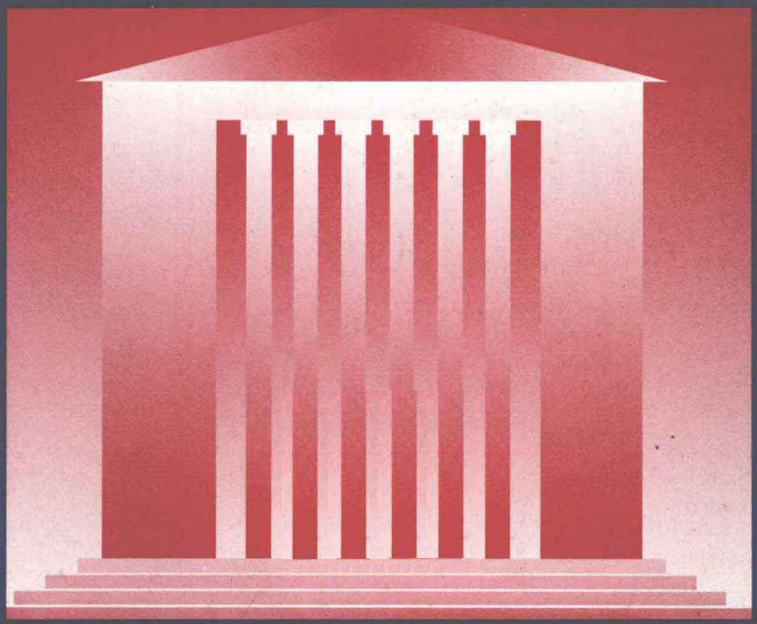
The Appeal of Civil Law

A Political-Economic Analysis of Litigation



Wayne V. McIntosh

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The Appeal of Civil Law

For my mother and father,
Myra and R.M.,
with love

Preface

This book represents a probe into the history of civil litigation at the trial level in St. Louis, Missouri. The story begins in 1820 and runs into the 1970s, with measurements taken at regular intervals. Litigation is conceived here as being indelibly linked to the larger community context. This means that the litigants, their relationships, and their claims all provide a reflection of the larger political economy. The role and functions of the court, too, are subject to the same influences.

St. Louis, in 1820, was a small town, but by midcentury it had become one of the nation's leading transportation, manufacturing, commercial, and population centers. It held this position until the 1940s, after which the city's earlier catapulting industrial prosperity was matched by equally dramatic, but pernicious, postindustrial decay. I shall examine these developments through the window of litigation.

American society, as a community, has moved through a series of transitions over the past two hundred years. In the late 1700s, the United States was essentially a collection of loosely connected towns, villages, and frontier areas with a low technology agrarian economic base. Today, of course, the story is quite different. The country is dominated by a tightly connected grid of semidependent population centers, each with a high technology industrial base.

The transformation occurred neither abruptly nor smoothly. In fact at least four identifiable transitions have taken place: (1) commencement of the Industrial Revolution (circa 1830s and 1840s); (2) advanced industrial development with market consolidations (circa 1880s and 1890s); (3) initial significant government interventionism

in major economic markets and industry shift from labor intense to automated manufacturing techniques (circa 1920s and 1930s); and (4) displacement of remaining labor-intense heavy industry markets to third world areas and initiation of aerospace and communications technological revolution (circa 1960s and 1970s). Each of these junctures was accompanied by a host of related environmental changes and delivered a severe jolt to the national community. Each created extreme stress across all dimensions of human behavior and presented difficult challenges to the governing system.

The Industrial Revolution, for example, created a new regime of relationships with altered, perhaps unanticipated, sets of social, economic, and political problems. Industrialization and its concomitants also certainly influenced development of law. As various participants attempt to rationalize and cope with different conditions, particularly in periods of stress, the law and legal institutions assume enhanced significance, perhaps serving an adaptation function. This suggests a nonlinear relationship between social change and legal activity.

I contend that increased litigation, in generic terms, should be symptomatic of the stress created during such periods. Litigation generally occurs when relationships deteriorate, and when people experience difficulty in reaching agreement in problem situations. The likelihood that these conditions exist should escalate in a context of deep transformation and social stress. This means that I do not expect to find a simple curvilinear litigation trend line over the study period but a more complex one, where intervals of relatively high litigation rates correspond to political economic stress cycles, as they have occurred in St. Louis history.

