Review Essay

Ordinary Litigation in America's Civil Courts: Images of Lawyers and Bargaining

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Herbert M. Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation*. New York: Oxford University Press, 1990. 233 pages.

Herbert M. Kritzer, *Let's Make a Deal: Understanding the Negotiation Process in Ordinary Litigation*. Madison: University of Wisconsin Press, 1991. 203 pages.

The Civil Litigation Research Project (CLRP) is a landmark investigation of the disputing process and ordinary civil litigation in America's trial courts. In *The Justice Broker* and *Let's Make a Deal*, Herbert M. Kritzer, one of the principal investigators of this project, relies on CLRP for his data; his books signal the completion of this ambitious project. As the titles suggest, Kritzer gives each book a different focus. *The Justice Broker* surveys the characteristics of civil litigators, investigates the contexts and kinds of work they perform, and probes the outcomes of litigation for the lawyers and their clients to develop an alternative image of lawyering. *Let's Make a Deal* first presents an empirical portrait of how ordinary civil cases are negotiated and then assesses how well the literature on game theory, economic models of bargaining, and the sociology of negotiations fit his depiction of settlements. When read as one study, the two books provide a valuable perspective of civil litigation.

In ordinary civil litigation, Kritzer argues, attorneys function as brokers.[1] Brokers, he explains, are intermediaries who for a fee help to transfer money or property between parties or aid in transforming other interests between parties. In effecting

[1] Some time ago, H. Laurence Ross pointed to the "brokerage activity" performed by attorneys in automobile claims, but he did not elaborate on this conceptual difference from the more traditional, professional model. See Ross 1980:75, 77.

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these changes through the legal system, litigators combine professional knowledge and expertise with the practical information and skills of "insiders" who regularly deal with other participants in the system. As brokers, attorneys discharge their responsibilities according to their clients' instructions. Thus, the broker model, according to Kritzer, differs from the traditional professional model in which the attorney occupies a more autonomous role in relation to the client. In addition, the broker image stresses the fee relationship between lawyer and client and thus the business side of the lawyers' work, something the professional model tends to be downplay. These images of lawyers as professionals and brokers, Kritzer (*Broker*, p. 12) cautions, are not exclusive of one another.

> Instead, they are alternative conceptions that combine contrasting and complementary elements; used jointly, they provide a better vehicle for understanding the work of lawyers in ordinary litigation than either one does in isolation. The two perspectives taken together . . . capture the reality of an occupation whose members have been socialized to a professional ideal but who must cope with a set of working realities that often conflict with that ideal.

The broker image has considerable appeal. It is a worthy contribution that gathers together several strands in the empirical literature and weaves them into a single idea of potential value. In particular, Kritzer in both books emphasizes the business interests of litigators and how these interests shape litigation. However, there are unresolved issues and ambiguities in *The Justice Broker* and in *Let's Make a Deal* that stem from this emphasis and that pivot around the overlapping influences of fee arrangements, the type of client who employs the lawyer and whether the client is a plaintiff or defendant in the lawsuit, and the nature of the legal dispute (e.g., torts or domestic relations) on attorney behavior. These concerns reflect more than anything else the limited potential of the CLRP data for disentangling the effects of these confounding influences. The limitation also plagues the depiction of bargaining in *Let's Make a Deal*.

The Empirical Foundation

CLRP drew samples of federal and state lawsuits concluded during 1978 from the records or files of five federal district courts and from either one or two state courts of general jurisdiction within each of the federal districts.[2] Only middle-

[2] For readers who are not familiar with CLRP, a special issue of this journal was devoted to the project in which Trubek (1980–81) discussed the theoretical perspective that guided the project's design and Kritzer (1980–81) explained CLRP's sampling strategy.

