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THE IMPORTANCE OF LITIGANT WEALTH

Albert Yoon*

INTRODUCTION

In litigation, there are three relevant actors: the plaintiff, the defendant, and the court. Each has different incentives. The litigants have opposing incentives: each side wants as favorable an outcome as possible, even at the expense of the other side. The court's incentive, however, is entirely different. It wants to reach the correct outcome based on the information presented before it. In most instances, the court reaches an outcome that corresponds to the preferences of one of the litigants, although in some instances, the court may reach a decision that displeases both litigants.

It is important to recognize that in an adversarial system such as ours, the court's role is constrained. In each case, the court makes a decision based on the information presented by the litigants' lawyers. The court must play a neutral and, in this regard, largely passive role in the information process. While the court makes determinations on the admissibility of evidence, its role is not to raise arguments overlooked by the litigants, nor is it to balance deficiencies in legal representation of one or both of the parties. Therefore, the decision of the court is based solely on the information that the litigants presented.

The adversarial system is a study of persuasion amid divergent incentives. The litigants attempt to convince the court of their view of the case, in most cases, through the mechanism of lawyers. Accordingly, lawyers are both the controlling and limiting factor because the court decides a case based on the facts and laws presented by the lawyers. Consequently, the quality of any decision—however impartial the court—depends on the facts and law upon which it is based. Although the court will reach an autonomous decision, the information

* Associate Professor, University of Toronto Faculty of Law; Visiting Scholar, the Russell Sage Foundation, 2008–2009. The author would like to thank the Russell Sage Foundation and the Law School Admissions Council (LSAC) for their generous financial support, as well as Richard Abel, Marc Galanter, Stephan Landsman, Richard Lempert, Richard Startz, Dorian Warren, and Ben Zipursky for their helpful comments. My appreciation also to the editors of the DePaul Law Review for organizing the Fifteenth Annual Clifford Symposium and for their valuable contributions during the editing process. All remaining errors are my own.
provided by the lawyers will influence the decision that the court reaches.

An important implication of the adversarial system is that the lawyers, acting on behalf of their clients, jointly affect case outcomes. The effectiveness of a lawyer cannot be viewed in isolation, but rather only in conjunction with the relative effectiveness of her opposing counsel. If there are considerable differences in skill between opposing lawyers, it could affect the outcome of the case.\(^1\) For example, it may affect the magnitude of the remedy (e.g., the scope of damages), or which party prevails (e.g., whether the plaintiff is awarded damages at all).

Multiple disciplines within law have made valuable contributions to our understanding of litigation. One such contribution has come from law and society scholars. A seminal contribution came from Marc Galanter, twenty-five years ago, when he famously observed that litigation favors the "haves" over the "have-nots."\(^2\) He commented that the haves, typically wealthy litigants, are often repeat participants who understand the nuances of litigation; the have-nots are less wealthy litigants, often "one-shotters" who are much less sophisticated.\(^3\) In litigation that pairs the haves against the have-nots, the former are more likely to prevail. Galanter's work inspired subsequent exploration of litigation involving parties of disparate wealth, both in the United States\(^4\) and other countries.\(^5\)

1. For an excellent discussion of the effect of the incentives of litigants regarding legal expenses, see generally Avery W. Katz, Judicial Decisionmaking and Litigation Expenditure, 8 INT'L REV. L. & ECON. 127 (1988).


3. See Galanter, supra note 2, at 97.


Another contribution to our understanding of litigation has come from law and economics scholars. In the aftermath of scholarship on settlement, Steven Shavell wrote a seminal article with the short title, *Suit, Settlement, and Trial*, in which he described the conditions under which a plaintiff brings suit, and thereafter, the conditions under which the parties either settle or proceed to trial. At each of these stages, each party engages in a cost-benefit analysis. Shavell provides a model to explain how parties maximize the returns of litigation: they proceed in litigation only when doing so yields higher expected net returns than if they were to settle. Shavell’s paper inspired subsequent scholarship that explored various conditions under which parties resolve disputes.

I focus on these disciplines because they have arguably made the greatest contributions to our understanding of litigation. I also posit that because of their different emphases, they have not fully explored the role of legal representation in litigation. In their dichotomy between the haves and the have-nots, law and society scholars recognize how law favors the wealthy and disfavors the poor. Wealth, however, is ultimately a continuum, where litigant wealth runs the entire gamut. While differences in wealth may matter most when a wealthy litigant is pitted against a poor litigant, it potentially matters even when the differences are less stark.

Conversely, while law and economics scholars have made important theoretical and empirical contributions to our understanding of litigation, they have largely ignored the costs of legal representation. These costs are included in these models, but they are typically exogenously assigned to the parties rather than decided by the parties.

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8. See Shavell, supra note 7, at 56–57.
9. Id.
More significantly, the models assume that parties have the resources to pay these costs, an assumption that is at odds with what we know about actual litigation.  

This Article seeks to explore the relationship between litigant wealth, the costs of litigation, and litigation outcomes. Lawyers are the focal point by which parties litigate and resolve disputes. To better understand litigation, one needs to recognize how the absolute and relative financial resources of litigants influence their decisions. In short, I argue that litigant wealth has a significant effect on legal outcomes, in both subtle and dramatic ways.

