdle that a plaintiff has to surmount to get pass summary judgment, or shifting doctrine towards greater acceptance of alternative dispute resolution tracks that reduce legal costs or expected damages. From a democratic perspective, the increasing dominance of cases in which individuals sue organizations, particularly on the basis of newly created or expanded rights and benefits, bolsters the possible relevance of the critique that sees settlement and ADR as a means of retrenching on rights or limiting the public expression of values. What we need to know is, are the changes in civil disposition that cause concern in the aggregate occurring in these cases? It is to the more careful assessment of the changes in civil litigation across casetypes that I now turn.

IV. AUDITS OF DISPOSITION CODING

The AO's disposition codes have been frequently used,[69] and criticized,[70] in empirical work. Recently, the availability of electronic dockets on PACER has allowed audits of AO data,[71] and here I continue this effort by reporting audit results for major disposition codes, those that are particularly prone to error and ambiguity. In Part V I use these audit results to estimate (more) accurate percentages of cases disposed of by trial, settlement, and non-trial adjudication, in order to compare disposition across case and litigant types.

Table 5 is based on an audit of disposition code 9, which codes for termination by a bench decision. I treated this as accurate if there was a contested proceeding with findings of fact and conclusions of law reached by a judge. I treated decisions on motions—including motions for preliminary

69. *See, e.g.*, Dunworth & Rogers, *supra* note 5; Eisenberg & Farber, *The Litigious Plaintiff Hypothesis*, *supra* note 5; Eisenberg and Farber, *The Government as Litigant* supra n. 5; Schlanger supra n. 39. Waldfogel (1995, 1998), Johnston and Waldfogel (2002) and Siegelman and Waldfogel (1999) (all supra n. 22) use the "judgment for" variable, but this implicitly relies, as it turns out, on the "disposition" variable. This is because, at least in 2000, the "judgment for" variable is coded only in cases in which a "judgment" disposition code is entered; that is, cases with disposition codes 12, 13 or 14—in which we do indeed find significant numbers of non-trial adjudications—do not have a corresponding "judgment for" entry; appeals from magistrates are also predominantly coded as "unknown" judgment-for. In these studies, therefore, all of these dispositions are incorrectly treated as settlements.

70. *See, e.g.*, Stephen Burbank, *Keeping Our Ambition Under Control: The Limits of Data and Inference in Searching for the Causes and Consequences of Vanishing Trials in Federal Court*, 1 J. EMP. L. STUD. 571, 580 (2004).

71. *See, e.g.*, Eisenberg & Schlanger, *supra* note 24; Hadfield, *supra* note 1.

injunctions, petitions for the enforcement of subpoenas, etc.—as non-trial adjudications; I also treated reviews of agency decisions as non-trial adjudications. (N indicates the total number of cases in the non-prisoner, non-student loan database after excluding districts for which the casetype coding could not be used. The total number of such cases in 2000 was 155,858.)

Table 5: Audit of Disposition Code 9 ("Court Trial"), Federal Civil Cases 2000 (N = 1,119)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	-	0.8	2.4	0.7
Abandonment	-	-	-	-
Default	1.2	-	2.4	0.7
Settlement	3.7	1.5	2.4	1.4
Non-Trial Adjudication	1.2	0.8	4.8	1.4
Bench decision	87.7	87.2	83.3	90.6
Jury or directed verdict	6.1	9.8	4.8	5.0

Table 5 shows the "court trial" variable to be highly accurate, with the only significant source of error coming from a miscoding of a jury or (most frequently) directed verdict as a bench decision. Table 6 tells a similar story about the coding for jury and directed verdict: this is a very accurate code. There are a few settlements "hidden" in this code (generally, settlements that occurred after a jury trial was completed), but by and large the AO data very reliably identify cases disposed of by a trial.

Table 6: Audit of Disposition Codes 7 and 8 ("Jury Verdict" and "Directed Verdict"), Federal Civil Cases 2000 (N = 2,709)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	2.9	0.5	-	3.1
Abandonment	-	2.4	-	-
Default	-	-	-	-
Settlement	3.8	4.3	1.5	5.5
Non-Trial Adjudication	2.9	0.5	-	3.1
Bench decision	-	0.9	-	-
Jury or directed verdict	93.3	91.9	97.0	90.6

Tables 5 and 6 show the importance of looking to disposition as opposed to merely procedural progress to determine whether a case was decided by a trial, the latter of which is the data reported by the AO and used by Galanter as an

estimate of trial rates.[72] In other audits I do not report here, I have found that while the procedural progress code is highly accurate for what it purports to indicate—whether a trial was *started*—it is not as accurate as an indicator of when disposition was based on a jury verdict or bench decision; I have found the procedural progress codes to identify terminations by a trial decision only about 60% to 80% of the time. Whether a trial was started is a relevant piece of information for the management of the courts because the purpose of collecting the data is, by and large, to assess demands on judicial resources. For the purposes of assessing economic incentives to continue to a verdict or democratic concerns about whether cases are adjudicated or settled, however, the variable we should focus on is disposition. The above audits show that this is a highly reliable variable in the AO data.