ranged disputes involving monetary claims over $1,000 or substantively important, nonmonetary issues of racial or sexual discrimination were sampled. The total sample was 1,649 cases, roughly half of which were federal cases. Overall, the sample included a diverse array of civil cases, although a cap was placed on the number on family law or divorce cases and other cases were excluded for various reasons (Kritzer 1980–81). Tort, contracts, and real property issues predominated, especially in the state courts, while issues pertaining to business regulation, discrimination, and civil rights were more common in the federal courts. In most cases, individual plaintiffs sued organizational defendants, and the monetary "stakes" were generally modest; in state courts, the median was $4,500, and in the federal courts it was $15,000. A substantial number of disputes involved nonmonetary stakes and thus were omitted from Kritzer's quantitative analyses of outcomes. While these cases do not figure greatly in Kritzer's discussions, their absence nonetheless can be felt because their exclusion not only reduced the number of observations but more importantly left behind a nonrandom subset of the original sample of cases.

Most civil justice research relies on court records, jury verdict reporters, or closed insurance files to measure who wins what in civil cases. What distinguishes the CLRP is its interviews with the lawyers and parties involved in the sampled cases. These interviews provided a second source of data for a number of variables. More important, they were required to operationalize the "stakes" of the parties involved in the lawsuits.

Unlike other civil justice research, which focuses generally on case dispositions and the amounts of recovery, CLRP used stakes as both a dependent variable and as a benchmark against which to measure the parties' successes. The demands put forward in civil complaints can be expected to exceed what plaintiffs are actually seeking, and the sizes of recoveries or settlements may be less than the amounts in dispute. In the first instance, if the recoveries are compared to the initial demands, plaintiffs would be seen as less successful than they really were. In the second, if the underlying amounts in dispute are unknown, plaintiffs may be seen as winning when in fact they "lost."

CLRP defined stakes as the actual issues, monetary and nonmonetary, involved in the lawsuits which the litigants or their lawyers reported they were prepared to accept or offer in order to resolve the dispute and settle the case. Litigation decisions were then conceived initially as reflecting the participants' calculations of the costs and benefits of various dispute options given the stakes in their cases. Modifying this calculus were other factors relating to the characteristics and litigation goals

of the parties, their fee arrangement with their lawyers, their lawyers' backgrounds and goals, plus other factors such as the type of dispute, its complexity, area of law, and the like.

The Characteristics of Ordinary Litigators

What kinds of lawyers handled these ordinary civil cases? Somewhat unexpectedly, given popular and even academic stereotypes, the litigators were not isolated individuals struggling to survive on the fringes of their profession. The lawyers' median income in the late 1970s was $45,000, for example. And only one of five was a solo practitioner. These litigators, however, did not appear daily in court; nor were they necessarily specialists. As Kritzer puts it: "The work of these lawyers is heavily dominated by court cases, but not by actual trial work. The litigator's practice, while being specialized in the sense of being heavily weighted toward litigation, is not substantively specialized by area of law" (*Broker*, p. 46).

Kritzer deemphasizes distinctions among the ordinary litigators that he describes in his profile. Despite ample literature documenting the various cleavages that divide the legal profession and stratify it, he makes no systematic effort to chart, for example, whether plaintiff and defense attorneys differed with respect to education, size of firm, or incomes. The endnotes suggest some contrasts existed. For example, in one note, Kritzer (*Broker*, p. 186) mentions that the prestige of the lawyer's law school increased with the size of the firm and that attorneys in firms were more likely to have been on law review. In another note, he points out that plaintiffs, usually individuals, used solo practitioners more often than did defendants, generally organizations (*Broker*, p. 187). These notes hint at the kind of stratification between the plaintiff and defense bars that would be expected in light of the research on the legal profession.[3] However, it is difficult to tell from *The Justice Broker* how stratified the litigators might have been. Perhaps the major obstacle is that court records were often unclear about the identities of the parties, and, more critically, CLRP's survey of lawyers did not record whether their clients were individuals or organizations (*Broker*, p. 188). As a substitute or surrogate for this

[3] It is important to know that these pieces of data were in the book's endnotes; both books are heavily footnoted. *The Justice Broker* has an average of 28 footnotes per chapter and a total of 34 pages of endnotes or roughly 3.4 pages of endnotes for each chapter. *Let's Make a Deal*, a slimmer volume, has 40 pages of endnotes, an average of 40 footnotes per chapter, and nearly 6 pages of endnotes per chapter. This academic virtue normally would not warrant comment if it did not approach being a vice. These notes very often provide important substantive and empirical information that must be read for a full understanding of the books' findings and for a complete appreciation of the qualifications or conditions attached to their arguments.