This basic argument consists of three parts. First, the more financial resources available to a party in litigation, the more she can spend on legal representation. The cost of legal representation is not trivial, and it places a greater financial burden on parties with less wealth. Second, the more a party expends on legal representation, the greater her chances, all things being equal, of a favorable legal outcome. The idea is that by spending more on legal representation, a party gets more in return: more time spent on gathering facts, better preparation of witnesses, and more thorough development of arguments. The third statement logically follows from the first two: the more financial resources available to a party in litigation, the greater her chances, all things being equal, of a favorable legal outcome.

First, in Part II of this Article, I describe heterogeneity in the quality of legal representation by drawing upon recent empirical studies. Next, in Part III, I discuss the heterogeneity in the wealth of litigants, both in the general population and between opposing parties. In Parts IV and V, I describe how the interplay of heterogeneous lawyer quality and litigant wealth affects outcomes at every stage of litigation. I briefly describe existing mechanisms to mitigate the heterogeneity in litigant wealth and their limits in Part VI. Finally, in Part VII, I conclude by suggesting areas for future research and policy by exploring various considerations.

11. See, e.g., Galanter, supra note 2.
13. See infra notes 18–37 and accompanying text.
14. See infra notes 38–54 and accompanying text.
15. See infra notes 55–72 and accompanying text.
16. See infra notes 73–86 and accompanying text.
17. See infra notes 87–92 and accompanying text.
II. Evaluating Legal Representation

One of the core ideals in American society is that we live according to the rule of law.\textsuperscript{18} When disputes arise, parties resolve them without the use of force, guided by existing laws. When parties are unable to reach a resolution on their own, they can turn to an impartial court that is charged with rendering a fair and reasonable decision. We pride ourselves on the belief that our legal system is coherent and consistent and that litigants receive equal treatment under the law.\textsuperscript{19}

The role of the lawyer is central to this enterprise, as articulated by the U.S. Supreme Court in 1932:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.\textsuperscript{20}

The demands placed on the lawyer are substantial. She is entrusted with two important tasks: (1) to possess a substantive and procedural\textsuperscript{21} understanding of the law relevant to her client, and (2) to ably apply this knowledge to the relevant facts of the case in a manner that is most helpful to the client. These responsibilities are a challenging undertaking for lawyers, and a potentially insurmountable challenge for non-lawyers. As Robert Rasmussen has commented, "Nonlawyers know that law is not their domain."\textsuperscript{22}

Legal representation encompasses multiple components, including the gathering of facts and the development of arguments. While the production of legal representation often involves several people—such as litigants and witnesses—the lawyer serves as the focal point, responsible for overseeing and directing the case in a manner that is

\textsuperscript{18} See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 868 (1992) ("Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law.").

\textsuperscript{19} See Chambers v. Florida, 309 U.S. 227, 241 (1940) (rejecting the rationale for a discriminatory law enforcement method and holding that "this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court").

\textsuperscript{20} Powell v. Alabama, 287 U.S. 45, 69 (1932).


most beneficial to her client. Accordingly, when discussing legal representation, this Article focuses on the lawyer.

The argument that the resources of the parties influence legal outcomes rests on two important premises. The first is that the quality of legal representation is heterogeneous, or stated more simply, that some lawyers are more effective than others. If Law School Admission Test (LSAT) scores are a proxy for lawyer quality, as illustrated by Figure 1, the distribution appears roughly normal.23

![Figure 1](http://lsacnet.lsac.org/research/rr/LSAC-National-Longitudinal-Bar-Passage-Study.pdf)

FIGURE 1
DISTRIBUTION OF LSAT SCORES FOR MATRICULATING LAW STUDENTS (2008–2009)24

Approximately four-fifths (eighty-two percent) of the test takers received scores between 140 and 165. Roughly nine percent received scores below 140, and nine percent received scores above 165.

The second premise is that expenditures on legal representation are the central mechanism by which this heterogeneity in quality emerges. The intuition here is that the party who incurs more legal expendi-


24. E-mail from Philip Handwerk, Institutional Researcher, Law School Admission Council, to Albert Yoon, Associate Professor, University of Toronto Faculty of Law (July 28, 2009, 16:22:32 AST) (on file with author).
tures gets better legal representation, either in terms of quantity (more units of representation), quality (higher level of representation), or perhaps both.

While these assumptions may comport with our own intuitions, testing these assumptions poses a challenge for two reasons. First, the pairing of clients and attorneys makes it difficult, if not impossible, to distinguish between attorney ability and case selection. Second, lawyers often work in groups, making it difficult to identify individual contributions. Nonetheless, two recent studies, each exploiting a random experimental design, provide empirical support for the two premises.

In 2007, David Abrams and I conducted a study of the Public Defender's Office in Las Vegas that provides evidence of heterogeneity in lawyer quality. Fortunately for our study, the Las Vegas office randomly assigns cases to attorneys within the office, and the attorneys individually represent clients from beginning to end. This unique process of assignment creates a natural experiment that avoids issues of case selection, thereby allowing us to attribute differences in case outcomes to individual lawyers in the office.

We found considerable variation in case outcomes between the highest and lowest performing lawyers. For example, we found that clients assigned to lawyers in the ninetieth percentile of ability had an incarceration rate fourteen percentage points lower than clients assigned to lawyers in the tenth percentile; similarly, on average, clients assigned to lawyers in the ninetieth percentile served 1.2 months

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25. See Edward L. Rubin, Getting Past Democracy, 149 U. PA. L. REV. 711, 764 (2001) (writing that "the side with more money can buy a better lawyer").


