

UNDERSTANDING CIVIL JUSTICE

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Introduction

This chapter focuses on the need to achieve a better empirical understanding of civil justice and to conduct debates about civil justice policy within a broader theoretical framework that addresses the social functions of law and the role and responsibility of the state in civil justice. The discussion draws on socio-legal research in the civil justice field to explore questions about behaviour in and around the civil law and to consider what the system delivers in practice. Against this background recent policy trends in the civil justice field are considered and the contemporary enthusiasm for private dispute resolution explored. The chapter concludes by suggesting that in developing a vision of the civil justice system of the future, there is a need to articulate what and whom the civil justice system is for in a way that takes into account the interests of citizens in having access to public dispute resolution forums with coercive powers and the value of the civil justice system to the social structure.

This discussion is timely. Concern about the ‘failure’ of the civil justice system is everywhere. It is argued that the courts are too slow, too expensive, too complicated, and too adversarial to provide litigants with what they want. As a result of an apparent consensus about these matters we stand at the end of the twentieth century on the threshold of substantial changes in the civil justice system. The Master of the Rolls, Lord Woolf, has recently concluded a comprehensive review of civil justice procedure. There are proposals for radical changes to the delivery of legal aid and the imposition of budgetary constraints. The Lord Chancellor’s Department appears to be committed to policies which involve

making litigants bear more of the costs of court services,¹ control of what lawyers can charge, and encouraging a shift away from the courts and towards the cluster of private activities that come under the umbrella of 'Alternative Dispute Resolution'. Perhaps for the first time, policy-makers are looking strategically at the civil justice system. They are becoming less reactive and seeking to exert greater influence over the volume and type of cases that come to court.²

Some of the proposals currently being debated can be viewed as the continuation of policies that have been evident since the nineteenth century, while others reflect a more contemporary trend—the contracting-out of the core functions of the State as we have known them in the post-war period. The new role envisaged for the State involves the regulation of markets rather than the direct provision of services.

Arguments about change to litigation procedures and government concerns about the resources devoted to the civil courts have a tendency to be conducted outside any wider context. The framework within which such debates should be set comprises theories about the social function of law, and about the function of the civil justice system as the means by which the law is mobilized by the citizen. Such theories, were they to be considered by policy-makers, would not necessarily help in choosing, for example, between block-contracts or other means of delivering legal aid. They might not determine exactly how much should be charged for court fees. However, without a sense of what the civil justice system is for, we run the risk of adopting short-term presumed solutions while creating new problems and possibly jettisoning aspects of the system that are valuable in social terms.

In the context of current policy developments then, it is important to consider the following questions: what and whom is the civil justice system for? What social functions does it serve?

¹ The recent successful challenge to this policy in the High Court is unlikely to change the basic thrust of the policy: *R. v. Lord Chancellor, ex p. Witham* [1997] 2 All E.R. 779.

² The basic principles were amplified in a speech given by the Lord Chancellor at All Souls, Oxford, in June 1996 entitled 'Civil Justice: Choice and Responsibility'. The 'twin pillars of policy' were described first as the removal of restrictive practices and the development of alternatives to lawyers and courts; and, secondly, increasing information about alternatives to courts, making costs more predictable, court fees more closely related to the cost of the service, and limiting subsidy by the taxpayer to those instances where there is a 'clear social policy objective'.

Why does the state accept responsibility for providing the means of adjudicating civil disputes and rights claims? It is important to consider some of these fundamental issues even if we do not reach any particular conclusion. We need to lift our eyes occasionally from our preoccupation with policy detail, to gaze on the horizon in order to check in which direction we are moving.

There are proper and important questions to be asked about the future role and interest of the state in protecting rights, resolving disputes, and channelling conflict. However, our ability to engage in such discussions is limited because we lack a convincing description of what the civil justice system *is* doing, and more importantly we lack any normative arguments about what the civil justice system *should be* doing. In recent debates about the ‘crisis’ in civil justice Lord Woolf has argued repeatedly that the civil justice system is an anachronistic legacy of the nineteenth century; its traditions, procedures, and protection of vested interests are not suited to the late twentieth century, let alone the next millennium. This conclusion may be correct and we may be moving into a transitional period during which we substantially reconsider what the appropriate civil justice system of the future might be. Unfortunately, although there may be some agreement about what we do not want from the civil justice system, there does not seem to be any clear articulation of what we do want—other than for things to be easier and cost less. As I will argue later, however, it is not even clear that we want that. We may think we want access to the courts to be easy and cheap, but do we want it to be so easy and so cheap that litigation becomes a national past-time? If we are not sure what we want—in the broadest sense—from our civil justice system, how can we decide what the appropriate policies or long-term strategy should be?

It is arguable that there is currently no coherent modern vision of the ideal civil justice system. The somewhat contradictory vision of the Lord Chancellor’s Department and the judiciary is for the courts to be simpler, cheaper, and more accessible, but at the same time to play a much reduced role in the resolution of civil claims and disputes. The vision of the legal profession is to be left alone to make a living. The vision of pressure groups for the poor often seems to go little further than the objective of maintaining legal aid at current levels. The vision of pressure groups for commercial interests is a world in which law and lawyers could be ignored, but

if resort must be had to the courts it should cost as little as possible and be over with quickly, so that business can be got on with and relationships preserved.

The vision of the middle class, as represented by those who presume to speak for them (since there is no obvious pressure group to speak for them), is apparently a world in which access to the courts is simple and cheap, and in which lawyers charge less than plumbers for their services and secure a positive outcome in no longer than it takes to repair a central heating system.³

Why, then, do we have no comprehensive understanding of the civil justice system of the present, and no vision of a civil justice system of the future? I would suggest that the difficulty of achieving an understanding of civil justice arises from three factors: an historic lack of interest about how the civil justice system operates; the scope and variety within the civil justice field; and the difficulty of disentangling cause and effect in civil justice behaviour and policy.

Lack of Interest in the Civil Justice System

Civil justice, by comparison with criminal justice, has attracted relatively little interest or attention either by scholars or policy-makers which leaves us with a field that is under-researched and under-theorized. Black-letter scholars have displayed only a peripheral interest in how the law operates in practice, and even less in theoretical questions about what law is for and its relationship, at the broadest level, with society. Civil procedure has never been regarded as a respectable academic subject in English law schools, and the institutions and processes of the legal system, if taught at all, are taught to impatient first years who want to get on and do some real law, like crime. Even socio-legal researchers—who are interested in asking questions about what law is for and how it is used—have found the criminal justice system a more fascinating

³ Even socio-legal researchers who have explored the system empirically have sometimes been criticized for unquestioningly adopting the agenda and rhetoric of policy-makers, and for conducting research with only the limited objective of discovering how the system could all work better within its own terms, rather than challenging more fundamental assumptions and offering an alternative agenda. Cf. Austin Sarat and Susan Silbey, 'The Pull of the Policy Audience' (1988) 10 *Law and Policy* 85.

site for their enquiries. Criminal justice may be easier to comprehend, it is more dramatic, and politically it is more sexy.

There are few votes in civil justice and it therefore does not feature prominently on the agenda of either of the main political parties. An important side-effect of this is that the kind of statistical information that would help us to understand behaviour in relation to the civil courts has never been collected on a national or even a local basis. Despite any possible limitations, the annual statistics published by the Home Office provide the raw material with which analysts can describe and seek to explain patterns and trends in the criminal justice system. Regular crime surveys carried out by the Home Office tell us about victimization rates, reporting behaviour, exposure to risk of crime. We know something about recidivism rates, and we know about sentencing behaviour.⁴ By comparison, when the Woolf Inquiry team were carrying out their review of civil justice, the most basic descriptive information was unavailable and currently remains unavailable. Apparently simple questions such as who is using the courts, for what kinds of cases, with what value, at what cost, and with what rate of success are currently unanswerable.⁵

This relative lack of knowledge and enthusiasm for the civil justice field is important and reflects a wider indifference at the political and social level. Representations of law in popular culture focus almost exclusively on the drama of criminal law. For many people the law *is* the criminal law. Ordinary people do not routinely carry a distinction in their head. But lack of interest may also be a direct result of the second problem, which is that of scope.