variable, Kritzer used the fee arrangement in many of his analyses. As he discovered:

> Probably the most striking aspect of the fee arrangement itself is how closely it is related to the kind of client represented. . . . The contingent fee arrangement is the arrangement of choice for individuals. . . . With the possible exception of domestic relations (primarily divorce related), hourly fee arrangements are virtually unused by individual plaintiffs, regardless of the area of law! (*Broker*, pp. 58–59)

The overlap between fee arrangement and "side" was not complete, however, for, as Kritzer's qualification about domestic relation disputes suggests, the degree of overlap varied with the type of legal dispute. Nor, for that matter, was there a total overlap between side and type of client: Plaintiffs were not invariably individuals, and defendants were not always organizations. Only torts offered a tidy alignment: Individual plaintiffs with contingency fee lawyers generally sued organizational defendants who hired hourly fee lawyers to represent them.

Alignments in other kinds of disputes evidently were not as tidy. In an earlier article, for example, Kritzer and his colleagues (1985:264) noted that for 249 contract cases in CLRP's sample, 64 attorneys were hired on a contingent fee basis and that 90 plaintiff and 95 defense attorneys received hourly fees. Thus, it is important to keep in mind that at many points the discussion in *The Justice Broker* is often not about lawyers per se so much as it is about cases in which the lawyers for each side were paid in a particular way. It is possible that, outside of torts, no distinctive plaintiff and defense bars could be identified from CLRP's data; perhaps in contracts and other legal areas, the attorneys routinely represented both sides and were paid in different ways according to the nature of the legal dispute. A final caution is that tort cases not only were the most numerous cases in CLRP's sample but they most often had monetary stakes. This means that analyses involving lawyers and monetary stakes often relied disproportionately on torts, further clouding the clarity of the empirical findings at a number of points.

Workgroups, Work, and Time Investments of Ordinary Litigators

The attorneys litigated in settings where many of them had previous dealings with opposing counsel as well as reasonably high expectations of facing their opposing parties in the future. One quarter of the interviewed attorneys were professionally or personally acquainted with the lawyers on the other side, and one of four of these attorneys had referred cases to or received cases from them. Such relationships were more common

in small jurisdictions than in large ones. Roughly one-third of the lawyers expected that they would have future dealings with the opposing party in their cases; this was particularly true of tort cases where the defendant often was an insurance company.

Judges cast a longer than expected shadow over the attorneys' work. Although only 7% of the cases went to trial, which at first glance suggests a minimal role for the judges, the judges' importance became more apparent when their decisions to dismiss for cause and their rulings on motions were taken into account. Judicial involvement was influential in upwards of 29% of the sampled cases. Interviews with the lawyers indicated that more than half of them felt the judges affected the ultimate disposition of their cases in important ways.

The work attorneys put into ordinary civil cases matched the cases' modest stakes. A check of docket books revealed no signs of formal discovery in half of the sampled cases; no briefs in two-thirds of them; and no pretrial conferences in almost three-quarters of the sample. The frequency of these and other similar activities, like pleadings and motions, was lower in state than federal courts. Regardless of the venue, however, the frequency of these activities increased as the stakes rose.

The time attorneys spent on their cases also reflected their usually modest stakes. The median case received 30 hours of the attorneys' time, and they typically spent most of this time on "informal legal activities," such as consulting with clients and negotiating settlements. Time investments and how they were allocated among various activities were sensitive to the forum and type of case. For example, in state tort cases, Kritzer (*Broker*, p. 105) estimated:

> The typical state tort case takes only 20 hours of lawyer time on each side of the case, and 68 percent of that time is made up of informal legal activities. Fifty percent of the formal legal activity in the typical tort case consists of drawing up and answering the pleadings, most of which are probably based on form pleadings . . .; almost no time is spent in the typical state tort case on legal research.