27. In the office, public defenders are divided into teams to represent indigent clients charged with felony offenses. Id. at 1164. Each team consists of a team chief and approximately six attorneys. Id. The team chief assigns attorneys within her team to preliminary hearing dates set months in advance. Id. After the assignment and before the hearing date, the court fills its calendar based solely on the cases that come before it. Id. The random assignment excludes misdemeanors, child sex crimes, and capital cases, all of which are assigned to separate teams. See id. at 1161.

28. See id. at 1164 (describing vertical representation of clients).

29. Examining cases over a three-year period, we observed differences in outcomes among lawyers in the office. Id. at 1162. Looking at whether their clients were incarcerated and, if so, for how long, we found that experienced lawyers achieved more favorable outcomes for their clients than their less experienced colleagues. Id. at 1168. With respect to other individual attorney characteristics, we found no statistical difference on outcomes based on gender or educational background, although we did find that Latino lawyers outperformed lawyers of other ethnic backgrounds. See id. at 1176.

30. See id. at 1150.
shorter sentences than those clients who were assigned to lawyers in the tenth percentile.31

The second study provides evidence of the link between parties’ resources and legal outcomes. In 2001, Carroll Seron and her colleagues conducted a randomized experimental study of low-income tenants in New York City’s Housing Court.32 Among this population of tenants, most were unable to afford a lawyer in the event of a housing dispute, and therefore, they had to represent themselves in court.33 Because this study was interested in the returns associated with having legal representation, the randomization mechanism was whether the client received a lawyer who was provided free-of-charge and paid for by the state.34 The authors found that tenants who were represented by a lawyer fared significantly better than those without a lawyer.35 For example, compared with tenants without lawyers, tenants with legal representation were four times less likely to receive evictions, warrants, or default judgments, and twice as likely to be granted abatements or repairs.36

While limited to specific, discrete areas of the law, these studies provide support for the assumptions central to my argument. The Abrams-Yoon study provides evidence that, even within a single firm, lawyer quality is heterogeneous, and however fair (or random) the process, the allocation of lawyers to clients can have significant consequences. The Seron study provides evidence of the positive returns to expenditures for legal representation, at least when having and not having legal representation is concerned. An indigent or poor client’s limited access to legal representation is not confined to criminal and housing law. When legal problems arise, they are consistently less likely to contact or receive representation from a lawyer.37

31. The average incarceration rate was thirty-nine percent, and the average sentence length was seven months. See id. at 1162 tbl.2.
32. See Carroll Seron et al., The Impact of Legal Counsel on Outcomes for Poor Tenants in New York City’s Housing Court: Results of a Randomized Experiment, 35 Law & Soc’y Rev. 419 (2001).
33. Id. at 421.
34. Id. at 423–24.
35. Id. at 426–29.
36. See id. at 428 (describing differences in legal outcomes between represented and unrepresented indigent parties).
III. WEALTH AMONG LEGAL PARTIES

The relationship between parties’ wealth and litigation outcomes can be broken down into two parts: (1) the distribution of wealth across parties, and (2) the distribution of wealth between parties.

A. Distribution of Wealth Across Parties

Analyzing the relationship between a party’s wealth and the litigation outcome first requires an understanding of the distribution of wealth across the general parties, or the population of prospective parties more generally. If this distribution were fairly uniform across the population, then concerns about disparities in legal expenditures would largely dissipate. However, as one might suspect, as illustrated by Figure 2, the distribution of wealth, at least in the United States, is non-uniform.

Figure 2
DISTRIBUTION OF WEALTH, U.S. HOUSEHOLDS, 2007

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The figure illustrates how the nation’s wealth is heavily concentrated among the wealthiest households. The wealthiest one percent of households own one-third of the wealth, and the wealthiest five percent of the nation’s households collectively own sixty percent of the nation’s wealth. Collectively, the top half of the population owns ninety-seven percent of the overall wealth. Compared to other developed countries, the United States ranks near the top in income inequality.39

While the adverse effect of wealth inequality on housing,40 healthcare,41 and education42 is well documented, its effect on litigation is more subtle, and for this reason, relatively unexplored. Recent articles have described the growing cost of litigation, which forces many parties to represent themselves in legal proceedings that often involve complex legal matters.43 This phenomenon has affected the middle-class as well as the poor.44

B. Distribution of Wealth Between Parties

This brings us to the second step in analyzing the relationship between a party’s wealth and the litigation outcome: the allocation of wealth between opposing parties in litigation. Galanter famously distinguishes between the haves and the have-nots,45 a dichotomy that


42. See, e.g., Tamar Lewin, Higher Education May Soon Be Unaffordable for Most Americans, Report Says, N.Y. TIMES, Dec. 3, 2008, at A19 (describing how an increasing number of high school graduates cannot afford college, given rising college tuition and reduced grants and loans).

43. See Jonathan D. Glater, Amateur Hour in Court: In a Downturn, More Act As Their Own Lawyers, N.Y. TIMES, Apr. 10, 2009, at A1.