In more specific terms, as well, I also expect litigation activities to reflect environmental conditions. For example, socioeconomic change and development should influence who uses the court system. The records of litigation likely reflect the dominant interests at a given time. Considered in a different way, court activities may indicate which interests are usually dominated in normal political arenas. Hence the profile of parties involved in litigation should be relevant to such environmental factors. Furthermore, socioeconomic change and development probably influence the type of action that is litigated. Environmental change creates new activities, market dynamics, new sets of realities that will be filtered through the judicial system. The litigation mix of cases, then, should register the mix of important activities occurring in the community at the time. In addition, winning and losing in court should reveal which interests are winning and losing elsewhere in the social-political system. Litigation ought to reflect the

power balances existing in the larger community. Finally, socio-economic change and development create new relationships and new dimensions to old associations. Hence relationships in litigation will likely express important dynamics in the local community. When certain relational partners appear in court frequently, then something is occurring contextually to generate such intense legal activity.

During the course of this project, I was fortunate to have the advice and assistance of a number of generous colleagues and friends. In particular, I would like to acknowledge the valuable criticism of M. Margaret Conway, Frank Munger, Joe Oppenheimer, Eric Uslaner, and, especially, my good friend and adviser John Sprague. Sherry Abelove gave me considerable editorial help. Several graduate students were also instrumental toward the completion of this work. For their able and creative research assistance, I thank Cynthia Cates Colella, Patti Davis-Giehrl, Garry Jennings, Paul Parker, and Lisa Schneider. Of course, none of this would have been possible without the very best in secretarial assistance. I was most fortunate for having been able to avail myself of the services of Mary Brian, Carol Bellamy, and Denise DiLima. A very special thanks goes to Mrs. Kay Klein. The University of Maryland at College Park also facilitated the project's completion in a number of important ways, providing excellent computer facilities, equipment and services, and assistance in the form of a Book Subsidy Award (from the Graduate Research Board).

Finally, I thank Lea and Jesse for all the love and joy they bring to my life.

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Litigation and Social-Economic Change

This is a study of civil litigation. Private parties who generate cases and controversies, and who thus compose the judicial clientele, provide the main subjects for investigation. I attempt to determine how socioeconomic and political conditions affect the volume and range of litigation in a judicial system and to explore the role courts play in the development of their surrounding communities. This chapter lays the groundwork by assessing various notions regarding what courts do and how they will likely respond to environmental changes.

The cases and historical context are drawn from one trial court jurisdiction, St. Louis, Missouri, for the years 1820 to 1977. There is little that makes this particular research site unusual, aside from idiosyncracies that mark the history of any American city. In fact, its phases of economic and social growth and decay are fairly typical of older cities in the industrial regions. By extending the analysis to encompass several cycles of social-economic development, however, I will expose patterns and trends of activities that have generic relevance.

Research of this genre, with an emphasis on the "demand" side of the judicial process, is of relatively recent vintage. Previous research has been restricted largely to courts at the appellate level, probably because they are the most visible American judicial institutions, where an ongoing process of debating, formulating, interpreting, and refining public policy is easily detected. However, there are sound reasons to question the validity of theories regarding litigation that have been generated from appellate-level studies.

It is unclear, for example, whether an appeals court caseload is truly

representative of the larger litigation-adjudication drama. Only a small fraction of cases, self-selected from the trial level, are subsequently appealed for review. "Upper" court activities are an additional step removed from the political-economic environment. In essence, they are insulated from direct contact by the institutional, spatial, and temporal buffer provided by the set of "front line" courts below.

From a different angle, it is equally unclear whether appellate-level courts render decisions that are any more definitive and final than do courts whose decisions they review. The literature is replete with accounts of appellate court failure to fashion policy with which target populations will properly comply (e.g., Johnson and Canon, 1984). Moreover, nearly all litigation is initiated in the trial courts, and the great bulk of it goes no further. In fact, much of it ends even before a trial judge has an opportunity to intervene, with the parties determining the outcomes.

For a variety of reasons, then, the "lower courts" warrant treatment that is equal to, if not greater than, that given to courts in the appellate ranks. The focus here is upon a state tribunal where claims originate and where linkages to the historical context are direct, not muffled by institutional layers. Indeed, a trial court will perhaps facilitate or direct the process of finding solutions to the common, frequently recurring problems, as well as to those unique, sporadic episodes of more serious conflict. Given the nature and focus of civil law, the litigation records should help tell the story of social change in St. Louis. The "law" perspective of individuals and the legal connections they have with each other are partially a function of context (e.g., time, location, technology, political economic conditions). My general perspective views law and the process of litigation as coping mechanisms that are activated by members of the community in order to deal with stressful conditions.