Table 7: Audit of Disposition Code 6 ("Judgment on Motion Before Trial"), Federal Civil Cases 2000
(N = 17,322)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	8.7	7.1	4.4	5.5
Abandonment	-	-	-	-
Default	0.8	0.6	17.7	8.5
Settlement	3.8	3.6	10.8	14.0
Non-Trial Adjudication	84.4	86.9	67.1	71.3
Bench decision	1.1	1.7	-	0.6
Jury and directed verdict	1.1	-	-	-

Table 7 shows disposition code 6 is also reasonably reliable, particularly in the most frequent case type, I v. O.[73] Moreover, the likelihood that a case coded as having been disposed on a motion before trial was in fact terminated by a non-trial adjudication (for example, decided on summary judgment, or dismissed on the defendant's or the court's motion with prejudice) is significantly higher if the case was brought by an individual plaintiff than if it was brought by an organizational plaintiff.[74] A significantly higher percentage of these cases are in fact settlements in organizational plaintiff cases.[75]

[72] Galanter, supra n. 1.

73. The audits conducted for this paper identified an error in the sampling for the audits I conducted in previous work, in which disposition code 6 appeared highly unreliable, with error rates on the order of 70%. *See* Hadfield *Where Have All The Trials Gone?*(2004). The audits I report here are the ones I consider accurate.

74. I conducted significance tests using the Tukey-Kramer multiple comparisons tests. All differences apparent in the table are significant at the 0.01 level or better with the exception of the difference between I v. I and I v. O, and the difference between O v. I and O v. O.

75. Tukey-Kramer significance tests again show the differences apparent in the table to be significant at the .05 level or better, with the exception of the difference between I v. I

Interestingly we see a significantly higher percentage of cases that are actually default judgments (which can be interpreted by a clerk as "judgment on a motion" for a default judgment) in the organizational plaintiff cases. Although this is consistent with the overall higher rate of defaults in O v. I cases, it is more surprising in the O v. O cases.[76] Also importantly, these audits confirm that some judgments on motion are in fact bench decisions, but this percentage is very small. This code does not, therefore, hide trials.

Table 8: Audit of Disposition Code 17 ("Judgment on Other"), Federal Civil Cases 2000
(N = 4,781)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	20.6	18.4	7.7	12.2
Abandonment	-	0.5	0.9	0.8
Default	1.0	0.5	29.1	8.9
Settlement	20.6	13.3	30.8	37.4
Non-Trial Adjudication	55.9	64.8	27.4	30.9
Bench decision	-	2.0	4.3	8.1
Jury and directed verdict	2.0	0.5	-	1.6

Table 8 shows that the "judgment on other" code is unreliable if interpreted as a non-trial adjudication code: roughly 60% of cases coded in this way are indeed non-trial final adjudications in individual plaintiff cases; a far smaller percentage (approximately 30%) of organizational plaintiff cases coded "17" are in fact non-trial adjudications.[77] In both cases, this code hides a substantial number of settlements—significantly more in organizational plaintiff cases than in individual plaintiff cases.[78] This code also hides a number of non-contested dispositions—specifically defaults—for the O v. I cases, and a substantial number of non-final dispositions.[79] Finally, this code hides a significant

and I v. O, and the difference between O v. I and O v. O.

76. Tukey-Kramer significance tests show all differences to be significant at the .001 level with the exception of the difference between I v. I and I v. O.

77. Tukey-Kramer tests show the differences reported in the text to be significant at the .001 level; the differences between I v. I and I v. O, and between O v. I and O v. O, are not significant.

78. The differences apparent in the table are all significant at the .05 level or better with the exceptions of the following: I v. I – I v. O; O v. I – O v. O; and I v. I – O v. I. I can still make the claim that the difference between individual and organizational plaintiff cases are significantly different, however, because of the greater frequency of I v. O cases among individual plaintiff cases.

79. The differences in non-final dispositions are not significant with the exception of I v. I as compared to O v. I. The differences in default dispositions are all significant with the exceptions of I v. I – I v. O and I v. I – O v. O.

number of bench decisions, but only in intra-organizational cases.[80]

Table 9: Audit of Disposition Code 12 ("Dismissed: Voluntary"), Federal Civil Cases 2000
(N = 18,516)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	46.2	37.0	60.1	56.6
Abandonment	-	0.2	0.3	-
Default	-	0.2	3.0	0.7
Settlement	52.7	59.8	35.0	41.3
Non-Trial Adjudication	1.1	2.7	1.3	1.4
Bench decision	-	-	0.3	-
Jury and directed verdict	-	-	-	-

Cases that are "voluntarily dismissed" are expected to contain two types of dismissals: unilateral and non-final (without prejudice) dismissals by the plaintiff, and settlement dismissals. The audit reported in Table 9 confirms that this is indeed the case, but it demonstrates an important difference between individual and organizational plaintiff cases. Fifty-five to sixty percent of cases dismissed voluntarily by individual plaintiffs are settled, whereas settlement accounts for only 35% to 40% of cases brought by organizational plaintiffs. Conversely, 35% to 45% of voluntarily dismissed cases brought by individual plaintiffs are non-final, whereas 55% to 60% of voluntarily dismissed cases brought by organizational plaintiff cases are non-final.[81] Together with the fact that organizational plaintiff cases are more likely to end in a voluntary dismissal (16% as compared to 10% in this dataset[82]), this suggests that organizational plaintiffs are much more likely than individual plaintiffs to institute (federal) litigation and withdraw that litigation without resolution. This may suggest a greater strategic use of litigation and/or the availability of more alternatives for final resolution.