44. See Margery A. Gibbs, Courts See More People Being Own Lawyers, DENVER POST, Nov. 25, 2008, at 2A.

45. See Galanter, supra note 2.
rings true. It is difficult to create finer gradations along the continuum, given the limited information on the relative wealth of litigants.\textsuperscript{46} Parties are not required to publicly disclose their wealth in any legal proceeding, nor are lawyers required to disclose how much they charge their clients. The available data suggest, however, that wealth disparities exist between litigants, at least in certain areas of the law.

Criminal cases provide one such example. Each criminal case involves the government against the defendant. While some defendants are able to retain their own counsel, the vast majority qualify for court-appointed counsel.\textsuperscript{47} Existing studies show that approximately seventy percent of federal defendants\textsuperscript{48} and eighty percent of state defendants\textsuperscript{49} are indigent. Given these figures, it is well documented that prosecutors generally have more resources than most criminal defense counsel.\textsuperscript{50}

Similarly, in certain areas of civil litigation, such as civil rights, tax, and immigration, the government is often one of the parties involved.\textsuperscript{51} While there may be instances where the government finds itself at a relative disadvantage in resources—such as when it brings a securities claim against a large private firm—it is more common that any resource disparity cuts in the other direction.

\textsuperscript{46} While parties have to satisfy pleading requirements, they are not required to report their overall wealth in any public court records.


\textsuperscript{50} See, e.g., Roger A. Hanson et al., Indigent Defenders: Get the Job Done and Done Well 100 (1992) (discussing how prosecutors have more resources than most public defenders); see also Harry Kalven, Jr. & Hans Zeisel, The American Jury 139 (1966) (describing how a prosecutor is seven times more likely than a defense attorney to offer the only expert witness).

IV. DIFFERENCES IN THE PERCEIVED QUALITY OF LEGAL REPRESENTATION

In the absence of a true randomized experiment, it is impossible to directly measure differences in the quality of legal representation. Observed differences can be due to selection effects, and if so, the differences in lawyer performance may reflect differences in case assignment rather than lawyer quality. In an alternative approach to assessing differences in the quality of legal representation, Judge Richard Posner and I sent out surveys to a random sample of 455 Article III judges asking their impressions of the quality of the legal profession in both civil and criminal matters, to which 237 judges (fifty-two percent) responded.

When asked to rate the quality of legal representation in federal criminal cases on a scale from one (lowest quality) to five (highest quality), judges responded as follows:

<table>
<thead>
<tr>
<th>Type of Criminal Lawyer</th>
<th>Rating (sd)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutor</td>
<td>4.16 (0.62)</td>
</tr>
<tr>
<td>Public Defender</td>
<td>4.29 (0.61)</td>
</tr>
<tr>
<td>Court-Appointed Counsel</td>
<td>3.59 (0.63)</td>
</tr>
<tr>
<td>Private Counsel (paid by client)</td>
<td>3.64 (0.67)</td>
</tr>
</tbody>
</table>

The F statistic across the four types of criminal lawyers is statistically significant at p < 0.001, strongly indicating the judges' ratings are not all equal across the groups. Judges gave their highest ratings to public defenders, followed closely by prosecutors. The difference in ratings between these lawyer types was small and statistically non-significant (p < 0.001). By contrast, judges gave statistically significant lower ratings to court-appointed (i.e., non-public defender) counsel and private counsel. These figures suggest that the judges' perceived disparities in legal representation are relatively small (and statistically non-significant) between prosecutors and public defend-

52. The one-way analysis of variance for repeated measures produced a F-statistic of 72.79 (p < 0.001)
53. To test for multiple (pairwise) comparisons of significance in Table 1 and Table 2, I used the Bonferroni, Scheff, and Sidak normalizations. These adjustments control for non-independence across groups, thereby reducing the likelihood of erroneously finding statistical significance in pairwise comparisons of means. These normalizations produced similar results.
54. The difference in ratings between court-appointed counsel and private counsel was small and statistically non-significant.
ers, but relatively large in cases involving prosecutors and other types of criminal defense lawyers.

In civil cases, we asked judges to rate the quality of lawyers by area of law, and the responses are collected in Table 2. As with Table 1, the judges’ ratings were not equal across groups (p < 0.001). Judges gave the highest ratings to commercial litigation and intellectual property lawyers, and the lowest to family and immigration lawyers. The difference in ratings between commercial litigation and intellectual property were small and statistically non-significant. By contrast, the differences between these two groups and the other practice areas are large and statistically significant (p < 0.001).\textsuperscript{55} While they do not provide definitive proof, the ratings in Table 2 suggest that lawyers may be sorting across practice areas. A causal explanation is beyond the scope of this Article, but it is noteworthy that commercial and intellectual property lawyers on average earn the highest salaries, while family and immigration lawyers typically earn much less.\textsuperscript{56}

\begin{table}[h]
\centering
\caption{Article III Judges’ Rating of Civil Lawyers by Practice Area}
\begin{tabular}{ll}
\hline
Area of Civil Litigation & Rating (sd) \\
\hline
Commercial Litigation & 4.25 (0.60) \\
Civil Rights & 3.36 (0.76) \\
Family & 3.15 (0.69) \\
Immigration & 3.00 (0.92) \\
Intellectual Property & 4.40 (0.64) \\
Personal Injury/Malpractice & 3.67 (0.68) \\
Tax/Trusts & Estates & 3.88 (0.66) \\
\hline
\end{tabular}
\end{table}

To better understand the allocation of legal ability within each area of law, we asked judges to identify the area of law in which they perceived the greatest disparity in the quality of legal representation.