Kritzer's analysis of the attorneys' time investments extends and elaborates on previously published articles using the CLRP data to investigate this topic (Trubek et al. 1983; Kritzer et al. 1984, 1985). When compared with these articles, however, *The Justice Broker* tends to ignore some of the ambiguities surrounding this question. The central concern of these analyses stems from the literature on the economics of the legal profession (Schwartz & Mitchell 1970; Clermont & Currivan 1978; Johnson 1980–81) which, among other things, has looked at whether hourly fee attorneys, to maximize their incomes, over-

invest in their cases, while contingency fee lawyers, interested in maximizing their effective hourly rates, underinvest.

In absolute terms, *The Justice Broker* suggests that fee arrangements had little substantive bearing on the amount of time attorneys invested in cases. Kritzer (*Broker*, p. 118) notes the "general lack of differences" as "striking." After taking into account other relevant variables, he estimated that attorneys paid on a contingent fee basis expended 45.7 hours in an "average case" compared to 49.5 hours by hourly paid lawyers, a difference of roughly 4 additional hours. When he compared these investments according to the stakes in cases, the only statistically significant relationship occurred when the stakes did not exceed $6,000. In a $6,000 case, a contingency fee lawyer invests fewer hours (25) than an hourly fee attorney (32), a gap of 7 hours, which substantively, if not relatively, is "not large," Kritzer (pp. 119–20) remarks. The analysis, then, neither unequivocally supports nor refutes the fee and time investment hypothesis.

Matters seem clearer with regard to how attorneys made time-allocation decisions and to what factors were related to variance in their time investments. To the virtual exclusion of other variables, contingent fee attorneys were found to be positively influenced by "party interaction" variables, such as whether there was discovery or somewhat more strongly by whether briefs were filed, and by "case characteristic" variables which deal with stakes and complexity. These variables also affected the decisions of hourly fee attorneys in roughly similar ways, although these lawyers doubled the time investment made by contingency fee attorneys when opposing attorneys filed briefs (8 hours vs. 4 hours, respectively). A more important contrast was the fact that several other factors strongly influenced the hourly fee lawyers' time investments. In particular, clients' goals and levels of control and participation in the lawsuits exerted negative influences on the attorneys' time investments, counterbalancing the positive influences of party interaction and case characteristics factors (*Broker*, p. 116).

Largely ignoring the effects of the opposing attorney's actions on the time investment decisions of contingent fee lawyers, Kritzer (*Broker*, p. 117) sums up his analysis in this way: "The contingent fee lawyer seems sensitive to the potential return to be achieved from a case, which is closely related to the stakes" and then adds that these lawyers were "highly sensitive to the potential productivity of their time." He goes on to say, in contrast, that "[t]he hourly fee lawyer's return from a case is not as tied up with stakes and other types of considerations . . . have a greater influence." Kritzer may make too much of the contingent fee attorneys' attention to stakes; the regression coefficients for the stakes variable were estimated to be .303 in

contingent fee cases and .227 in hourly fee cases, a difference of about 8 minutes (p. 116). One could argue, based on Kritzer's analysis, that if it were not for the constraining influences of their clients, hourly fee attorneys would exploit their opportunities to increase their incomes and significantly overinvest in cases. In this regard, hourly fee attorneys fit the broker image more closely than lawyers working on a contingency fee basis, who may indeed be attuned to the productive value of the time they spend on cases.

Other analyses of the CLRP data also grappled with the issue of what factors influence lawyers' time investment decisions. A critically important and confounding influence is which side (plaintiff or defendant) the lawyer represents. In *The Justice Broker*, Kritzer (p. 197) relegates the issue to a footnote where he warns:

> One potentially confounding factor for this analysis is the fact that contingent fee lawyers represent plaintiffs while hourly fee lawyers represent either plaintiffs or defendants (in this sample 71 percent of the hourly fee lawyers represent defendants). To what extent do the differences described represent the effect of side rather than that of fee arrangement? This question was considered in some detail in [an earlier article]. The conclusion that was reached was that while one should be cautious in attributing specific differences to fee arrangement effects or to side effects, fee arrangement definitely has a significant effect over and above any impact that might be attributed to side.