Table 10: Audit of Disposition Code 13 ("Dismissed: Settled"), Federal Civil Cases 2000
(N = 47, 793)

True Disposition	Casetype

80. The differences shown in Table 8 with respect to bench decisions are not significant with the exception of the differences between O v. O and individual plaintiff cases.

81. These differences are significant at the .01 level or better; the settlement and non-final differences between I v. I and I v. O, and between O v. I and O v. O cases, are not significant.

82. This is based on the raw casetype coding; however as my audits demonstrate, the errors in raw casetype coding generally involve errors in defendant, not plaintiff, coding.

(percent)	I v. I	I v. O	O v. I	O v. O
Non-Final	3.5	4.4	7.2	7.4
Abandonment	-	0.2	-	-
Default	-	-	1.1	-
Settlement	96.1	94.2	90.6	92.6
Non-Trial Adjudication	0.4	1.2	1.1	-
Bench decision	-	-	-	-
Jury and directed verdict	-	-	-	-

As Table 10 indicates, the settlement code ("13") is highly accurate in the sense that it is not sensitive to "type 1" errors: roughly 95% of all cases coded as settled were in fact settled.[83] My other audits, however, indicate that there is a significant degree of "type 2" error, that is, "false negatives": many cases that are not coded "13" are in fact settled.

Table 11: Audit of Disposition Code 14 ("Dismissed: Other"), Federal Civil Cases 2000
(N = 20,138)

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	31.7	23.9	22.6	32.6
Abandonment	-	-	-	-
Default	-	0.4	4.5	1.6
Settlement	25.4	32.4	43.2	40.5
Non-Trial Adjudication	40.5	42.0	25.2	22.6
Bench decision	2.4	1.3	3.9	2.6
Jury and directed verdict	-	-	0.6	-

The "dismissed: other" category proves to be an especially troublesome one for the interpretation of the raw AO data. We might expect that this is a catchall for dismissals that are *not* judgments on motions, settlements or non-final dismissals, but in fact it is a combination of all these dispositions. Moreover, the rates at which this code hides "type 2" errors in the "judgment on motion," "settlement," and "voluntary dismissal" codes vary across case types. This code is more likely to hide non-trial adjudications involving individual plaintiffs,[84] and more likely to hide settlements by organizational plaintiffs.[85] Across all casetypes (the differences are not significant) this code

83. None of the differences in the table are significant.

84. The differences in the table are significant at the .05 level or better with the exception of the difference between I v. I and I v. O, and the difference between O v. I and O v. O.

85. The differences between I v. O, O v. I, and O v. O are not significant; the differences between I v. I and both O v. I and O v. O are significant at the .05 level or better.

also hides a large number of non-final dispositions and a small number of bench trials. It also hides some default dispositions for the casetype in which this disposition is relatively frequent: organizational plaintiffs suing individual defendants.

While these audits can provide us with a basis for generating hypotheses about what might explain the differences in the coding errors, the more important role of the audits is to provide a basis for estimating true disposition rates by case type. I turn to this in Part V.

V. DISPOSITION RATES BY LITIGANT TYPE

A. *Do Differences in Disposition Matter?*

Much of the economic and democratic theory work on litigation, particularly the work that investigates the "have nots" phenomena, is focused on predictions or evaluations of "win" rates.[86] This is obviously of substantial interest in assessing the implications of differential resources on legal outcomes. But the recent concerns about the changing patterns of civil litigation—such as increased efforts to facilitate settlement, increased rates of summary judgment or non-trial adjudication, or decreased trial rates—raise economic questions of "why" and normative questions of "so what," not about the likelihood of success, but rather about the public and private routes by which disputes are resolved. Are people being deprived of their access to public adjudication? Are the courts successfully managing an overburdened docket by promoting increased settlement? Is a decreased rate of trial a consequence of increased litigation costs? These questions about the process of civil litigation and how it is changing over time are also, I contend, importantly affected by differences between litigant types. Access to public adjudication has a different normative import depending on whether we are talking about access of citizens—with predominantly democratic interests (public and private) at stake—or the access of corporations—with predominantly economic interests (public and private) at stake.[87] Increased settlement rates are an important economic phenomenon in terms of the possible saving of dispute resolution costs, but the implications of that saving are different if we are talking about the resolution of a commercial contracting dispute than if we are talking about