In separate questions, judges were then asked to identify the area of civil litigation in which they most frequently observed a significant difference in the quality of opposing lawyers. The following table summarizes the judges’ responses:

\textsuperscript{55} Although not listed here, other pairwise comparisons of civil litigation practice areas were statistically significant.

Clear patterns emerge from their responses. Judges overwhelmingly identified civil rights cases as the cases exhibiting the most frequent significant disparity between opposing counsel. Immigration and personal injury comprised the next two largest areas of law, but they were small by comparison. Collectively, ninety-two percent of judges pointed to one of these three areas of law.\textsuperscript{57} Commercial law and intellectual property, two areas primarily in the domain of large private practice firms, were identified by only five percent of the judges.\textsuperscript{58}

It is worth mentioning that if we rank the areas of law in ascending order of frequency of observed significant disparity in the quality of legal representation, one can draw a line that places some areas of law on one side—intellectual property; tax, trust and estates; family law; and commercial litigation—and other areas of law on the other side—personal injury and malpractice; immigration; and civil rights.

\textsuperscript{57} Judges were also asked to identify the area of civil practice with the \textit{least} amount of disparity in legal representation. Forty-two percent of judges identified commercial law, and forty-five percent identified intellectual property. By contrast, eleven percent of judges pointed to civil rights (two percent), immigration (four percent), and personal injury (five percent).

\textsuperscript{58} We also asked judges to identify areas of law in which they \textit{least} often observed a significant disparity in legal representation. Forty-two percent of respondents identified commercial litigation, while forty-five percent identified intellectual property. By contrast, less than two percent identified civil rights.
With the exception of family law, the areas of civil litigation above the line typically involve sophisticated litigants on both sides, many of whom are familiar with litigation. Conversely, the areas of civil litigation below the line typically involve less sophisticated litigants who are unfamiliar with litigation, such as plaintiffs in civil rights cases and personal injury and malpractice cases, as well as defendants in immigration case. This divide is consistent with Galanter’s argument about the haves and have-nots.

This divide is also consistent with my argument regarding litigant wealth. In each of the areas of civil litigation above the line, it is common that opposing litigants both have considerable wealth, particularly when it involves firms. Conversely, for areas of law below the line, an individual is usually matched against a firm, an insurer, or the government. While the individual may have comparable wealth, it is more likely the anomaly than the norm.

Judges were then asked a follow-up question: For the area of civil litigation they identified as having the most frequent disparity in the quality of legal representation, which lawyer do they perceive as typically being of higher quality?

59. I am indebted to Marc Galanter for suggesting the similarities of the results in Table 3b with his prior research.

60. The courts often consider the sophistication of the parties in a dispute. See, e.g., Cummings Props., LLC v. Nat’l Commc’ns Corp., 869 N.E.2d 617, 618 (Mass. 2007) (considering the fact that the parties were sophisticated commercial entities as a relevant factor in awarding liquidated damages).

61. Galanter, supra note 2, at 95.

62. Galanter describes how some litigation involves repeat players—usually government and business—who interact with each other often. Id. at 107 fig.1, 110–11. While Galanter does not make this point explicitly, repeat players are more likely to have the resources to litigate.
In each of these areas of law, judges identified large differences in the quality of legal representation. In civil rights and immigration litigation, the defense (i.e., the government) was identified as providing higher quality legal representation. In the area of personal injury and malpractice, judges identified the defense—typically a corporation or large insurer—as providing higher quality legal representation; not a single judge selected the plaintiff's lawyer.

Finally, we asked judges how a significant disparity in the quality between opposing counsel at trial affected the jury. Table 5 reports the responses of judges. While fifty percent of judges thought that significant disparities in the quality of legal representation did not affect the jury, nearly the same percentage (forty-nine percent) thought that it favored the stronger attorney. Only one percent of judges perceived that a litigant benefitted from having the weaker lawyer.

The judicial survey responses should be interpreted with the usual caveats of caution regarding surveys. They cannot provide a precise measure of the degree of disparity in legal representation, or even definitively establish that disparities exist. Moreover, judges' responses, however informed, reflect their impressions from the bench and may be biased. Nonetheless, their responses are consistent with both the

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63. Approximately ten percent of judges responded that they could not answer the question because they had not presided over a jury trial.
model and the other empirical evidence that suggest that disparities in the quality of legal representation exist and may influence case outcomes.\textsuperscript{64} The magnitude of some of their figures suggests that these disparities may be significant.

V. Litigation in the Shadow of Parties’ Resources

I briefly return to Shavell’s \textit{Suit, Settlement, and Trial} article. In his article, Shavell shows how the plaintiff (P) will bring suit when her expected gross return ($x_p$) exceeds her expected litigation costs ($c_p$).\textsuperscript{65} Once suit has been brought, parties will proceed to trial if P’s net return ($x_p - c_p$) is greater than D’s net return ($x_d + c_d$), and settle otherwise.\textsuperscript{66} Figure 3 slightly modifies Shavell’s original figure.\textsuperscript{67} The model, like many models of litigation, is an optimization model, where parties are attempting to achieve the best possible outcome, given the facts, the law, and the costs of litigation. One of the important contributions from this model is to show how parties make decisions based on their expectation of future outcomes. This strategic behavior discourages most prospective plaintiffs from bringing suit with a negative expected suit value. Similarly, it encourages parties who have brought suit to settle when doing so allows both parties to avoid the transaction costs of a trial. This model provides a theoretical basis for why the vast majority of cases settle.\textsuperscript{68}

Absent from these models are constraints on parties’ resources. Litigation costs are relevant to the outcome, but they primarily represent a hurdle to bringing suit or proceeding to trial. In most models, litigation costs do not determine the substantive outcome of the case. More significantly, for this reason, parties’ relative and absolute resources are not germane; the models assume that the parties could, if they chose, incur their relative litigation costs. Even models that recognize litigation costs, which ultimately depend on the underlying facts, law, and expenditures of the opposing party,\textsuperscript{69} fail to consider resource constraints of the parties.