Scope of the Civil Justice System

A fundamental problem that has dogged theorizing in the civil justice area is the sheer complexity of the task. Theorizing about

⁴ Examples of published series are: Home Office Statistical Bulletins, *The Criminal Justice System in England and Wales* (Digest 2); Annual Reports from Crown Prosecution Service; Report of Chief Inspector of Constabulary; British Crime Surveys (1982, 1984, 1988, 1992, and 1994, with samples ranging from 10,000 to 14,500).

⁵ See the comments of David Sugarman and G. R. Rubin on the paucity of civil judicial statistics as compared with criminal statistics in *Law Economy and Society 1750–1914: Essays in the History of English Law* (Abingdon, 1984), 'Introduction', 55.

behaviour in and around civil justice lags behind criminal justice, not simply because the civil justice system has been a less seductive site for socio-legal researchers, but arguably because it lacks the coherence of the criminal justice system. There is an infinite pool of potential cases. Trouble, conflict, and misfortune are endemic. The possibilities for legal redress are myriad, and the avenues of redress diverse.

Although it is a mistake to think of the civil justice system as a seamless whole there is a tendency to do so. We talk of 'litigants' as if there could be the kind of shared interests and commonalities that we think of in relation to 'the accused' in the criminal courts. However, a moment's reflection will reveal the weakness of such an approach. The parts of the legal system that are not concerned with criminal law comprise a rag-bag of matters and participants. There are disputes relating to the performance or non-performance of contracts involving businessmen suing each other, individuals suing businesses, and businesses suing individuals. There are claims for compensation resulting from accidental injury in which individuals sue institutions. There is the use of the courts by lenders who realize their security by evicting individual mortgage defaulters. Civil justice also involves attempts by citizens to challenge decisions of central and local government bureaucrats, a rapidly growing field that includes immigration, housing, mental health, child welfare, and the like. In these situations individuals and groups confront agencies of the state which can bring to bear apparently unlimited resources to ward off claims. Finally, there are the acrimonious and often heartbreaking struggles between men and women following the breakdown of family relationships as property and children become the subject of legal dispute. All of these matters come within the ambit of the civil justice system.

There is also the question whether we can accurately describe all of this activity as constituting a 'system'. Unlike the criminal justice system, which is mobilized by an extremely narrow class of prosecutors and has limited fora for the disposal of cases, the civil justice system is available to be mobilized by an assortment of litigators and incorporates a collection of fora for dispute resolution with widely differing processes. These fora include the various divisions of the High Court, courts with specialist jurisdiction, the county courts and small claims arbitrations, statutory tribunals, and a growing proliferation of ombudsmen.

The difficulty of adequately theorizing the activities around the civil law among this potential army of litigants with all its different configurations, and the way in which different parts of the system work together or bump against each other, seems to render the possibility of meaningful generalization delusional. The fact that researchers have had limited success in theorizing behaviour across the boundaries of different legal fields is unsurprising. It may be less a failure of imagination than too much imagination, too clear an appreciation of the enormity of the difficulties.

The Problem of Cause and Effect in Civil Justice

The final and perhaps most intractable problem that besets the attempt to understand civil justice is that of disentangling cause and effect in the system. The work of the courts represents the cumulative choices of thousands of decision-makers who have their own personal, group, and cultural impulses towards and against law. These impulses are sensitive, in unknown ways, to procedural and substantive changes *within* the system. We do not know which are stable factors and which are the more volatile. Theoretically, the courts are passive. They do not create cases, but wait for them to arrive. However, we know that courts are in a position to influence behaviour, that they can operate autonomously, and that they do so. We are also aware that other factors influence what comes to court: for example, the availability of remedies, the costs of actions, litigation procedures, the profitability of different areas of legal practice, the certainty of the substantive law, the creation of new regulation. Until we more fully understand the drives, needs, and decision-making processes of users and potential users of the system, and until we understand how changes in structure, procedure, and substantive law interact with these decision-making processes, we will not understand the civil justice system. We will not be able to anticipate the social impact of policy change or the extent to which fluctuation in demand for the courts reflects change in underlying social and economic processes, or is merely a natural reaction to procedural change.

Despite these obstacles to comprehension it is important to begin the project of unravelling the conundrums of civil justice, because arguably civil law provides as important an underpinning to social and economic stability as the criminal law. Civil law fulfils

significant practical and symbolic functions. We cannot develop a vision of the civil justice system of the future that serves the wider interests of society unless we have some understanding about the functions of law that we wish to promote.

Functions of Law

It is necessary to reflect on the theoretical functions of law in order to think about what the civil justice system should be delivering in terms of social and economic good. An understanding of the functions of law may also help to explain some of the anxiety expressed about the social impact of lack of access to the courts.

What, then, are the practical and symbolic functions performed by the civil law? Unfortunately, theorists provide no simple answer to the question. What you believe the law is for depends largely upon your politics, your conception of how individuals and society operate, your view about the nature of conflict within civil society, and your view about the relationship between law and state power. Despite the various formulations of argument, there are, however, some broad areas of agreement among theorists. Many of the jobs of law can be reduced to the over-arching necessity of maintaining social order. Although laws and courts that are backed by the coercive power of the state do not have a monopoly over social control,⁶ there can be little dispute about their importance. Whether one subscribes to a structural/functionalist view, in which law represents a lubricant between the gently turning cogs of the social machine, or whether one subscribes to the crude Marxist view that law is the tool by which capitalists protect their property and contain revolt—law provides the answer to the central problem of the maintenance of order.

The second area about which there is little disagreement is that a primary function of law is dispute settlement. Almost all societies have fora for the peaceful resolution of disputes. This objective, arguably, offers individual litigants the possibility of remedies for grievances and claims, as well as a sense of justice, and also delivers

⁶ The communication of social norms and rules of behaviour and the sanctioning of deviant behaviour are also conducted, for example, through the family, religion, and employers. Indeed in the view of some scholars the most important structures of social control have little to do with the coercive power of the State. See E. Ehrlich, *Fundamental Principles of the Sociology of Law* (Cambridge, Mass., 1936).

the collective benefit of stability. It has been frequently observed that societies without lawyers are common; societies without judges and courts are much more rare. Institutions that resolve, or help to resolve, disputes peacefully are ubiquitous, and all but the very simplest societies have them.⁷

An equally important function of state law, and one that is seen by some to be of increasing significance in modern, developed democracies, is that of checking executive power. Although some are sceptical of the extent to which the law is capable of controlling as well as expressing power, there are compelling arguments that it does. Even Marxist theorists suspicious of law as a tool of the powerful accept that the law cannot *seem* to be just without, on occasion, *being* just. As E. P. Thompson memorably observed:

The law may be rhetoric but it need not be empty rhetoric. . . . The rhetoric and rules of a society . . . in the same moment . . . may modify the behaviour of the powerful and mystify the powerless. They may disguise the true realities of power, but, at the same time, they may curb that power and check its intrusions.⁸

There is a difference between arbitrary power and the rule of law. Thus law can serve to maintain the legitimacy of the system of domination while at the same time restraining those with power from acting solely in their own self-interest.⁹

As an instrument of state policy, law can also perform redistributive or innovative functions. It can be used for social engineering to change social conditions, and to regulate economic and social behaviour. It has also been suggested that law has a facilitative function, as an 'enterprise for facilitating voluntary arrangements'. As Lon Fuller pointed out, law fulfils many functions: 'Law is a living process of allocating rights and duties, resolving conflicts, creating channels of co-operation.'¹⁰

In addition to these primary functions state law also operates as a 'secondary' means of social control. Lawrence Friedman suggests

⁷ Lawrence M. Friedman, *Law and Society* (Englewood Cliffs, NJ, 1977); Peter Stein, *Legal Institutions* (London, 1984); Simon Roberts, *Order and Dispute* (Harmondsworth, 1979); E. Evans-Pritchard, *The Nuer*, (Oxford, 1940).