86. See sources cited *supra* note 5.

87. I have argued elsewhere that there may be no good reason for the state to provide, for example, commercial contract law or corporate law, and that indeed, private competitive entities may do a better job of providing efficient commercial and corporate law than the state. *See* Gillian K. Hadfield, *Delivering Legality on the Internet: Developing Principles for the Private Provision of Commercial Law*, 6 AM. L. & ECON. REV. 154 (2004); Gillian K. Hadfield, *Privatizing Commercial Law*, 24 REGULATION 40 (2001); Gillian Hadfield & Eric Talley, *On Public Versus Private Provision of Corporate Law*, Center in Law, Economics and Organization Research Paper Series, Paper No. C04-13 (June 2004), *at* http://ssrn.com/abstract=570641.

a civil rights dispute. With these differences in mind, I turn to the evidence in the federal civil trials database that the phenomena that have captured increasing attention among those who study the changes in trial, settlement, and non-trial adjudication rates do indeed differ, and apparently substantially, between individual and organizational litigants.[88]

B. *Disposition Rates by Casetype: Three Definitions of "Rate"*

As I discussed in my earlier work on the "vanishing trial,"[89] the assessment of "trial rates" (and settlement and non-trial adjudication rates) has to be informed by a theoretical framework: why are we interested in the trial (or other) rate? Galanter has reported the overall trial rate, meaning the percentage of *all terminated cases* that end in a trial.[90] This is a rate that may be of interest to the courts and particularly to those managing the resources of courts. For researchers interested in assessing the relevance of different predictive and normative theories of civil litigation, however, this trial rate is not particularly meaningful. As we have seen, and as Bert Kritzer and Carl Baar have long emphasized,[91] cases end in a myriad of ways, many of which, as the audits above and in my earlier work show, are non-final dispositions. Most economic theories and democratic critiques of civil litigation, however, are implicitly concerned only with alternative final dispositions of cases: trial, settlement, non-trial adjudication, abandonment, and default. These are theories that attempt to explain and judge what it means when cases are finally disposed in one method as opposed to another. For the purposes of evaluating these theories and critiques the relevant "trial" rate is the percentage of *final* cases that terminate in trial. And for many economic and democratic theories the more relevant rate is the percentage of *contested* cases—that is, those that are not abandoned or defaulted—that end in trial. This is true for economic theories that implicitly assume truly contested litigation between two active litigants: the analyses of the impact of litigation costs and stakes on the *choice* between settling a case and taking it through to trial (or at least adjudication, including non-trial adjudication) in these models are by and large informed by theories of bargaining between litigants. Many of the empirical studies of economic theories of case selection treat an abandoned or defaulted case as a polar outcome of settlement bargaining. But doing so misses the ways in which

88. For other studies that look at differences between individual and organizational (corporate and/or government) litigants in the disposition of cases, see Eisenberg and Farber, *The Litigious Plaintiff Hypothesis*, and *The Government as Litigant supra* note; Dunworth & Rogers, *supra* note 5; Waldfogel (1995 And 1998)

89. Hadfield, *supra* note 19.

90 Galanter, supra n.1.

91. Herbert Kritzer, *Adjudication to Settlement: Shading in the Gray*, 70 JUDICATURE 161-165 (1987); Carl Baar, The Myth of Settlement 1 (May 28, 1999) (unpublished manuscript, presented at the Annual Meeting of the Law and Society Association, Chicago). *See also* Burbank, *supra* note 73.

active bargaining, which can change and respond to the things courts and litigants do in the course of litigation—such as sharing information, obtaining court rulings on motions, participating in settlement conferences and alternative dispute resolution procedures intended to promote settlement, for example—differs from "unilateral" bargaining accomplished simply by not showing up for any of this. Some abandonments and defaults, of course, may occur after active interaction and participation in the procedures described above, but this does not appear, from the dockets I have reviewed, to be the case.[92] The focus on truly contested cases may be even more relevant for democratic critiques of changes in civil litigation. While it is of importance to a democratic critique to know whether more citizens are forced to abandon or default in their cases, most critiques of the vanishing trial, the move to increased pre-trial adjudication and alternative dispute resolution, are explicitly addressed to cases in which there are active litigants on both sides, for whom a trial is a real alternative.

I have therefore assessed three true disposition rates for the different casetypes: an "all terminations" rate, which includes all final and non-final dispositions in the denominator; a "final" terminations rate, which excludes non-final dispositions such as transfers, remands, stays, consolidations, statistical closings, and dismissals without prejudice and for lack of jurisdiction;[93] and a "contested" terminations rate, which in addition to excluding all non-final dispositions also excludes all non-contested dispositions, specifically cases dismissed for want of prosecution (what I call abandonments) and cases in which a default judgment is entered.

Table 12: Disposition by Casetype, All Terminations, Federal Civil Cases 2000

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Non-Final	26.3	28.9	15.8	24.1
Abandonment	3.8	2.4	1.8	1.8
Default	1.6	1.0	23.6	8.4
Settlement	37.5	36.0	42.0	46.5
Non-Trial Adjudication	23.6	23.3	12.4	14.4
Bench Decision	3.9	4.9	3.4	3.7
Jury and Directed Verdict	2.9	1.7	0.7	0.9
All Trials	6.8	6.6	4.1	4.6

92. As I was not investigating this question at the outset of my study, I did not design the audits to collect this information systematically. My observations are based on my anecdotal assessment of the dockets I reviewed.