\textsuperscript{64} See Abrams & Yoon, supra note 26.
\textsuperscript{65} See Shavell, supra note 7, at 58.
\textsuperscript{66} Id. at 64.
\textsuperscript{67} Id. at 57 fig.1.
\textsuperscript{68} See Marc Galanter & Mia Cahill, “Most Cases Settle”: Judicial Promotion and Regulation of Settlements, 46 Stan. L. Rev. 1339, 1339–40 (1994) (citing statistics showing that approximately nine out of ten cases settle without a trial, and approximately two-thirds settle without any “definitive judicial ruling”).
\textsuperscript{69} See Katz, supra note 1, at 127.
For example, suppose a plaintiff (P) and defendant (D) both believe that if P were to bring suit and prevail at trial, she would recover $10,000. Both parties are risk-neutral (i.e., they care only about the expected outcome and are unaffected by the range of possible outcomes), but they differ in their beliefs on the likelihood of this judgment. P believes that her chances of prevailing are eighty percent. If her litigation costs are $1,000, her net expected recovery \( (x_p - c_p) \) is $7,000 ($10,000 \times 0.80 - $1,000). Under these expectations, P brings suit. D believes that if he is taken to trial, he will incur $1,000 in litigation costs but have a fifty percent chance of a favorable verdict (zero damages award). D's net expected payout \( (x_d + c_d) \) is $6,000 ($10,000 \times 0.50 + $1,000). In this scenario, the parties will proceed to trial because both sides believe that going to trial would yield a more favorable outcome than settling the case on terms that the other side will accept, given their respective beliefs.

Suppose, however, that the parties must choose between two levels of litigation expenditures: high and low. The litigation expenditures in the previous paragraph represent the high: \( C_{P, \text{high}} = C_{D, \text{high}} = $1,000 \). Alternatively, each side could spend a lower amount. If P spends low

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70. This example is a modification of the original Shavell example. See Shavell, supra note 7, at 58–59.
(\(C_{P,\text{low}} = $500\)) her chances of prevailing are thirty percent; if D spends low (\(C_{D,\text{low}} = $500\)) her chances of a defense verdict are thirty percent. The intuition is that each party can save on litigation expenses by spending less, but doing so will decrease the likelihood of a favorable outcome at trial. With low litigation expenses, P’s net expected return is only $2,500; D’s net expected payout increases to $7,500. Plugging the values from above yields the following:

**Figure 4**
**Level of Litigation Expenditures on Suit Resolution**

<table>
<thead>
<tr>
<th></th>
<th>high</th>
<th>low</th>
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<tbody>
<tr>
<td>P</td>
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<tr>
<td>high</td>
<td>((x_p - c_p) &gt; (x_d - c_d)) \n$7,000 &gt; $6,000 \n Trial</td>
<td>((x_p - c_p) &lt; (x_d - c_d)) \n$7,000 &lt; $7,500 \n Settlement</td>
</tr>
<tr>
<td>low</td>
<td>((x_p - c_p) &lt; (x_d - c_d)) \n$2,500 &lt; $6,000 \n Settlement</td>
<td>((x_p - c_p) &lt; (x_d - c_d)) \n$2,500 &lt; $7,500 \n Settlement</td>
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If at least one of the parties chooses low rather than high litigation expenditures, the expected outcomes at trial will change such that the parties will have a mutual incentive to settle rather than proceed to trial. In addition, introducing the choice of low litigation expenditures affects the range of settlement outcomes. If P spends low and D spends high, the settlement range is between $2,500 and $6,000; if D spends low while P spends high, the settlement range is between $7,000 and $7,500; finally, if both parties spend low, the settlement range is its largest, between $2,500 and $7,500.

The point of this simple example is to show that the level of expenditures may affect the means by which parties resolve disputes and the substantive terms of their resolution. Parties’ resource constraints are an important additional parameter to these litigation models. Utility-maximizing parties will continue to bring suit when their expected return is positive; and upon the plaintiff bringing suit, the parties will forego trial for settlement when it mutually benefits them. As before, outcomes are a function of the parties’ expectations and litigation costs. However, these terms are interrelated: parties’ expectations are a function of their litigation costs. Finally, these costs themselves are a function of the parties’ resources. Thus, outcomes are partially a function of the parties’ resources.
Abstracting away from the example above, we can consider how parties’ resources affect the various stages of litigation. When deciding whether to file a suit, a plaintiff is deciding whether to “invest” in litigation based on whether the expected net returns are positive. Existing models inform us that when net returns are negative (i.e., \( x_p - c_p < 0 \)), then the plaintiff will not bring suit. Negative returns can reflect three different states of the plaintiff’s case: (1) it is nonmeritorious or weak; (2) it is meritorious, but it requires more expenditures in legal representation than the case is worth; or (3) it is meritorious, but the plaintiff lacks the resources to bring suit. While it is difficult, if not impossible, to determine the distribution of prospective plaintiffs across these three categories, cost constraints prevent some plaintiffs from bringing meritorious suits (i.e., plaintiffs in State Two or Three). Conversely, plaintiffs without constraints on resources may bring nonmeritorious or weak suits (i.e., plaintiffs in State One).