⁸ *Whigs and Hunters: The Origins of The Black Act* (Harmondsworth, 1975).

⁹ Richard O. Lempert, 'Grievances and Legitimacy: The Beginnings and End of Dispute Settlement' (1981) 15 *Law and Society Review* 707, 712.

¹⁰ Lon L. Fuller, 'The Forms and Limits of Adjudication' (1979) 92 *Harvard Law Review* 353.

that 'legal process can act as a teacher, reformer or parent. The law does more than state the norms; it tries to spread the word, explain the norms, convince its public to follow them.'¹¹ The public nature of trials is important here. Courts make authoritative declarations of what the law is, which obligations must be performed, and which responsibilities must be discharged—in sum courts reflect, communicate, and reinforce society's dominant social and economic values. To this extent the law is a statement of values.¹²

One cannot, however, focus on the facilitative and conflict-reducing potential of law to the exclusion of its other potential. Unfortunately for the project of trying to create a vision of what the civil justice system should be doing, it is accepted that there are also profound dysfunctional effects of legal process. Law can create and reinforce inequalities in society. Litigation can exacerbate and prolong conflict. Litigation can simply offer an outlet for vindictiveness rather than an opportunity for vindication. Regulation can be seen as burdensome and law can distort and even cripple, rather than facilitate, social and economic processes. Laws can be unjust in both design and effect.¹³

The fact that law reflects only certain values, that it attempts to achieve conflicting objectives, and the fact that it can be used by different people and groups to secure both desirable and undesirable ends may account for the ambivalence that we detect in policies regarding the involvement of the state in civil claims and disputes, and the contradictions in access to justice rhetoric, which I will discuss below. However, if we accept that law has important social functions, then there are questions to be asked about the extent to which in our modern, complex, democracy, the State is responsible for providing the conditions within which the theoretical primary and secondary objectives of law can be achieved, and the extent to which they can be safely left to other mechanisms.

¹¹ Friedman, n. 7 above.

¹² Owen M. Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073; Marc Galanter, 'The Radiating Effects of Courts' in Keith Boyum and Lynn Mather (eds.), *Empirical Theories About Courts* (New York, 1983), 117.

¹³ Cf. William Holdsworth, *A History of English Law*, Vol. 3 (London, 1923), observing quarrelsome lawsuits of medieval England, felt that law had been substituted for private war. He suggested that the sick court system was a kind of tumour. 'Manipulative and hostile use of litigation is widespread. Where law is technical and detached from everyday ideas of right and wrong, it can serve as a weapon of revenge or attack; as a source of unreasonable defence; as a means for delay and frustration of legitimate claims.'

Pattern of Civil Justice Policy

Before focusing on how some aspects of the civil justice system operate in practice, it is useful to set current concerns about the civil justice system in an historical context. The history of policy, in what Sir Jack Jacob has referred to as the 'wretched waters of civil justice',¹⁴ has been characterized by repeated efforts at reform in order better to achieve the objectives of justice. Such reforming activity has always occurred against a background of complaint about the sorry state of the civil courts. On this issue it is important to be clear: the cost and torpor of the civil courts has been a persistent complaint throughout the nineteenth and twentieth centuries,¹⁵ and the pattern of policy and the arguments surrounding proposals for reform during the nineteenth century make extremely familiar reading. For example, the stated objectives of the major court reforms in the nineteenth century were to make law more affordable, accessible, and available to rich and poor alike.¹⁶ The Common Law Procedure Amendment Act of 1838 simplified procedure, reduced legal fees, and cut the length of proceedings. Despite these reforms, business litigants turned in increasing numbers to arbitration as a means of resolving disputes. The establishment of the County Court in 1846 provided a means by which tradesmen could recover credit without an excessive investment of time and money.¹⁷ Reforms continued throughout the latter part of the last century, and the effect, apparently, was to increase the work of both the superior courts and the county courts. In 1854 the *Law Times* informed its readers that court reforms promote the pecuniary interest of lawyers.¹⁸

At the turn of the century there is evidence of continuing complaint about delays in the civil courts and the cost of litigation, and in 1930 the London Chamber of Commerce reported that although English legal procedure was the most perfect of its kind in the world it had become an expensive luxury and beyond the means

¹⁴ Sir Jack I. H. Jacob, *The Fabric of English Civil Justice* (London, 1987), 246.

¹⁵ The *Interim Report* of the Woolf Inquiry into civil justice noted that since 1851 there had been some 60 reports on aspects of civil procedure and the organization of the civil and criminal courts in England and Wales.

¹⁶ Brian Abel-Smith and Robert Stevens, *Lawyers and the Courts* (London, 1967), 29.

¹⁷ *Ibid.*, 34–5.

¹⁸ *Ibid.*, 41.

of the majority of people. The Report recommended simplification of procedure, fixed trial dates, and acceptance of documents unless challenged. Further Commissions and Committees of Inquiry met, considered, and reported on a fairly regular basis.

After the Second World War, during the rush of social legislation, the failings of the legal system were again brought into relief. In 1947 two committees, including both lawyers and laymen, were established to consider what reforms could be introduced to reduce the cost of litigation. The conclusion was that the answer to the problem of the civil courts was not to reduce charges for work done by the profession, but to avoid the necessity of doing the work.

The problem of access to the civil courts by the poor, as opposed to commerce and the middle class, which has been a dominant issue in the twentieth century, has been recognized at least since the time of Henry VII,¹⁹ although the foundations of the modern legal aid system were not established until 1949. Since its introduction citizens have become more assertive and the role of individually enforceable rights has become more central.²⁰ New rights and entitlements have been created in the fields of housing, education, child care, and mental health, and the public are showing themselves to be prepared to pursue these rights, contributing to the rise in legal aid expenditure. As Goriely and Paterson have recently pointed out, the English legal aid scheme was established at a time of collectivist provision, but now operates within an individually oriented society. It has become one of the most extensive and expensive in the world.²¹ During the last decade expenditure has risen faster than the rate of inflation, and the policy response has been to reduce eligibility, increase contributions, and limit the scope of the scheme. The official policy is that, although the rule of law is dependent on the legal system being reasonably accessible, the government cannot keep funding access through legal aid. The answer to the problem of access is, in the Lord Chancellor's view

¹⁹ The *in forma pauperis* procedure was given statutory recognition during the reign of Henry VII. See n. 16 above, 12.

²⁰ Tamara Goriely, 'Rushcliffe 50 Years On: The Changing Role of Civil Legal Aid Within the Welfare State' (1994) 21 *JLS* 545.

²¹ Tamara Goriely and Alan Paterson, *Resourcing Civil Justice* (Oxford, 1996), 15.

and yet again, a reduction in the cost and complexity of legal systems.²²

The true underlying causes of the enduring problems of cost and delay remain somewhat obscure. The fault is frequently laid at the door of the legal profession, with its 'unreformability' being seen as the chief cause.²³ However, the presumed failure of previous reforms may have less to do with the unreformability of the profession than its fascinating capacity to adapt itself to change and to prosper from that change.

We see, then, that complaint about the civil courts is by no means a new phenomenon. However, current concern about the apparent impossibility of making the civil justice system responsive to the presumed needs of citizens seems to be providing the justification for a rather different approach to reform. Hand in hand with the traditional simplification of court procedure and regulation of costs, there is also a state-sponsored retreat from court-based dispute resolution. Although this is not particularly novel in commercial matters, since businessmen have generally been willing to buy private arbitration when it was in their interests, the Alternative Dispute Resolution bandwagon is being propelled towards a wide range of civil disputes by an interesting alliance between ADR providers, the judiciary, and policy-makers eager to find legitimate ways of saving public money. What is being offered is a new solution to old problems and, as always, the new product bears the familiar 'Access to Justice' label.