93. I treat a dismissal for lack of personal jurisdiction as a non-final termination and assume that all cases coded as "dismissed for lack of jurisdiction" (3) are non-final. I treat a dismissal for lack of subject matter jurisdiction as a final termination unless the docket indicates otherwise.

Table 12 shows estimated disposition rates across all terminations.[94] These rates reveal some important features of modern civil litigation and speak powerfully to the differences, across all types of case outcomes, between individual and organizational litigants. Notice first that individual plaintiff cases are significantly more likely (10 to 15 percentage points) to end in a non-final termination (including not only voluntary dismissals without prejudice but also transfers and remands) than are cases brought by organizational plaintiffs against individual defendants.[95] Individual plaintiffs are also more likely to abandon their cases than are organizational plaintiffs; this is especially so when their cases are against other individuals.[96] But note that all rates of abandonment are relatively low. The lower rate of abandonment against organizational defendants may be a result of the greater likelihood that a suit against an organization is funded either by contingency fees and/or statutory attorneys fees (as in civil rights cases).

Plaintiff type also plays a significant role in determining the likelihood of a default: organizational plaintiffs are substantially more likely to obtain a default judgment than are individual plaintiffs, for whom the result is quite rare.[97] The stand-out result here, however, is the high rate of defaults in cases in which an organization sues an individual. Recall that the dataset being studied has excluded student loan default cases; if they were included, the rate of default judgments obtained by organizations against individuals would be much higher. The fact that default rates are still so much higher in O v. I cases, despite the removal of student loan cases, indicates the ubiquity of foreclosures and other efforts to collect against defaulting debtors: 24% of all O v. I cases in 2000 were foreclosures.

Table 12 also suggests that there are significant differences in the rates at which cases are settled, adjudicated without a trial, or terminated by a jury verdict or bench decision. Intra-organizational cases are significantly more likely to settle (5 to 10 percentage points) than cases brought by individual plaintiffs. And organizations suing individuals are significantly more likely to

94. These estimates were constructed by combining the audited code results with the unaudited code counts and treating the combined results as a disproportionate sample. Given the finding that casetype coding errors do not appear to vary across disposition codes, and the small standard errors for the pooled results (Table 1), I adjusted the raw casetypes to true casetypes without accounting for this error. I then used these adjusted casetypes to calculate weights for each disposition code for each true casetype, and used the audit results presented in Tables 5 through 11 to translate codes into true dispositions. I assumed that the unaudited codes were accurate.

95. Tukey-Kramer multiple comparisons tests confirm that these differences are significant at the .05 level or better; the differences between I v. I and I v. O cases, and between I v. I and O v. O cases, are not significant.

96. These differences are all significant at the .001 level.

97. All differences apparent in Table 12 are significant at the .001 level, with the exception of the difference between I v. I and I v. O.

settle than when the positions are reversed.[98] Individual plaintiffs are significantly more likely to have their cases terminated by a non-trial adjudication (10 percentage points) than organizational plaintiffs.[99] Individual plaintiffs suing organizations are also somewhat more likely to have their cases decided by the bench (1 to 1.5 percentage points) than organizational plaintiffs suing either individuals or organizations.[100] And individual plaintiffs are somewhat more likely to have their cases decided by a verdict in a jury trial, and more so when they sue another individual than an organization, than organizational plaintiffs.[101] Combining bench, directed and jury verdicts, individual plaintiffs are substantially more likely to have their cases decided in a trial than organizational plaintiffs.[102] Overall, we can conclude that individual plaintiffs are much more likely to have their cases adjudicated, whether by trial or non-trial methods, than are organizational plaintiffs.

Note also that the trial rates calculated in Table 12 are significantly higher than those reported by the AO and Galanter.[103] This is despite the fact that Table 12 is based on the disposition code and the AO published tables are based on the procedural progress code, which we know overstates trial decisions by including cases in which a trial is started but not completed. The major difference[104] comes from the "hidden" trials I found in other disposition codes, in particular, hidden bench trials. There are roughly 750 hidden bench trials in the data, almost as many as those (correctly) identified by disposition code "9."

Like the AO published rates, however, the "trial" "non-trial adjudication" and "settlement" rates in Table 12 are not the most meaningful ones in terms of the economic and democratic theories of litigation. This is because they are calculated on the basis of all terminations, including non-final and uncontested terminations. These termination rates, we see in Table 12, also vary systematically across casetypes. Because individual plaintiff cases are significantly more likely to end in a non-final termination, the final disposition rates we are interested in, such as trial and settlement, are understated—meaning the differences between individual plaintiffs and organizational

98. These differences are significant at the .01 level or better; none of the other differences in settlement rates in Table 12 are significant.

99. All differences in Table 12 are significant at the .01 level or better with the exception of the differences between I v. I and I v. O, and between O v. I and O v. O.