Of course, the example above does not capture the full effect of choices on litigation expenditures for settlement and trial. It assumes that a party’s expected outcome depends only on her own expenditure level; in actual litigation, outcomes are likely jointly determined by both parties’ choice of litigation expenditures. The degree to which parties can exploit their resources depends on the resources of their opponents. For example, all things equal, a party who can incur high litigation expenditures would fare better when her opponent can incur only low expenditures than when her opponent can also incur high expenditures.\(^71\)

In general, resource constraints may promote settlement to the extent to which they enable the plaintiff’s expected net return \( (x_p - c_p) \) to fall below the defendant’s expected net return \( (x_d + c_d) \). In so doing, these constraints may influence not simply the decision to settle or proceed to trial, but also the substantive terms within that decision. To the extent that higher litigation expenditures produce a higher net return—a reasonable assumption, given that parties would be acting irrationally to incur these expenditures otherwise—relative resource advantages skew the expected settlement or trial outcome in favor of the wealthier party. The normative implications are outside the scope of this Article; my point here is simply to show how resource disparities may affect outcomes in ways that are unobservable to those who are not personally involved in the litigation. Terms of settlements are typically non-public; trial outcomes, while public, do not reveal the

\(^71\) In addition, the model assumes binary expenditure levels, whereas actual litigation expenditures are a continuous variable.
parties' relative resources or the degree to which they produced the observed outcome.

While proponents of tort reform have argued that the current legal system makes wealthy individuals vulnerable to frivolous lawsuits, this Article makes the opposite argument: the current system actually disfavors those with resource constraints. In litigation, prospective plaintiffs with resource constraints may elect not to bring suit. Plaintiffs who do bring suit may find that wealthier defendants can exploit their resource advantage through various mechanisms—such as prolonged discovery—to prevail or resolve the dispute on favorable terms. Wealthier plaintiffs can use their resource advantage to achieve similarly favorable terms.

VI. Existing Mechanisms to Mitigate Resource Disparity and Their Limits

Our legal system offers various mechanisms that directly or indirectly mitigate the consequences of parties’ resource constraints. While certainly helpful to address substantive and procedural issues that arise in litigation, these mechanisms are limited in their ability to address the full consequence of resource constraints.

A. Appeals

While the Supreme Court has declined to recognize a constitutional right to appeal in either civil or criminal cases, most states provide this right through statute. The appeals process provides an opportunity for courts to formally reexamine earlier decisions.

This process, however, provides only a limited remedy. First, it is limited only to court decisions, not settlements. Parties dissatisfied by settlement, barring fraud, have no remedy. Second, in most jurisdictions, appellate courts, although they review a lower court’s determination of law de novo, view a lower court’s findings of fact with

72. See F. Patrick Hubbard, The Nature and Impact of the “Tort Reform” Movement, 35 Hofstra L. Rev. 437, 510 (2006) (“[T]he tort reform movement constantly asserts that frivolous claims are an important widespread problem in that there are ‘too many’ frivolous lawsuits.”).

73. See Griffin v. Illinois, 351 U.S. 12, 18 (1956) (“[A] State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.”).

74. See Jones v. Barnes, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal. . . .”)

75. See Sean Doran et al., Rethinking Adversariness in Nonjury Criminal Trials, 23 Am. J. Crim. L. 1, 44 n.185 (1995) (noting that every state affords criminal defendants the right to appeal their conviction); Michael L. Moffit, Customized Litigation: The Case for Making Civil Procedure Negotiable, 75 Geo. Wash. L. Rev. 461, 576 (noting that “virtually all court systems provide at least one opportunity for appeal as of right”).
Given that most cases are fact-intensive, this standard of review makes it more likely that appellate courts will uphold lower courts’ decisions. In addition, it is highly likely that resource disparities between parties at the trial stage will continue to be present during the appeal.

B. Contingency Fees

Contingency fee arrangements—whether involving individual plaintiffs or class actions—empower plaintiffs who, given their resource constraints, may otherwise be precluded from litigating their claim. Contingency fees provide a means by which the plaintiffs’ lawyers, not the plaintiffs, finance the litigation because the lawyer is compensated only if the plaintiff prevails. Thus, the plaintiff and her lawyer share similar incentives because the latter recovers only when her client or clients do.

Contingency fees, however, provide only limited relief. The contingency fee market, while well-developed, is thin relative to the demands for legal services. Under this fee arrangement, lawyers may restrict themselves to cases where they are likely to win or where the expected recovery is high, leaving a void for meritorious claims that are more difficult to argue or low expected recovery. In addition, because the incentives of the plaintiff and her lawyer are not perfectly aligned, moral hazard problems exist.