In the remainder of the chapter I reflect on several key issues that arise out of current policy within the context of what we do know about the way in which the civil justice system is used, and how it operates. I want to consider: why we are worrying about access to justice and for whom and what purpose we want to make the courts more accessible; what people want from the civil justice system as litigants, and what they want as citizens. Finally, I consider what litigants are currently getting from the system and how proposals for change might affect that for better or for worse. In the course of this discussion I consider several aspects of the tired problem of access to justice.

²² Speech to Consumers' Association 1996.

²³ Adrian Zuckerman has argued that the problem has always been and remains the basis upon which lawyers are paid: 'Lord Woolf's Access to Justice: Plus a ça change . . .' (1996) 59 *Modern Law Review* 773.

Access to Justice Revisited . . . Again

In 1978 Sir Jack Jacob wrote:

We must enable legal disputes, conflicts and complaints which inevitably arise in society to be resolved in an orderly way according to the justice of the case, so as to promote harmony and peace in society, lest they fester and breed discontent and disturbance. In truth, the phrase itself, 'access to justice', is a profound and powerful expression of a social need which is imperative, urgent and more widespread than is generally acknowledged.²⁴

This quotation encapsulates many of the underlying assumptions in access to justice arguments, and reflects ideas about the functions of law to which I referred earlier. The role of law and the rule of law are fundamental to liberal democratic ideology which emphasizes individualism and liberty, and promises justice and equality before the law. Moreover, it has been persuasively argued that access to legal services is a fundamental prerequisite of access to justice. Luban suggests that in order to participate effectively in the civil justice system, citizens require legal representation. '[T]he principle of equal access to the legal system is part of our framework of political legitimacy . . . to deny a person legal assistance is to deny her equality before the law, and . . . to deny someone equality before the law delegitimizes our form of government.'²⁵

I argued earlier that concern about use of law and access, or lack of access, to justice has a long pedigree, but despite Sir Jack's formulation of the issue, the messages have been, and continue to be, mixed, not to say confused. We hear of too much use of law; we hear of too little use of law; we hear that the civil courts are too slow, too complicated, and too expensive. We also hear that the availability of legal aid leads to inappropriate use of the courts. Civil litigation has been described at different times and at the same

²⁴ I. H. Jacob, 'Access to Justice in England' in Mauro Cappelletti and Bryant Garth (eds.), *Access to Justice, vol. 1 A World Survey* (Milan, 1978), 417.

²⁵ David Luban, *Lawyers and Justice* (Princeton, NJ, 1988), 251. For an alternative view and implicit criticism of this basic assumption, see also Christine B. Harrington, 'The Politics of Participation and Nonparticipation in Dispute Processes' (1984) 6 *Law and Policy* 203: 'Expanding legal participation is one way the state seeks to mediate social relations in a liberal democracy. The judiciary plays an important role in structuring dispute processes to absorb demands for social justice on the one hand, and maintain social order and stability on the other hand.'

time as an evil, and as necessary to participation in democracy. It has been seen as a manifestation of weakening social solidarity, and as an expression and reinforcement of fundamental societal values.²⁶ There is a pervasive schizoid element running through policy pronouncements and scholarly analyses of civil justice that simultaneously proclaims the importance of courts and access to them as fundamental to liberal democratic values, while condemning litigants and their lawyers as aggressive troublemakers who ought to be capable of sorting out their problems without resort to the courts. This contradiction, similarly, runs through the discussion and current proposals that underpin the revolution in civil justice promised in Lord Woolf's reforms.²⁷

Discourse about access to justice proceeds largely without knowledge of, and without reference to the impulses, interests, strategies, and needs of the community which the system is there to serve. The discourse is anti-empirical. It does not need information, although it does incorporate atrocity stories that support any particular matter under discussion. What is discussed becomes what is known. The mythology is developed and elaborated on the basis of war stories told and repeated. This discourse is conducted among policy-makers, the judiciary, and the profession with contributions by representatives of sectional interests who are sufficiently well organized to be able to communicate their views and sufficiently moderate to be taken seriously. It is inevitable that the participants in this discourse speak on the basis of a partial

²⁶ Carol J. Greenhouse, 'Nature is to Culture as Praying is to Suing: Legal Pluralism in an American Suburb' (1982) 20 *Journal of Legal Pluralism* 17: '[I]t is possible to imagine circumstances under which rising rates of litigation would indicate the increasing integration of society, not the reverse. When law-aversion stems from a rejection of judicial institutions and the state that they represent, rising law use may signal a positive accommodation to or acceptance of the social system. The law is a basis and means of social participation.'

²⁷ 'A system of civil justice is essential to the maintenance of a civilised society. The law itself provides the basic structure within which commerce and industry operate. It safeguards the rights of individuals, regulates their dealings with others and enforces the duties of government': *Interim Report of the Woolf Inquiry* (London: 1995) at 2. 'The new landscape will have the following features: Litigation will be avoided wherever possible. (a) People will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available. (b) Information on sources of alternative dispute resolution will be provided at all civil courts': *Final Report of the Woolf Inquiry*, at 4.

view, derived from experience of dealing with some users of the system. Little is known about the silent majority, both private and business, who deliberately avoid the legal system, the processes that occur outwith the courts, and the everyday strategies adopted to contain and resolve conflict. The absence of reliable, large-scale data relating to the operation of the civil justice system provides the conditions in which such discourse can flourish.

Discussion about the importance of civil justice is often accompanied by dark references to the implications of a civil justice system that is unresponsive to the uncharted needs of the community, but little consideration is given to the reality of the situation. What do we know quantitatively about access or lack of access to justice? What kind of access do litigants and potential litigants need and want? What do citizens mean when they say that they want justice? What would citizens want if they could design their own system, and what kind of access to civil justice does society need in broader social theoretical terms? What is the social impact of the lack of access to the courts?

Although I have said that we lack information that would provide us with a comprehensive understanding of the use of the civil justice system, there is some information available from socio-legal research about the propensity to resort to the courts. The conclusions of several studies tell us, first, that resort to the courts is the exception, not the rule.²⁸ Our everyday perception of litigation is distorted by media representation of extreme and novel cases where the boundaries of the law are being pushed and where the public are likely to react. A recent example is the attempt by disappointed schoolchildren to sue their schools for failure to deliver an appropriate quality of education. These cases should

²⁸ Donald Harris *et al.*, *Compensation and Support for Illness and Injury* (Oxford, 1984); J. Jenkins *et al.*, *Survey of Use of Legal Services* (London, 1989); MVA Consultancy, *Consumer Study of Knowledge and Use of Legal Services* (London, 1994); National Consumer Council, *Seeking Civil Justice* (London, 1995); Royal Commission on Legal Services, Chairman, Sir Henry Benson GBE (London, 1979), Cmnd. 7648; Herbert M. Kritzer, 'Propensity to Sue in England and the United States of America: Blaming and Claiming' (1991) 18 *Journal of Law and Society* 400; S. M. Lloyd-Bostock, 'Propensity to Sue in England and the United States of America: A Reply' (1991) 18 *Journal of Law and Society* 428. See also Deborah A. Hensler *et al.*, *Compensation for Accidental Injuries in the United States* (New York, 1991); RAND Institute for Civil Justice, *Patients, Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York* (Santa Monica, Cal., 1990).

serve to remind us of the ability of the law to reach into the furthest recesses of our social, family, working, and other relationships. They are examples of the capacity of law, with the assistance of lawyers, to intrude, to control, and to seek to adjust relationships. What the cases do not tell us anything about is the propensity of the *average* citizen to resort to law when trouble strikes, the ability of the law to provide a realistic remedy for the majority of life's vicissitudes, or the value of the existence of the courts, no matter how remote, to the average person's sense of stability and perception that there is order in the world.