100. These differences are significant at the .05 level; other differences apparent in Table 12 are not significant.

101. The differences in jury and directed verdict rates are significant at the .001 level; the only difference in Table 12 that is not significant is that between O v. I and O v. O cases.

102. Performing Tukey-Kramer tests on the sums of bench decisions and jury and directed verdicts, the differences are significant at the .01 level or better; the difference between I v. I and I v. O and the difference between O v. I and O v. O are not significant.

[103] Galanter, supra n.1.

104. There is a small difference coming from the fact that not all dispositions coded as a bench decision are correctly coded for "bench trial" in the procedural progress variable.

plaintiffs are also understated—when non-final cases are included. Table 13, therefore, calculates rates across final terminations only.[105]

Table 13: Disposition by Casetype, Final Terminations, Federal Civil Cases 2000

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Abandonment	5.2	3.4	2.2	2.4
Default	2.2	1.5	28.1	11.0
Settlement	51.0	51.0	49.9	61.3
Non-Trial Adjudication	32.0	32.8	14.7	19.0
Bench Decision	5.3	6.9	4.0	4.8
Jury and Directed Verdict	3.9	2.4	0.9	1.2
All Trials	9.2	9.3	4.9	6.0

Table 13, as expected, shows the impact of removing the systematically lower rate of non-final terminations from O v. I cases. Correcting for this difference increases the difference between O v. I cases and individual plaintiff cases in terms of trial and non-trial adjudication rates. The method for estimating the figures in Table 13—which requires removing estimated non-final quantities from the denominator and the numerator—does not allow for the formulaic determination of standard errors, and so I cannot perform standard statistical tests for significance on these figures. Nonetheless, the consistency in the trial and non-trial adjudication patterns with Table 12 (where I am able to test for significance) would seem to support the conclusion that individual plaintiffs are substantially more likely than organizational plaintiffs to have their cases determined by trial or non-trial adjudication, and that defendant type plays little if any role in the likelihood of trial or non-trial adjudication, although it is possible that individual cases against organizations are somewhat more likely to go to bench trial and individuals suing other individuals are somewhat more likely to obtain a jury trial.

Table 13 also appears to suggest that settlement rates between individual plaintiff cases and O v. I cases converge once non-final cases are removed. The reason for this, however, seems to be the extraordinarily high rate of default terminations in O v. I cases. Our interest in the rate of settlement is generally from the perspective of the likelihood of settlement in contested cases, that is, the willingness and capacity of litigants to resolve their differences without adjudication. Addressing this question, however, requires an assessment of

105. The rates in Tables 13 and 14 were calculated by applying the frequencies in Table 12 to an estimate of the true count of case types, subtracting out first non-final dispositions (Table 13) and then defaulted and abandoned cases (Table 14). The method is approximate due to rounding error.

disposition rates among contested cases. Table 14, therefore, shows disposition rates after removing not only non-final cases, but also abandoned and defaulted cases.

Table 14: Disposition by Casetype, Final Contested Terminations, Federal Civil Cases 2000

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Settlement	55.0	53.1	71.6	71.0
Non-Trial Adjudication	34.5	34.5	21.1	22.0
Bench Decision	5.7	7.3	5.7	5.6
Jury and Directed Verdict	4.2	2.6	1.2	1.4
All Trials	9.9	9.9	6.9	7.0

Although again we cannot perform systematic significance tests on these figures, the differences in the rates in Table 14 and their consistency both with Table 12 and with what we would reasonably expect to be the impact of removing defaulted and abandoned cases, suggest a strong conclusion that individual plaintiff cases differ systematically from organizational plaintiff cases, and that defendant type plays little if any role in determining outcomes. Strikingly, cases brought by individual plaintiffs are substantially less likely to settle—by as much as 15 to 20 percentage points—and more likely to be adjudicated than organizational plaintiff cases. This is consistent with Eisenberg and Farber's finding for diversity cases.[106] Most of this difference is attributable to differences in the rate at which these cases are decided by non-trial adjudication—that is, disposed of on a pre-trial motion, a petition or a hearing on appeal from an agency decision. Although a substantial number of these non-trial adjudications in individual plaintiff cases will indeed involve an agency appeal (such as from a social security assessment), it is important to note that the rate in individual plaintiff cases against individual defendants is not significantly different (see Table 12) from the rate in I v. O cases.

It also appears that trial rates are higher for individual plaintiffs, and that, again, the role of defendant type is to shift trials from bench (when the defendant is an organization) to jury (when the defendant is another individual). These results are somewhat more tentative than the settlement and non-adjudication results because of the smaller differences and thus the need for standard errors to be conclusive about significance. However, the pattern in Table 14 is consistent with the significant results obtained in Table 12. We can have some confidence, then, in the conclusion that individual plaintiffs are more likely to obtain a trial determination of their case than are organizational

[106] Eisenberg and Farber, *The Litigious Plaintiff*, supra n. __

plaintiffs. One last perspective on this is provided by Table 15, which shows settlement and trial rates among cases that "survive" non-trial adjudication. (Note that this includes cases that are never eligible for full-trial determination, such as agency appeals and cases based on various petitions and other motions.) In terms of the "settlement versus trial" model that generally forms the basis for most analyses of litigation, we see here that lower settlement rates do not appear to be fully explained by higher non-trial adjudication rates: individual plaintiffs are less likely to settle and more likely to proceed to a full trial than organizational plaintiffs, with perhaps a difference of 6 to 7 percentage points in the rate of trial.