C. Public Financing of Legal Services

The U.S. Supreme Court has established limited constitutional safeguards for legal representation. Its decision in Gideon v. Wainwright requires that all levels of government provide legal representation to


77. Class actions also provide a solution to the collective action problem where “small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves the problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

78. See John C. Coffee, Jr., Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 676 (1986) (describing how the traditional compensation scheme for plaintiffs’ lawyers in class actions is contingency fees).

all indigent criminal defendants. Governments fulfill their constitutional obligation either by paying defense counsel from the private bar or creating an office of the public defender. In civil matters, the Constitution does not expressly guarantee a right to legal representation, and the Court has declined to interpret such a right through the Fourteenth Amendment. However, in 1974, Congress did create the Legal Services Corporation, which provides legal services to low-income Americans in civil matters. Moreover, many states have, either through the courts or statutes, recognized a right to counsel in various civil matters, including parental rights and immigration.

Public financing of legal services, while helpful, is ultimately limited. The constitutional right to court-appointed counsel in criminal cases is limited to indigent defendants. Legal aid for indigent civil clients provides even less coverage; clients who qualify for these services are not entitled to these services. Instead, they may simply enter into a de facto lottery to receive them. The number of clients requiring these services far exceeds the number of lawyers available.

VII. GOING FORWARD

The degree to which this Article raises social concerns ultimately depends on one’s view of the allocations of both wealth and legal disputes across society. As illustrated by Figure 2, some individuals have more wealth than others. Unless one believes that a party’s wealth is positively correlated with the merits of her claim or defense, a legal

83. For example, Alabama, Louisiana, and New York recognize a right to counsel in termination of parental rights cases, whether brought by the state or another private individual. See Laura K. Abel, Keeping Families Together, Saving Money, and Other Motivations Behind New Civil Right to Counsel Laws, 42 Loy. L.A. L. Rev. (forthcoming 2010).
84. For example, Florida statutes require the state government to provide an attorney during actions regarding the immigration status of children who are eligible for special immigrant juvenile status. See id. at 2.
85. See Gideon, 372 U.S. at 342–44 (1963) (extending the right to court-appointed counsel to indigent criminal defendants in state court).
86. See Laura K. Abel, A Right to Counsel in Civil Cases: Lessons from Gideon v. Wainwright, 15 Temp. Pol. & Civ. Rts. L. Rev. 527, 527 (2006) (“While there is one lawyer for every 525 people in the general population, there is only one lawyer for every 6,861 low-income people.”).
87. See supra note 38 & fig.2.
system in which legal outcomes are influenced by the wealth of the parties raises efficiency as well as normative concerns.

The policy challenges of an unequal distribution of wealth on the legal system mirrors those for other quasi-public goods. While we may chafe at the notion that the quality of public goods and services that we receive depends on our wealth, the reality is that it most certainly does. Wealthier individuals typically receive better healthcare, and they attend better schools. Governmental efforts to equalize expenditures have met strong resistance. As a practical matter, in a world of limited public funds, public funding for legal expenditures is a difficult sell. On the hierarchy of needs, it is unlikely that the public would give legal services the same priority as food, shelter, education, and healthcare.

A limited, but perhaps more compelling, argument for a greater provision for public legal services is based on economic efficiency. The idea is that by “investing” in public legal services, government can reduce other costs for which they will ultimately be responsible for paying. For example, since the early 1990s, New York City has provided legal counsel for low-income residents. A 1996 study found that while the cost of providing counsel was approximately $12 million dollars, the City allowed thousands of low-income families to remain in their homes, which in turn saved the City over $27 million in expenses for homeless shelters.

88. See Marjorie E. Kornhauser, Choosing a Tax Rate Structure in the Face of Disagreement, 52 UCLA L. REV. 1697, 1716 (2005) (describing how the wealthy receive better healthcare than the middle class, which receives better care than the poor).

89. See Richard Brieffault & Laurie Reynolds, Cases and Materials in State and Local Government Law 39 (2004) (“Wealthy communities generally spend much more per capita on their schools, but can still tax their residents at much lower rates than poorer communities. . .”).

90. For example, in 1997 the Supreme Court of Vermont ruled that the state system of financing public education—local expenditures determined in large part by local taxes—violated the state constitution. See Brigham v. Vermont, 692 A.2d 384, 397 (1997). In the aftermath of this decision, the Vermont legislature enacted legislation that substantially equalized funding across the state by creating a statewide property tax to replace local property taxes and by equalizing spending across districts. See Laurie Reynolds, Skybox Schools: Public Education As Private Luxury, 82 WASH. U. L.Q. 755, 792–97 (2004) (providing a detailed description of school funding in Vermont). Opposition to this act led to the passage of another act in 2003 that allowed wealthier districts to raise additional revenue that they could then retain for their own schools. See id.


92. Id. at 710–11 (describing the New York City’s cost savings associated with providing legal representation to low-income housing litigants).
Finally, we know relatively little about the marginal returns on legal representation expenditures. As with any empirical examination of lawyers, issues of selection bias and unobservable variables arise. A randomized experiment offers the most compelling way to sidestep some of these challenges. I am in the early stages of a legal aid study in which cases are randomly assigned between different types of public interest lawyers. In this study we can observe both the lawyers' compensation and their level of effort on outcomes. While there is little doubt that the quality of legal representation matters, this study may allow us to better understand the mechanisms that make it true.