Empirical research on the propensity to litigate, then, suggests that most people do not (even when faced with obviously justiciable events). The range of factors that might, in theory, influence decisions about how to deal with life's problems includes: individual psychology; education; religion; belief about the value of the available remedy; resources; attitudes towards the courts and judges; alternative means of securing objectives; relationship with the defendant; the response of the defendant to a complaint; sense of injustices and so on. It is also likely that decisions are influenced by structural factors such as raising or lowering costs; availability of funding for litigation; changes in the law; and changes in the behaviour of lawyers. In his analysis of the 'litigation explosion' in the United States Galanter suggests that the most powerful explanatory factor for the transformation of grievances into disputes in different cultures is, in fact, the different 'institutionalized ways of handling different kinds of disputes, not on broader cultural propensities to dispute'.²⁹

Thus actual litigation rates reflect costs and the ability to pay, versus opportunities to succeed and assessments of what will be gained. Costs include both direct and indirect costs—including psychological costs. The cost-benefit analysis consists of something like this: what does the potential litigant want? What can he get? How much will it cost? How long will it take? How much trouble and discomfort will be involved? How likely is it that he will get what he wants in the end? Although we have a rough idea of the kinds of cases that end up in court, we do not know how court

²⁹ Marc Galanter, 'Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society' (1983) 31 *UCLA Law Review* 51, at 61.

actions relate to the universe of potential claims. We have little information about how these rough cost-benefit analyses are worked out on a daily basis among different groups in society.

Evidence from two current studies provides some insights into these issues. One is a national programme of research seeking to establish the range and prevalence of justiciable events faced by the public and to map responses to such events.³⁰ In identifying the factors that influence the strategies adopted to deal with these events, we hope to provide a picture of the way in which people seek to resolve conflict, to enforce rights, and to press claims—and the extent to which trouble and injustice is simply *absorbed*. We hope to achieve a better understanding of the factors that deter people from using the law, those that propel people towards the law, and the real motives for bringing civil actions. Is it a sense of an injustice that cannot be supported? Is it that the legal system offers the only possibility of redress? Are there circumstances in which the law is invoked without any particular sense of grievance or injustice, but opportunistically where money may be available with only the investment of time and trouble, but at no risk of cost?

Early developmental work has involved group discussions with members of the public who had experienced a range of events for which legal remedies are available. In talking about how these problems had been managed and the strategies adopted for obtaining remedies, respondents expressed profound disenchantment with lawyers and the legal system. The perception is that the legal system is costly, time-consuming, frustrating, and unlikely to deliver the desired objective. These perceptions were based partly on experience but also on received wisdom. The overwhelming view across the spectrum of social groups was that the law was to be used only as a last resort, when ordinary attempts to gain redress had failed and where the need for redress justified the costs risk. Examples of views are as follows:

‘They are the last resort. You have to be very desperate, very desperate and very frustrated to go and see a lawyer, because generally you equate

³⁰ Access to Justice In England and Wales and Access to Justice in Scotland, both funded by the Nuffield Foundation being conducted by Hazel Genn, Patten Smith, and Sarah Beinart of Social and Community Planning Research. The research will be completed in Summer 1998.

whether it is worth the time and effort. You try to sort it out yourself and if you can't sort it out yourself, you then have to equate the cost. And if the cost is there and at the end of the day you can get a result out of it and you can afford it. . . . Basically at the end of the day what happens is when you go and see a solicitor you say "Can I afford it? and is it worth what it is going to cost me?" And that is how you equate it. And it would have to be something very, very serious for you to say "well I don't care what it costs" and that is ultimately how it works.'

'There is no possibility that I would ever go to a solicitor for anything medium range because I am not going to get it paid for. It's just not worth it. It's going to have to be so big an issue that basically I'm going to go bust either way before it's going to be worth going to a solicitor. It just costs too much.'

'I think it's a balance . . . Sometimes I feel it is so unjust, it feels so unjust that this should happen, but in terms of how much financially it is going to cost, it is probably just better to forget about it because if you continue you are going to feel more hard done by in the end. You know—if I don't get anywhere and then I have to pay money on top of it, that would make you feel worse at the end of it.'

The cost-benefit analysis, which so often comes out against taking action, is strongly influenced by beliefs about the likelihood of achieving the desired outcome. Scepticism on this count derives from a perception of a disjunction between the law and ideas of justice and fairness. For example:

I went to court a few years ago . . . and the judge said 'well I can see you have been treated unfairly but unfortunately the law is that the housing society can make whatever decision it likes if it makes it in the correct way and followed its own procedures.' So it's not to do with fairness, it's to do with law—which is different.

Scepticism also derives from negative perceptions of the key decision-makers in the legal system. The average citizen has no direct knowledge of the judiciary and perceptions are based on media representation: what they know comes from the generally negative reporting that they read and what they see on the television. As a result, there is a sense, again across social groups, that judges are out of touch and that they are inconsistent. No distinction is made between criminal and civil cases, and accounts of crass remarks by judges and apparently inconsistent sentencing has a considerable impact:

'It just seems a very old system. The people at the top are just very old and I don't think they can understand technical problems. Generally they may not understand your situation. Like a District Judge or something. You know they are going to be much older, and they are not going to be the same age as a younger disputant, and you think this person is going to have completely different ideas to where this dispute is coming from because he comes from a different generation.'

'The top judges are not living in the real world with the kind of comments and kind of sentences they give out.'

'The thing with the judges you get the same case come up and one will get a suspended sentence and someone else will go to a different court with another judge and they will get 10 years. They are not consistent.'

'The people who are up there who are making decisions are some fuddy old judge. He might have lived in the real world 40 years ago but now he is living in a mansion in the middle of Berkshire and when was the last time he went down Soho late at night and got mugged because he didn't have anyone with him? They are not in touch with reality.'

Despite the general negativity of tone, a different reading at least of the earlier quotations reveals the *importance* of the existence of the courts as available for that 'last resort' case. There is no suggestion that the courts would never be used—only that the stimulus for mobilizing the courts would have to be serious and make the expenditure worthwhile. This underlines the sense in which courts contribute to a more generalized sense of stability and order and, in the end, to the faith that justice is achievable. It is not a rejection of the courts. It is an everyday appreciation that courts are there for special and serious events—but that they *are there* and that they are available to be used. As Galanter has argued, the courts, no matter how remote and expensive, provide citizens with 'symbols of entitlement'.³¹ They heighten consciousness of rights and expectations of vindication.

Motivations: What do People Want from the Civil Justice System

Available evidence about what people want when they *do* use the courts suggests only a weak linkage with what the system is capable

³¹ N. 29 above, 510.

of offering and what in most cases it actually delivers. Interestingly, although the chief remedy offered by the courts is financial compensation, research has shown that litigants frequently state that their primary motivation for taking legal action is something else: for example, achieving an apology, an acknowledgement of having been wronged, preventing the same misfortune from occurring to another, a proper investigation, making sure that people observe their legal obligations in the future³²—all of these things, which in truth the courts could rarely offer, are, apparently, at least as important as financial recompense. Although respondents to surveys rarely cite punishment as a prime motivation, one should not underestimate the desire to punish and the desire to be publicly vindicated. Recent extended interviews with county court litigants³³ have provided some insights into what drives private and business people into litigation and what keeps them litigating. Accounts of the genesis of disputes and the motivations driving litigation are presented as ‘principles’ in which reparation, punishment, and vindication are prominent. For example:

‘Even if I don’t get any money out of this guy I just want to get justice. To get him out of this business so that he can’t do this to other people. The law needs to be changed.’ [Private Plaintiff]

‘I have a slim chance of winning and it will cost my firm a lot of time. His offer of £1,000 is less than he and his wife will spend in a weekend if they choose to go away. The money doesn’t matter to him. He says it’s the principle—but his principle is that it’s for him to decide what was in the contract. We would only go to law on principle, not for money. He has withheld money from us and it puts me in debt. The principle is that even though he is economically more powerful, we will not cave in.’ [Business Plaintiff]

‘I’m not trying to be unreasonable. I’m happy to make allowances on all the items but frankly I also believe there should be proper reparation. I am

³² See e.g., National Consumer Council, *Seeking Civil Justice* (London, 1995); C. Vincent, M. Young, and A. Phillips, ‘Why do People Sue Doctors? A Study of Patients and Relatives Taking Legal Action’ (1994) 343 *The Lancet* 1609; H. Genn, ‘Supporting Staff Involved in Litigation’ in C. Vincent (ed.), *Clinical Risk Management* (London, 1996).