The earlier article (Kritzer et al. 1985) compared plaintiff attorneys paid on a contingency fee basis with other plaintiff lawyers who received hourly fees and with hourly fee defense attorneys. Kritzer and his co-authors (1985: 264) found:

> The results for hourly plaintiffs' lawyers appear to fall somewhere between those of hourly defendants' lawyers and contingent fee lawyers. . . . Consequently, although our observed effects may reflect some influence of side, we can say with a high degree of confidence that there is a fee arrangement effect in addition to any effects of side.

Later on, however, they (ibid., p. 272) acknowledge the murkiness surrounding these relationships.

> [T]he side-based dissimilarities tend to muddy the picture: e.g., where we had strong theoretical reasons to expect contingent fee lawyers and hourly fee lawyers to be influenced differently by client control and participation, the differences we find seem to be side-related; although we found that contingent fee lawyers put in less time than hourly fee lawyers responding to discovery, when it comes to briefs, the differences that we seem to find are between defendants' lawyers and plaintiffs' lawyers (irrespective of fee arrangement).

The Justice Broker offers interesting discussions about the

work setting of ordinary litigators, particularly those dealing with the shadow of the courts on the processing of civil cases and with the managerial roles of federal and state court judges. Less successful, for reasons that largely reflect the limitations of the data used in the analyses, are the efforts to isolate the effects of fee arrangements on how attorneys use their time in ordinary civil litigation. Kritzer continues to emphasize fee arrangements to the virtual exclusion of the effects of side and type of client in his observations on attorney-client relations.

Litigators' Relations with Their Clients

As brokers, attorneys would be the instructed agents of their clients; this is a central characteristic of the broker image Kritzer offers as a supplement or alternative to the professional image. His analysis, however, leads him to a very different conclusion: "There is little evidence of significant control of the lawyer by the client, regardless of whether the client is an individual or an organization" (*Broker*, p. 167). Kritzer may be overstating his conclusion since he tends to slight the evidence that suggests that the lawyers' relations with their clients varied with who their clients were.

The CLRP data highlight the tendency for organizational clients to keep their attorneys on shorter leashes than individual clients. Organizational clients, who often had prior dealings with their attorneys (p. 56), also had higher levels of involvement in their lawsuits (p. 62), expected their lawyers to report to them more frequently than individual clients (p. 64), and played a larger role in the decision to file suit (*Broker*, 65). Although client involvement generally diminished as the stakes in cases rose, the participation of individual clients shrank proportionately faster than that of organizational clients (p. 63). And even though participation by either organizations or individuals in formulating case strategies was not especially high, Kritzer states that "the likely organizational clients tended to play a larger role than did the likely individual clients" (p. 62).

Relations between lawyers and clients, it appears, resembled those typical of a broker or those of a professional according to whether the attorneys had individuals or organizations as clients. If organizational clients are sophisticated repeat players who by hiring attorneys on an hourly fee basis provide the lawyers with the economic incentive to spend more time on their cases than necessary, it is not surprising that these repeat players converted their attorneys into "brokers" if only to control the costs of litigation, a concern that rose with the stakes in cases (*Broker*, pp. 188–89). One-shot, individual clients may have lacked the knowledge or economic motivation needed to monitor the attorneys they had retained on a contingent fee

basis. This more "professional" relationship also may be constructed by the lawyers (Rosenthal 1974; Sarat & Felstiner 1986). Kritzer (pp. 66–67) suggests that lawyer-client relations dealing with fees and costs fit the broker image while the professional model better describes how these relations affect attorney autonomy. This distinction may be valid, but it seems clear it also sidesteps important client-related variations in these relationships.