Table 15: Disposition by Casetype, Final Contested Terminations Surviving Non-Trial Adjudication, Federal Civil Cases 2000

True Disposition (percent)	Casetype			
	I v. I	I v. O	O v. I	O v. O
Settlement	84.7	84.4	91.1	91.1
Bench Decision	8.7	11.6	7.3	7.2
Jury and Directed Verdict	6.5	4.1	1.6	1.7
All Trials	15.3	15.6	8.9	8.9

CONCLUSION

I began this study with the observation that our legal system performs multiple, differentiated functions and that both positive and normative theories of litigation require us to pay attention to the differences—positive and normative—between individual and organizational litigants. The results above confirm that there are systematic differences in the phenomena of changing civil litigation, at least so far as we can tell from the state of the world in 2000. And they suggest that we should be tailoring our policy recommendations more specifically according to casetype, particularly plaintiff type.

From an economic predictive point of view, it appears we should be analyzing litigation behavior differently for individual and organizational plaintiffs, thus continuing the work started by Eisenberg and Farber.[107] The differences I document here may be explained by systematic differences in the amounts at stake in individual plaintiff as opposed to organizational plaintiff cases, but there doesn't seem to be an a priori reason to think that individual plaintiff cases are, on average, higher value than organizational plaintiff cases: both types contain big and small dollar-value cases. The more likely explanation rests in what we know to be systematic differences in the nature and organization of the legal representation of individual and organizational litigants. Individuals, as I discussed earlier, are generally represented by

[107] Eisenberg and Farber, *The Litigious Plaintiff*, supra n. __

lawyers who work in smaller firms—with less sharing of human and organizational capital—with lower levels of specialization and lower educational attainment than is the case for the lawyers who represent organizations—be they in large firms or large corporate or government legal departments. We may be seeing the implications of Galanter's "have-nots" phenomenon, specifically the likelihood that individuals are one-shot players while organizations are repeat players. But, government aside, there is some reason to think that repeat play—particularly with respect to the same legal issue—is relatively rare even among organizations other than the very largest.[108] The more likely source of "repeat play" benefits may very well be located not in the repeat play of organizational clients, but the repeat play of the large law firm lawyers who represent organizations.

The fact that organizational plaintiffs are substantially more likely to settle their cases than proceed either to a non-trial or a trial-based determination of their claims is an interesting one from the perspective of the "have-nots" analysis. In the law and economics literature, the repeat-play incentives are often captured as an *increased* incentive to take matters to trial, in order to obtain future benefits from a rule change. The higher settlement rate among organizational plaintiffs, which is basically the same whether an organization is suing an individual or another organization, may suggest that organizational plaintiffs are *less* interested in rule change or precedent than individual plaintiffs, despite the "one-shot" nature of many individual plaintiffs. The results here suggest a need to investigate also whether repeat players have a greater risk aversion to trial outcomes, derived either from their longer-run stakes in outcomes or perhaps the nature of their (hourly) compensation (as compared to the contingency compensation more frequently collected by lawyers representing individuals.)

Economic models may also have to address the apparently greater importance of plaintiff as opposed to defendant type in the pattern and progress of civil litigation. My results suggest defendant type is not a factor in determining case disposition. This is consistent with Eisenberg and Farber's results, but it is not consistent with economic models of differences between organizational and individual litigants: if organizations are more or less interested in rule change, for example, or have greater access to better legal resources, we would expect this to show up not only when they are plaintiffs but also when they are defendants. The results I have reported on this score, however, need to be interpreted with caution. First, they are descriptive only. Second, as shown in Table 3, most cases—particularly individual plaintiff cases—involve defendants of the "other" type. My results (and Eisenberg and Farber's) are based only on the first-named plaintiff and defendant. Because additional plaintiffs are more likely to be of the same type as the first-named plaintiff, the first-named plaintiff differentiates between cases well. The first-

108. This is what Dunworth and Rogers suggest. Dunworth & Rogers, *supra* note 5.

named defendant, however, is a very "noisy" variable. The effort to distinguish between cases based on defendant type, with the complication that comes also from interpreting "case" results with multiple defendants (some defendants may settle, others may have the claims against them dismissed, still others may proceed to trial), is a labor-intensive one not taken up in this paper. It is an important project for future work, however.