³³ Interviews have been conducted in the course of an evaluation of an experimental mediation scheme in the Central London County Court. The research, commissioned by the Lord Chancellor’s Department, will be completed in Spring 1998.

prepared to spend £10K to get this money from him. The law is there to see that people honour their obligations.’ [Business Plaintiff]

These sentiments are what propel some plaintiffs into litigation and they are what provide the resistance to compromise that prevents disputes from resolving themselves *before* litigation is commenced. These principles are felt powerfully—at least until the wear and tear of litigation channels anger, frustration, and a sense of injustice about the *initial event* into anger, frustration, and a sense of injustice about the *legal system* and the inability of legal representatives to deliver what the litigants see as ‘justice’.

This leads to the question of what kind of justice the civil justice system delivers.

Justice

It has been widely accepted that the full meaning of access to justice involves more than access to advice and legal services or courts for those who seek such assistance. There is an implicit, and sometimes an explicit, acknowledgement that access involves access to just outcomes. The Woolf Report stressed that the basic principle of the civil justice system is that it should be just in the results it delivers and it should be fair (i.e. comply with principles of natural justice). The new rules of procedure have an overriding objective which is ‘to enable the court to deal with cases justly’, which includes but does not necessarily comprise: ensuring parties are on an equal footing; saving expense; dealing with cases in a proportionate way (value, importance, complexity, parties’ financial position); speed; balancing court resources.

This is a simpler formulation than has been achieved by scholars faced with the problem of defining and articulating the relationship between law and justice, and contains probably one or two items that neither Plato nor Aristotle might have envisaged. The extent to which the law is involved in delivering justice is a vexed question among philosophers and legal theorists. Theorists have struggled with the issue, but a lucid account of the meaning of justice, particularly one that is empirically grounded in everyday concepts of justice, continues to elude us. It has recently been suggested that ‘like liberty and equality, justice is yet another notion at the very center of Western political, social, and legal thought whose boundaries are notoriously indistinct, ill-defined and incessantly

contested'.³⁴ The problem has been well put by Jack Balkin who suggests that:

Laws apportion responsibility, create rights and duties, and provide rules for conduct and social ordering. . . . Law is always, to some extent and to some degree, unjust. At the same time, our notion of justice can only be articulated and enforced through human laws and conventions. We may have a notion of justice that always escapes law and convention, but the only tools we have to express and enforce our idea are human laws and human conventions.³⁵

There is, however, a commonplace conviction that justice and law are inextricably linked.³⁶ In the lawyer's conception, justice is to be found in the substantive legal rules and in the rules of procedure. Justice is seen in the impartial, unbiased, and accurate application of substantive laws, the content of which embody justice. Thus, for example, where the driver of a car owes a duty of care to a pedestrian, and the behaviour of the driver falls below the appropriate standard, and the pedestrian suffers damage as a result, it is *just* that the driver pays compensation to the pedestrian.

What, then, does the civil justice system actually deliver in the way of justice? What do users of the system get and what influences what they get? It is important to consider what we know about the kind of justice delivered by the civil justice system, and to assess what an increased emphasis on forcing settlement both within court litigation procedures and outwith the courts might mean for our concept of justice.

Settlement and the Notion of Justice

The idea that the outcome of litigation is necessarily *just*—even in narrow lawyer's terms—presupposes that cases are *decided* in court, on the basis of their merits in relation to the law. This view, however, fails to acknowledge the realities of litigation, the

³⁴ Austin Sarat and Thomas Kearns, *Justice and Injustice in Law and Legal Theory* (Ann Arbor, Mich., 1996).

³⁵ 'Being Just with Deconstruction' (1994) 3 *Social and Legal Studies* 393, 401.

³⁶ 'Though there can be law without justice, justice is realized only through good law.' It has been further argued that law's central link to justice is via the concept of impartiality. See Samuel Weber, 'In the Name of the Law', in chap. 6 in Druscilla Cornell, Michel Rosenfeld, and David Gray Carlson (eds.), *Deconstruction and the Possibility of Justice* (New York, 1992), 232.

pervasiveness of settlement, and the effects of the power relations of the parties on outcomes.

An important area in which socio-legal research has achieved success in theorizing across legal boundaries in the civil justice field is in relation to the factors affecting outcomes in civil litigation. Several studies highlight the sources of power in litigation and the ways in which power influences the outcome of settlement negotiations and, to a lesser extent, the outcome of trial. Factors which are important are: legal intelligence—getting the right lawyers and experts; financial resources—paying for the right lawyers and experts; and having the psychological, social, and economic ability to endure litigation.

UK studies have shown how in the fields of divorce litigation,³⁷ personal injury litigation,³⁸ and litigation over the retention of goods following winding-up,³⁹ the extent to which the resources available to the parties to investigate and construct claims, and their ability to withstand the pressures of litigation, influence the outcome of cases, independent of their legal merits. Legal merits may exist in objective ether somewhere, but in real life legal merits depend on storytelling by the parties, by experts, and by advocates. The facts of legal claims are socially constructed. Settlement negotiations take place in a climate of uncertainty in which the balance of evidence is important, but so is the ability to wait for an outcome, to endure exhaustion, and to withstand costs pressures. There is rarely a level playing field in litigation. As Davis comments on divorce settlements, ‘Adjudication is a leveller. The real unfairnesses arise in the context of settlement. Inequality in terms of the ability and commitment of legal advisers . . . is paralleled by an inequality of bargaining power between the parties—principally reflected in their ability to tolerate a postponed resolution.’ Similarly, in negotiations over reservation of title clauses Wheeler concludes that ‘the requirements of the formal law form only one of several planks in the negotiation process. Others of more import-

³⁷ Gwynn Davis, Stephen Cretney, and Jean Collins, *Simple Quarrels* (Oxford, 1994); Richard Ingleby, *Solicitors and Divorce* (Oxford, 1992).

³⁸ Hazel Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford, 1988).

³⁹ Sally Wheeler, *Reservation of Title Clauses—Impact and Implications* (Oxford, 1991).

ance are the power of the repeat players and the extent of their control of the process.⁴⁰

In this context the link between procedure and outcome is crucial. Changes in court procedure and other policies affect not only the question of access to the courts, but also the outcome of cases, by affecting the balance of power in litigation. One of the most important elements of power is insulation from legal costs. Subsidization of parties influences and distorts bargaining and outcomes. The development of conditional fees, informal contingency arrangements, legal expenses insurance, and insurance against failure will theoretically provide more opportunity for potential litigants to use courts. Capping the cost of litigation will also influence power relations, as illustrated by an insurance company claims negotiator talking about the anticipated character of personal injury litigation after Lord Woolf's changes are introduced:

Unfortunately a lot of the time, because of legal aid and legal expenses insurance the cost pressure is more on us than on the actual plaintiff . . . We are really up against the wall. I've never seen a claim where legal expenses insurance has withdrawn funding. Unfortunately not. I think that's where you get a lot of these actions taking up court time. They run the distance. I think fixed costs will really concentrate the mind on that—then these cases will go a lot faster. [Insurance Company Claims Negotiator]

The message is that plaintiffs will settle for less because solicitors will not be inclined to press cases so hard when the amount they can earn is limited under the rules. Thus the balance of power shifts.