Negotiating Settlements in Ordinary Civil Cases

How did the attorneys settle their cases? Bargaining in ordinary civil cases, according to the analysis in *Let's Make a Deal*, had the following characteristics:

1. Negotiations were not complicated. The sequence or number of exchanges (e.g., first a demand, then an offer, followed by another demand, then another offer, etc.) was limited and abbreviated. Only one of six lawyers reported more than three exchanges in their cases. Exchanges were most extensive in tort cases but most truncated when the government was a defendant.
2. Negotiations took three basic forms based on the negotiators' ends and their bargaining styles—"maximal result, concessions-oriented" negotiations, "appropriate-result, consensus-oriented" bargaining, and "*pro forma* negotiation." Routine, pro forma negotiations and consensus-oriented bargaining were the least complicated, most typical forms in ordinary civil litigation. The type of negotiation could be identified according to the ratio between plaintiff demands or defendant offers to the stakes in cases.
3. In *consensus-oriented bargaining,* most demands and offers as proportions of the stakes in cases fell within a narrow range. Plaintiffs' lawyers demanded less than 133% of the stakes in 69% of their cases. Defense attorneys offered more than 75% of the stakes in 52% of their cases.
4. *Concessions-oriented bargaining* was less common. For example, in only 13% of the cases did plaintiffs' lawyers make demands that were twice or more the cases' stakes, although defense attorneys offered less than half the stakes in 32% of their cases.
5. Given the prevalence of consensus-oriented negotiations, most settlements did not reflect "strategic bargaining" where lawyers either demanded substantially more than what the cases were worth or offered considerably less than the case's settlement value. Indeed, the *highest demands* in 52% of the cases were equal to or less than the stakes, while the *lowest offer* in 25% of the cases was the same as the stakes.

6. Nevertheless, asymmetrical bargaining situations (instances where one party negotiates strategically while the other does not) were not uncommon. Defense lawyers were more likely to bargain strategically than plaintiffs' lawyers.
7. Roughly two-thirds of defense offers were for less than 100% of the plaintiffs' stakes, and the offers grew proportionately smaller as the stakes of cases increased. For example, when stakes were under $5,000, 50% of the defense offers were *equal to or greater* than the stakes. But when stakes exceeded $50,000, 95% of the offers were for *less* than the stakes.
8. When plaintiffs' lawyers bargained strategically, they were most likely to do so in tort cases; approximately 60% of the lawyers' demands exceeded the stakes in these cases. For other kinds of cases, the proportion was roughly 40%.

Pro forma negotiations occur in cases with low stakes but high transaction costs (relative to the stakes) which encourage limited bargaining and standardized outcomes, especially among repeat players. The choice between concessions or consensus modes, Kritzer (*Make a Deal*, pp. 128–29) hypothesizes, may depend on the economic self-interests of the individuals, or it may be a function of the characteristics of the "community of negotiators." Drawing parallels from recent research in criminal courts, Kritzer suggests the negotiating behavior of this community will reflect the influence of "going rates" in reducing uncertainty and the costs of bargaining as well as the structuring effects of "sponsoring organizations" in shaping incentives and defining discretion. Consequently, bargaining in civil litigation, as in most criminal cases, is not a matter of exchanging demands and offers with an eye toward gaining maximum or optimal advantage but an exchange of information aimed at reaching a consensus on the appropriate settlement given prevailing going rates.

Several things need to be said here. First, no matter how plausible the notion of a pro forma mode may sound, *Let's Make a Deal* provides no direct evidence of its existence or of its frequency in CLRP's sample of civil cases. Second, while Kritzer discusses the problems of accountability inherent in the principal-agent relationship between client and attorney, his models (as well as most bargaining models of civil litigation) fail to take into full account the reciprocal, mixed-motive relationships that exist between clients, between clients and their lawyers, and between the lawyers themselves. Conceptual developments in understanding the guilty plea process simplify these complexities by focusing on the agents (the prosecutors and attorneys) to the virtual exclusion of the principals. With some notable exceptions (e.g., Vera Institute of Justice 1981; Flemming 1986), criminal court research pays little attention to how rela-

tionships between defendants and victims or their relations with attorneys or prosecutors influence the guilty plea process. It is by no means clear that a similar simplification will be as profitable in civil litigation. For example, when interviewing divorced individuals, Jacob (1992) found that only a minority credited their attorneys with actually negotiating their divorce. Most said their attorneys' roles were informational and clerical; the lawyers kept them informed and processed the necessary papers. They served as "scribes," translating agreements reached by the parties themselves into the required legal format (see also Griffiths 1986).