The sections that follow set the stage for examining the historical trends. The first section defines the fundamental units of analysis—"case," "litigation," and "litigation rate." This is followed by a sketch of the basic services that trial level courts provide their constituents. The second section examines some of the theoretical foundations underlying the expectation that litigation activities are determined by macrodynamics in the political economy.

Units of Analysis: Case, Litigation, and Litigation Rate

Case

For the purposes of this study, a case is any matter formally filed and recorded with the court. Moreover, such terms as "case," "petition,"

"claim," "legal matter," and "legal action," will be used interchangeably. Some cases, like name change petitions, only seek an administrative change of status and may not explicitly designate a defendant; nonetheless, these are treated as cases. The typical claim involves at least one plaintiff and at least one defendant, whether it is a land boundary dispute filed in 1830, an attempt to recover an overdue personal loan in 1850, a divorce petition initiated in 1910, or a personal injury claim filed in 1955. The mere fact that there are "adversaries" indicated in the public records, however, does not necessarily mean that a case was prompted by irresolvable conflict. Indeed, relatively few claims of any variety show real signs of pitched warfare, where the respective parties use the court as a personal battlefield. For example, as far back as 1820, the proportion of petitions moving to adjudication, involving give-and-take before a judge (and perhaps a jury) is never a majority (see Daniels, 1985; Friedman and Percival, 1976a). In fact, the great bulk of civil cases, regardless of time period, remain untouched by judicial hands, moving instead into the legal shadows, where negotiations are conducted and bargains are struck (e.g., Harrington, 1985; Kritzer, 1985, 1986a, 1986b; Mnookin and Kornhauser, 1979). A "case," then, does not imply the existence of boundless controversy, but simply is a legal matter placed in the public domain by the formal filing process we call litigation.

Litigation

All communities provide ways for people to manage their relationships. In United States history, law has always played an important role in that regard. People have looked to the law for guidance, support, and expectations in the process of organizing their affairs and managing the complex and multidimensional web of relationships in which they inevitably become involved. Litigation is a means of formalizing expectations, articulating them to a particular relational partner, and demanding authoritative clarification of mutual status; that relational partner might be a spouse, merchant, business associate, employee, former land titleholder, medical doctor, or insurance company. The other party might also be the community at large, as when someone sues a government agency as representative of the community, and it is implicitly the case when an individual files a name change petition.[1]

Litigation is often appraised from a generic perspective, implying that all cases are basically alike and are influenced by environmental conditions in the same way. It represents a gross measure of legal demands, many of which have political and economic overtones; and it provides an indication of a community's activity level, at least with

regard to legal relations. Case classifications are easily distinguished by the activities that generated them. As a result, in many instances, issue content specifies the parties involved. Moreover, the balanced scales of Lady Justice notwithstanding, adversaries are often unequals on the power dimension, with some better able to manipulate the process and control outcomes. Thus, blind reference to generic litigation radically oversimplifies what occurs. Such questions are important, and the chapters ahead address them specifically.

Litigation Rate

Aggregate litigation totals are not very informative except as gross measures of demands placed upon a court system. Litigation rates have typically been calculated as a ratio of cases filed to population (or adult population; Friedman and Percival, 1976a; Daniels, 1980, 1985; Grossman, Kritzer, Bumiller, McDougal, Miller, and Sarat 1982). This is a poor measure; still, it is the best available. The true rate of litigation would be calculated on the basis of the actual number of disputes occurring within the court's jurisdiction, but such information does not exist (cf. Miller and Sarat, 1981). To identify the complete dispute incidence pool, or to determine the total number of conflicts actually occurring in a community at any given time, would be impossible, as is the task of determining the existence of potential legal cases at any particular point. Another good alternative would be to disaggregate cases into categories and create issue-specific rates of litigation based on the number of relevant relationships or interactions in the community. However, relationship and interaction data are also nonexistent.

Lempert (1978:95–96) suggests that although population statistics have obvious analytic weaknesses, they may "serve in a loose sense as a proxy for the number of disputes arising at particular points in time, since, other things being equal, one would expect the number of disputes in society to vary with the number of potential disputants" (cf. Cavanagh and Sarat, 1980:386–87). In subsequent chapters of this book, I shall present both the raw number of cases filed and a converted rate of litigation that controls for population size and growth. The rate measure, then, will use general population figures as its base, bearing in mind its analytic limitations. Occasionally, when a more appropriate base measure can be used as a proxy for underlying activity, an alternate litigation rate will be presented for comparison.