In focusing on power relations in litigation, however, we must remember that there are two sides to costs pressures. All defendants—not just institutional defenders—can benefit to some extent from delay and heavy litigation costs. Disadvantaged and poor defendants use the cost and delay of the litigation system as a shield

⁴⁰ See also on the question of power relations in settlement negotiations: Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law and Society Review* 95; Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950.

against claims. Will they be pursued or will they escape because the plaintiff makes a commercial decision? The same is true for rational calculator business defendants who regard payment of the contract price as a game, and gamble on the plaintiff's unwillingness to enter a lose/lose situation by litigating. The disadvantages of an expensive, inaccessible civil justice system create opportunities for potential defendants to escape litigation, and also for *lack* of access to be used as a dispute resolution strategy in itself. For example:

That really is the most powerful remedy. It doesn't really matter what the legal niceties are—if you haven't paid somebody you are in the driving seat and that is your most immediate remedy. Recently I was dealing with some architects . . . they completely failed to deliver either what I'd asked for or on time . . . so I offered them half the fee—which I thought was reasonable. I didn't want to take advantage of the situation, but I also knew that in a way I was exploiting the lack of access to justice myself by knowing that it just wouldn't be worth their while pursuing me even if they were right. So you were in the driving seat from that point of view. Although everybody has the same problem of actually being able to afford to go to law, you can sometimes use that against your opponent.

Structural changes to the courts and expanded opportunities to litigate will affect these decisions. Not everyone is currently unhappy with the cost and delay of the current system, and making the courts quicker, cheaper, and easier to use will not please all litigants or potential litigants, as cases currently unpursued for commercial reasons get sucked into the system.

The Cost of 'Justice': How Cheap is Cheap Enough?

Before considering the future I want to pause briefly on the issue of legal costs and consider how cheap would legal costs have to become before they were cheap enough to satisfy consumers of legal services? Losers in litigation currently face large bills for legal costs, and a disproportionate amount when the sums in issue are small. Current concern about the courts is driven largely by the costs issue. The argument is that if costs could be reduced, more people would be able to engage in litigation (presumably a social good) and people would complain less about legal aid withering away, because more people could afford to pay for themselves. The extent of legal costs is related to the requirements of the substantive law and the procedures for proof. So the argument runs that if we

cut down on procedures, costs will fall and potential litigants, currently denied access to the system, will flock to the courts.

However, something that has never been investigated, but is worth considering, is the attitude of ordinary people to the cost of legal services. What is the perception of the value of legal knowledge and skills? Why are people shocked at having to pay £40 for a solicitor's letter or £550 to read a lease when they will pay £2.50 for a glass of fizzy water, £40 for a workman to inspect a faulty appliance, or £5,000 to an estate agent, with relatively little complaint? Is it the sheer scale of legal costs? Is it the uncertainty about the extent of risk as a result of the costs indemnity rule and the fact that costs liability is open-ended? Or is it also something to do with a lack of value in the good that is being purchased? That what people seek from legal assistance is what they believe they are entitled to? They are not *gaining* something—they will not have slaked their thirst, sold their house, or fixed the washing machine. They will simply have avoided some theoretical future problem, or they will have been returned to a position of equity⁴¹—to have been given back what they feel they have lost. It is just possible that one could almost never reduce legal costs to a level that individual and business litigants found acceptable, because they do not value the service supplied. The following view is typical of the public's perception of the cost and value of legal skills:

At work we recently had a bill from a solicitor who read our lease and he charged £550. He read the lease—that's all he did. If it cost £550 to read a lease God help you if you wanted them to fight your case. If that's a sign of how much solicitors charge! And the sting in the tail was a letter came with the bill saying 'I've tried to reduce my costs as much as I can bearing in mind your situation at the moment and I've reduced the bill to £550.' And all he did was read through four sheets of paper!

The Future

Where does all of this leave us, and what of the future? We cannot conclude a turn of the twenty-first century discussion of civil justice without considering Alternative Dispute Resolution. I

⁴¹ For a discussion of the psychological literature see Sally Lloyd-Bostock, 'Fault and Liability for Accidents: The Accident Victim's Perspective' in Donald Harris *et al.*, n. 28 above.

remarked earlier that one of the main planks of civil justice policy is the promotion of alternative, private forms of dispute resolution, and I want to consider the current apparent enthusiasm for ADR in the context of my comments about the functions of law and the role of the state in the settlement of disputes.

The first point is that, although the ADR bandwagon has really started to roll in this country, it is well behind developments elsewhere. Debate and disagreement about the value of ADR has been continuing in the United States for more than a decade and the North American scholarly literature is awash with theoretical discussion and empirical research on ADR schemes. These debates incorporate struggles between competing visions of justice and competing claims about who should control dispute processing. In 1989 Sarat and Silbey convincingly dissected the politics of dispute processing, arguing that the contemporary ADR movement was held together by a critique of courts, and a desire to recast the market for dispute resolution services by different interests attempting to advance their own professional projects.⁴² Their analysis, however, shows that the character of the movement in the United States was somewhat different from developments here. In the United States an important stimulus was the desire to save judicial resources for the resolution of business and commercial disputes and the removal of other matters from the courts and possibly the legal field itself. This tendency caused substantial criticism on the ground that the problems of the poor were being downgraded and relegated to inferior courts and inferior forms of justice. The problems of the poor could be jettisoned because they were less important than the problems of business. Similar arguments were made in this country following the Courts and Legal Services Act 1990 and the expansion of the jurisdiction of the county courts.⁴³

This is, I think, an occasion when extrapolation from the United States is unhelpful. The current passion for ADR can hardly be a response to court congestion. *Judicial Statistics for England and Wales* show that, for the last two or three years, litigation has been declining. In fact, the promotion of ADR, at least on the part of the

⁴² Susan Silbey and Austin Sarat, 'Dispute Processing in Law and Legal Scholarship: From Institutional Critique to the Reconstruction of the Juridical Subject' (1989) 66 *Denver University Law Review* 437.

⁴³ Stephen Sedley, 'Improving Civil Justice' (1990) 9 *Civil Justice Quarterly* 348.

Lord Chancellor's Department, may simply be another instance in which the state is seeking to withdraw from responsibility for core functions while maintaining overall control—what has been referred to by political scientists as the 'hollowing-out' of the state. This trend, together with the new interest in innovation among the judiciary stimulated by the Woolf Inquiry, means that the energetic lobbying of ADR providers, which has been in progress for several years,⁴⁴ is producing an uncritical fervour for ADR at the highest levels. The result is a growth in mediation experiments in civil cases⁴⁵ and increasing judicial pressure on litigants to resolve disputes outside court.⁴⁶ These developments are running ahead of any systematic evaluation of the presumed benefits or possible disadvantages of private dispute resolution systems.

The evaluation in progress of the mediation scheme in the Central London County Court raises a number of questions that require consideration. First, in common with other experimental schemes, the take-up rate has been low because of the widespread failure of the legal profession to recommend mediation to their clients. Suspicion of mediation among practising lawyers arises from: ignorance about what mediation involves; entrenched views about how litigation should be conducted; a genuine belief that mediation is inappropriate in ordinary litigation; and a lack of any obvious financial incentive to cut cases short.

Those cases that have been mediated in the Central London County Court to date largely concern recovery of money for goods delivered or services rendered, involving small and medium sized businesses suing each other over relatively modest sums of money. The prime motivation for accepting mediation is to alight from the runaway litigation train, and the chief benefit of mediation is seen by litigants as being the avoidance of legal costs and cutting short

⁴⁴ The leading organization, the Centre for Dispute Resolution, was established in 1990.