From a practical perspective—the perspective that is of interest to the proponents within the judiciary of promoting greater private resolution of cases and reducing trial rates—the results here suggest some important considerations. First, the significant difference in settlement rates in individual plaintiff cases is largely—although not wholly—explained by different rates of non-trial adjudication. Increasing settlement rates for these plaintiffs may not decrease the burden of trials; it may only decrease non-trial adjudications. Second, efforts to promote greater settlement in organizational plaintiff cases may be a poor target: these cases are already very likely to settle; moreover, they are much less numerous than the individual plaintiff cases. Perhaps most important, given the persistence of the difference in settlement rates even after removing cases disposed of through non-trial adjudication, there may be a need to use different techniques to overcome barriers to settlement in individual plaintiff cases than the ones used in organizational plaintiff cases. It may be, for example, that the barrier to settlement in organizational cases is largely an informational one, which can be solved through judicial mediation efforts focused on increasing information exchange and case assessment. Individual plaintiffs, however, may have other interests at stake—the types of interests that lead them to prefer public adjudication and trials to private dispute resolution[109]—which may not be addressed by information-focused efforts, particularly informal judicial settlement efforts, to promote settlement.

Ideally, what we need to know is whether the differences that are apparent in the 2000 data have been true throughout the decades in which courts and others have attempted to increase settlement rates. The importance of distinguishing between litigant types, as shown in this paper, demonstrates that any comparisons with data from, for example, the 1970s, should be conducted at the casetype level. I believe there is some indication in the data that one could conclude that settlement rates in individual cases have not increased, while those in organizational cases may have remained constant or increased somewhat. A careful study of these conjectures, however, requires a labor-intensive effort to go back to the 1970s dockets—which are not available in electronic form. Such a study would also allow us to determine whether changes in trial rates—which I demonstrate here have not fallen as sharply as suggested by the published AO data, and which differ between individual and

109. At least one RAND study suggests that individuals in tort cases prefer more formal, dignified and adjudicatory methods of case disposition to informal settlement procedures. E. Lind et al, *The Perception of Justice: Tort Litigants' Views of Trial, Court-Annexed Arbitration, and Judicial Settlement Conferences*, RAND (1989)

organizational plaintiffs—differ across casetypes. Again, casual investigation suggests that individual trial rates have not fallen much if at all over the past three decades, and that any aggregate fall may have come from a substantial drop in the rate at which organizational plaintiffs go to trial. This would be consistent with the tremendous changes in the economics of organizational litigation over the past three decades, with the increasing size and specialization of large law firms and the increased use of litigation as a strategic tool in business relationships. Similar changes are much less apparent in the individual legal services market.

Last, but certainly not least, the differences between individual and organizational cases in the federal data indicate a need to differentiate our democratic critique. Again, many of these claims are longitudinal ones about changes that we cannot yet assess based solely on this cross-section of 2000. It is clear, however, that the substantial shift in federal litigation towards individual cases brought against organizational defendants needs to be evaluated carefully in light of democratic concerns. One of the effects of this shift, if the differences apparent in 2000 were also true in previous decades, will have been to decrease overall settlement rates, not (necessarily) because of changes in the costs of litigation or the predictability of legal results, but simply because individual plaintiffs are systematically less likely to settle their cases than organizational plaintiffs. Increased pressure on courts to adjudicate may have arisen, then, from the double-effect of increased caseloads and this shift in the makeup of litigants. But the shift in the make-up of cases is not an indifferent one from a democratic perspective. Whereas increasing settlement rates in intra-organizational cases may come at no democratic cost—it may in fact increase efficiency in organizational disputing—increasing settlement, as many critics of these efforts suggest, may entail such costs. To assess this, however, we need to pay close attention to the fact that individual plaintiff cases are *more*, not less, likely to be decided by adjudication. A lot of this is non-trial adjudication, which may have negative implications for the likelihood that individual plaintiffs prevail (most non-trial adjudication is a dismissal or summary judgment for the defendant), but such adjudication is still a public, reviewable, on-the-record disposition.

The more troubling aspect, from a democratic point of view, of the differences among casetypes may be the increasing asymmetry between plaintiffs and defendants. I have estimated that defendants are or include organizations in roughly 90% of all federal (non-prisoner, non-student loan) litigation; individuals, on the other hand, appear to account for almost 70% of plaintiffs. This does appear to be a shift from the 1970s. The differences in the legal resources these two litigant classes draw upon are thus systematically related to plaintiff and defendant status. The much higher rates of non-trial adjudication in individual plaintiff cases may thus very well reflect an asymmetry in access to legal resources. The success of organizational defendants can perhaps be attributed to the greater legal expertise on which

they can draw by hiring large specialized law firms that share human and organizational capital and the top law school graduates. Lawyers representing individuals are far more likely to work in small law firms, under the pressures of contingency fee work, and have lower levels of human and organizational capital on which to draw. These successes among organizational defendants have implications not only for the results achieved on a case-by-case basis, but also for the very content of both procedural and substantive law. Because law is an organic institution, with legal standards and principles developed in the context of actual litigation, the strong and systematic asymmetry between plaintiffs and defendants almost certainly has long-run effects on the content of the law. Indeed, the higher rate of non-trial adjudication in individual plaintiff cases may be the long-run result of the systematic asymmetry in the resources brought to bear by defendants as opposed to those available to plaintiffs. This will be especially so if, as many believe, this rate has increased over time with tougher standards for surviving motions to dismiss and for summary judgment. This may be one of the most important features and implications of the changing nature of civil litigation.