In all probability, a one-to-one ratio does not exist between change in the number of people in an area and litigation change. As a result, the rate of litigation in any community is not likely to remain constant for long. A number of theories have been developed to explain why.

Some see it as a result of contextual change in the larger environment; others view it as a logical consequence of change in the menu of functions performed and services provided by courts. I shall return to these ideas later in this chapter. First, let us consider the mission with whose performance courts are charged.

Court Functions

Contrary to conventional wisdom, courts are very flexible institutions, perhaps more flexible than administrative agencies and legislatures or their competitors in the dispute processing market (cf. Horwitz, 1977). Indeed, they offer potential clients a wide variety of services (Lempert, 1978:99–100), and they also trade in a commodity that alternative forums cannot offer—the official sanction of law (e.g., Krislov, 1983). For instance, a court can legitimize, or sanctify, agreements reached privately, whereas a mediator cannot. Moreover, by initiating and following through successfully with litigation, a plaintiff can tap the power of government to enforce a set of rights against the will of another party. Launching a legal claim, unlike initiating arbitration proceedings or seeking a counselor's advice, can be employed as a means of rejuvenating or reconfirming a set of legal advantages that affect scores of subsequent negotiations (Galanter, 1981).

Courts, then, do not simply try cases; rather, they are multipurpose institutions. Different parties seek different services, depending upon their unique needs. A litigant's facility in achieving its objectives is a function of its level of sophistication, experience, resources, and propensity to take risks. A party's objective may hinge upon direct judicial intervention, resulting in announcement of a verdict and the legal reasoning behind it. Such an outcome contributes to the larger body of law and policy. Alternatively, a party's objective may be to dodge adjudication altogether, in order to avoid contributing to (i.e., changing) the law-policy mosaic.

In short, courts provide a variety of services activated by constituency demand. For the sake of clarity (although there will be inevitable overlap), trial court functions can be divided into at least four broad categories: resolution of conflict; administration; determining status quo and balances of influence; and norm enforcement and regime support.

Resolution of Conflict

The courts have traditionally served as public arenas for the peaceful resolution of disputes between private parties. Most conflicts, though, end far short of the judicial arena (Auerbach, 1983). In many minor

disputes one party may simply select a strategy of avoidance or withdrawal or choose to "lump" it (e.g., Felstiner, Abel, and Sarat, 1980–81). Dissatisfied customers may take their patronage to a sales competitor. Quarreling lovers may part, avoiding any subsequent contact. In some other situations, unilateral moves are inappropriate or unavailable, or they do not work, in which case the parties deal directly with each other. Two neighbors, for instance, might discuss the problem one has with the other's barking dog. Or a poker game might erupt into a brawl when a winner having a lucky night is charged by the others with cheating. Even where some third party is called upon for assistance, usually because the conflicting parties have failed to reach bilateral agreement, litigation is generally not in the offing. A radio station may intervene to resolve a landlord and tenant disagreement; an arbitrator may decide that a professional baseball player deserves a higher salary. In each instance, some solution is obtained without initiating legal action.

In many debates a true settlement never emerges; the parameters merely shift as the opponents keep trying to improve their respective positions. The formal legal option, although chosen rarely, does not, in itself, always produce a final result. Postlitigation conflict, or post-adjudication conflict for that matter, is common. In fact, an entire field of inquiry, centered upon disputes and related strategic activities, examines "dispute processing" on the premise that "dispute resolution" occurs relatively infrequently (see, e.g., Harrington, 1986). The relevance of litigation thus varies radically from one situation to the next, and the role of the judicial system depends upon the context surrounding each incident.

Theoretically, courts stand prepared to grant full-scale adjudication to all cases appropriately filed. The adversary trial, culminating in a decision from the bench, perhaps aided by deliberation from a panel of jurors, is the most visible use of a court. Indeed, this is the classic image of the judicial function (Fuller, 1978; Shapiro, 1975). In practical terms, though, no court operates this way, nor are very many litigants likely to prefer adjudication. Allowing a case to progress to trial entails relinquishing control over the dispute to some outsider or set of outsiders.