⁴⁵ Experimental scheme in Bristol county courts; experimental scheme promoted by the Department of Health for medical negligence cases; mediation experiment in the Central London County Court; mediation experiment in the Patents County Court.

⁴⁶ Lord Chief Justice's and Vice-Chancellor's Practice Direction of 24 Jan. 1995; Commercial Court Practice Statements in Dec. 1993 and June 1996. A booklet, 'Resolving Disputes without Going to Court', published by the LCD, was distributed to members of the judiciary in Jan. 1997.

litigation time. To that extent the interest of the parties is primarily in *outcome* not in the *process*.

The mediations appear to be capable of producing compromise at an early stage through skilful management and compression of settlement negotiations. Mediations seemed to work well when parties had had legal advice and where there was some rough equality of representation. Legal advice is important because the context is legal. Although parties are urged at the commencement of the mediation to ignore their legal rights and focus on their *interests* in the context of the litigation nightmare, perceptions of legal merits, strength of evidence, and chances of winning at trial provide the foundations for discussions and the impetus that propels the parties toward compromise.

What then are the questions raised by these mediations in the context of a growing pressure towards mandatory use of Alternative Dispute Resolution for much of the current business of the civil justice system?

First, that whether the mediators are lawyers or non-lawyers, the mediations are controlled by the *mediator* and *not* by the parties. Despite the rhetoric of the mediation organizations and despite the conventional introduction given by mediators at the outset of mediations stressing their facilitative role and the parties' control of the proceedings, it is invariably the case that the mediator decides the rules by which the mediation will proceed: for example, who will be permitted to speak and when; what evidence is relevant and what can be produced and discussed. *The mediator sets the criteria of relevance and shapes expectations*. There is thus considerable scope for the exercise of covert power. The evidence, so far, strongly indicates that evaluation is not absent from mediation; it is simply communicated with more or less subtlety depending on the personality and individual philosophy of the mediator. The role of the mediator therefore requires close examination since the activities of mediators are currently unregulated. Mediators are unaccountable, the nature and extent of their responsibility to the parties is unclear, and their ethical standards are unarticulated.

Finally, it seems to me that the current justification for mediation in civil cases derives primarily from the deficiencies of litigation, and *if it is* succeeding it does so within the context of an expensive and stressful litigation system. Without the pressure of mounting legal costs the stimulus for compromise may be lacking. The

parties' 'interests today' largely comprise the interest in avoiding further litigation. Absent the disadvantages of the litigation system—what are the parties' interests? We are left with their desire for *full* reparation, for vindication, and for punishment. Litigants are prepared to forgo these things *only* because the financial and psychic costs of litigating in the end are too great.

There is also the question of enforcement. In all cases, the enforceability of mediated agreements is crucial. The first question that many parties ask at mediation is whether any agreement reached will be enforceable and the possibility of coercion through the civil courts to enforce mediated agreements is regarded as essential. It is therefore possible to argue that mediation works, in the context in which I have been observing it, on the one hand because of the disadvantages of the current litigation system, but also because of the continuing shadow cast by the courts. To steal a phrase,⁴⁷ mediation in the absence of courts would be the sound of one hand clapping.

Conclusion

It should be a fundamental aim of civil justice to open wide the gates of the Halls of Justice and to provide adequate and effective methods and measures, practices and procedures, reliefs and remedies, to deal with all justiciable claims and complaints. Such an aim would produce greater harmony and concord in society and increase the understanding and respect of the community for law and the system of civil justice.⁴⁸

There are some important, and possibly intractable, problems bundled up in the questions about what the civil courts are for and in arguments about access to justice. But I also think that access to justice concerns reflect deeper anxieties which reform of the civil courts is unlikely to solve. The truth is that even if Sir Jack Jacob's vision of open access to the courts for the widest range of grievances were realized, it is by no means certain that we would be happier, more equal, or more secure. Conflict would not be reduced

⁴⁷ Used by Marc Galanter in relation to out of court settlement in the absence of the possibility of litigation, in 'Worlds of Deals' (1984) 34 *Journal of Legal Education* 268.

⁴⁸ Sir Jack Jacob, 'Justice Between Man and Man' (1985) 37 *Current Legal Problems* 211, at 230.

and we would certainly not be more prosperous. It is arguable that our future prosperity has more to do with what is going on in offices and factories in the Far East than with whether Lord Woolf's fast track will achieve its objectives.

But on the other hand, the future role of the courts is important. The state's responsibility in the provision of courts is about more than the interests of litigants. It is not simply a question of whether people have access to triadic modes of dispute settlement. In addition to adjudicating on disputes the courts develop the law, they can reflect and influence public policy at a broad level, and they communicate and reinforce dominant values. As Sarat and Silbey point out, 'law works quietly and unobtrusively, to shape both attitudes and behaviour . . . and communicating particular visions of order, justice, goodness, property, family, health, education'.⁴⁹ Citizens do not routinely perform their duties because they fear the threat of adjudication or compulsion by the state, but because the values of the law—publicly expounded in courts—have been absorbed.

Moreover there are questions about whether the current emphasis on dispute settlement outside court is necessarily to be regarded as intrinsically desirable. Critics of settlement point to the influence of resources and incentives on outcome,⁵⁰ the dangers in the loss of the influence of courts in articulating and developing public norms of justice,⁵¹ and the loss of public knowledge about law.⁵² Private justice has other potential weaknesses: for example, the creation of the suspicion that in addition to purchasing a process, the content of the decision can also be bought.⁵³

Economists have argued for a long time that private arbitration and full-cost sharing by the parties should be totally substituted for

⁴⁹ Sarat and Silbey, n. 3 above, 138.

⁵⁰ See for an example Janet Cooper Alexander, 'Do the Merits Matter? A Study of Settlements in Securities Class Actions' (1991) 43 *Stanford Law Review* 497 at 574–7.

⁵¹ Owen M. Fiss, n. 12 above.

⁵² David Luban, 'Settlements and the Erosion of the Public Realm' (1995) 83 *Georgetown Law Journal* 2619. See also Judith Resnick, 'Judging Consent' [1987] *University of Chicago Legal Forum* 43; Marc Galanter and Mia Cahill, '“Most Cases Settle”: Judicial Promotion and Regulation of Settlements' (1994) 46 *Stanford Law Review* 1339.

⁵³ Cf. Samuel Krislov, 'Theoretical Perspectives on Case Load Studies: A Critique and a Beginning' in K. Boyum and L. Mather, n. 12 above, at 169.

present court arrangements.⁵⁴ But there is a public purpose in courts, and there are compelling arguments for accountable and universalized justice. Moreover, at a time when family structures are changing, when religious authority is vestigial, the emphasis on self-reliance and the growth of individualism may lead to an increasing judicialization of misfortune and conflict and a greater desire to pursue rights and redress through the courts. The court system is something more than the provision of a consumer service like dry cleaning or motor repairs; it is an essential part of a properly functioning democratic society—as is reflected within the Magna Carta’s promise that ‘To no one will we sell, to no one deny or delay right or justice’.

If we cannot afford to provide at public expense sufficient courts or judges to decide cases expeditiously and if we believe that certain classes of litigants would do better to take their disputes elsewhere, it is necessary to debate and decide which kinds of cases should have priority in terms of court resources and why. Access to the public dispute resolution system is already rationed through cost and delay, but a *strategy* for the civil justice system of the future requires clearly articulated rationing principles that take account of the social function of the civil justice system and the interests of *citizens* in the structures of civil justice.

⁵⁴ William M. Landes and Richard A. Posner, ‘The Private Enforcement of Law’ (1975) 4 *Journal of Legal Studies* 1.