A more common expectation is that courts will facilitate negotiation (Chayes, 1976), a process whereby parties retain control over their outcomes. A large and growing literature has developed around the question of plea bargaining in the criminal process (e.g., Feeley, 1979a, 1979b; Heumann, 1975, 1978; Alschuler, 1979; Skolnick, 1966; Newman, 1966), where negotiated settlement is now openly acknowledged

to be the primary technique for reaching outcomes. Negotiation is also the recognized norm for resolving auto accident torts (Ross, 1970), divorces (Mnookin and Kornhauser, 1979), debt collections (Kagan, 1984), commercial contract issues (Macaulay, 1963), and civil commitments (Lewis, Goetz, Schoenfield, Gordon, and Griffin, 1984).

Administration

All cases do not involve conflict. The trial courts have also traditionally performed administrative functions, such as approving name changes and granting professional licenses. Ordinarily there is no defendant in a case of this type; the petitioner is simply seeking the court's stamp of approval on a change of status, which is generally granted routinely. There are always two parties to a divorce action, but these can also be essentially administrative proceedings (e.g., Jacob, 1986). Few divorces are contested, and many are placed on the trial court docket only after agreement between the parties has been reached and only because the approval of the trial judge is necessary in order to legitimize a new arrangement (Friedman and Percival, 1976b; Mnookin and Kornhauser, 1979).

Similarly, few estate cases stir controversy. The probate procedure is, in most instances, simply a legal requirement. Civil commitment is another field where petitions are generally treated as administrative matters and usually with minimal debate. Obviously, one could question whether such cases ought to be handled in a more adversarial manner (e.g., Lewis, et al., 1984) and whether their apparent blandness actually masks quite conflicting histories (e.g., Cavanagh and Sarat, 1980). Nevertheless, the fact remains that courts provide a wide range of administrative services to their communities (e.g., Friedman, 1976; Friedman and Percival, 1976a; Daniels, 1985).

Define Status Quo and Reinforce Balances of Influence

Engaging the civil law is an act that the plaintiff hopes will lead to a desired judicial response or will nudge the defendant to agree to some private solution. Peacekeeping is generally not the only issue at stake. There are advantages to be held for future dealings by gaining a favorable position. Private matters become public when they are litigated, and results radiate to others situated similarly. In contrast, outcomes obtained in other ways do not share this impact. Indeed, some potential litigators, especially those who draw benefits from the law, may wish to avoid the public nature of litigation and the possibilities for policy change. They prefer privacy of action but can use their advantageous legal position as extra leverage to promote a pri-

vate ordering that serves their interests (Galanter, 1983c). Parties who enjoy such benefits may not wish to jeopardize their status by litigating difficult cases. It is often preferable to concede some cases and to handle issues, when possible, on the periphery of the law. At the same time selective use of the system by parties already holding advantaged positions can introduce a bias into the overall caseload that is favorable to their long-term interests.

Courts, through adjudication, determine who holds rights and who holds obligations in every conceivable type of relationship. The law governs private relationships, designating sets of officially recognized rights and obligations. To possess a right is more desirable and advantageous than to possess an obligation. For this reason law is a highly conflictual commodity, and courts are the public arenas in which the conflict can be played out. It is, at the core, an extremely political process in which one would likely observe the "haves" coming out ahead of the "have nots" (Galanter, 1974). Mobilization of law may therefore, in large part, consist of efforts to perpetuate and/or penetrate a theoretically wide open, but empirically rather closed system.

Adjudication comes only in response to clientele demand, which makes law a relatively difficult commodity to obtain. Judges articulate law only when they adjudicate conflicts. They cannot simply pronounce their opinion on a question, unsolicited, no matter how clearheaded that opinion might be. Carrying conflict all the way through the process to a contested conclusion is cumbersome, costly, and riddled with uncertainty. Few parties will prefer such a route, and the court itself cannot seek them out because, by design, it is a reactive institution.

The cumulation of decisions in a given area carves out a set of referents, guiding the behavior of players in each field and becoming the background upon which participants can draw conclusions and extrapolate predictions. Among informed players, then, the judicial process enhances stability. As judge-crafted law is absorbed into a community of actors, private orderings are arranged relatively less often on the basis of ad hoc criteria. This is one dimension of the lawmaking aftershock.[2] Prediction of likely outcomes, although not without some degree of hazard (Frank, 1940), creates advantages that can be deployed in negotiations as "bargaining chips" or "bargaining endowments" (Mnookin and Kornhauser, 1979; see also Galanter, 1983c; Damaska, 1978; Kritzer, 1985). The value of such currency depends upon the characteristics and purchasing power of the parties.