Some important differences between criminal and civil cases should be noted because they affect the extent to which models in one area can be exported to another. The characteristics and outcomes of criminal cases are sufficiently homogeneous and fungible that they can be readily compared and quantified. Analysis is not greatly hampered by large proportions of cases with nonquantifiable outcomes as in the instance of civil cases. Moreover, criminal cases also do not exhibit to the same degree the diversity that exists between torts, contracts, real property, civil rights, business regulation, and family law. At a minimum, this creates more severe sampling problems in civil litigation research since the design and size of the sampling scheme must take this diversity into consideration. In the instance of CLRP samples, the number of cases, given the range of civil disputes, hobbled Kritzer's analysis.

Much of Kritzer's discussion often rests on a relatively small subset of the cases where tort cases predominate. The parallels that he sees between the negotiation processes in civil and criminal courts often seem to reflect the particular qualities of torts. For example, as Kritzer (*Make a Deal*, p. 129) points out, insurance companies can be viewed as sponsoring organizations, which have, as Rosenthal (1974:79–85) discovered, differing bargaining styles or settlement policies, just as prosecutor's offices do. Moreover, if liability is not an issue (*Make a Deal*, pp. 121, 176), attention then shifts to damages where local going rates will shape the settlement, as in most criminal cases where guilt may be presumed with the only issue at hand determining the appropriate sentence. Without belaboring the obvious, other areas of civil litigation differ, with divorce perhaps the starkest contrast.

Another important point is that current models of the criminal process are strongly contextual in a way that differs from Kritzer's models. He constructs his models based on the goals (maximal-results or appropriate-results) of the negotiators and their means or bargaining styles (strategic bargaining or information exchange), all of which is consistent with the micro-level, process-oriented emphases that dominate the bargaining

literature. He incorporates such things as a "community of negotiators" on an ad hoc basis since the prevalence of simplified, consensus-oriented negotiation hints at the possibility of contextually structuring factors such as going rates. Criminal court models, however, define contexts in terms of institutional and organizational factors that structure the interactions among courthouse participants, one result of which is going rates, and shape their goals or motives as well (Eisenstein & Jacob 1977; Eisenstein et al. 1988; Flemming et al. 1993). A less micro- and more macro-oriented perspective would have highlighted the apparent differences between areas of civil law, like torts and family law, and investigated more thoroughly how the structure and dynamics of the "community of negotiators" in these areas varied.

Who Wins in Ordinary Litigation?

How successful were the parties involved in ordinary litigation? As a first step, Kritzer in *The Justice Broker* measures success as the ratio between outcome (i.e., the amount the plaintiff recovered) and the plaintiff's perceived stakes in the case; the higher the ratio, the more successful the plaintiff, and the less successful the defendant. In the state courts, the ratio was .78, but in the federal courts, it dropped to .43. When attorney costs were taken into account, a substantial proportion of litigants suffered net losses. Roughly one-fifth (22%) of the litigants who hired lawyers on an hourly fee basis recovered nothing after paying their attorneys. Approximately 1 out of 14 parties (7%) with contingent fee lawyers incurred net losses.[4]

As the ratio of outcomes to stakes suggests, most defendants did not fare badly. Still, as Kritzer argues, a better measure of success should recognize that the defendant's interests are in paying out less in recovery and attorney expenses than the plaintiff's stakes or the amount the plaintiff would accept to resolve the dispute. "For 65 percent of the defendants," he points out, "their lawyer saved more in reduced payments to plaintiffs than the lawyer was paid in fees. Thus, for most defendants, litigation was successful [because] . . . relative to what they might have lost, defendants' positions are improved by the work of the lawyer" (*Broker*, p. 144; emphasis omitted). Strategic bargaining was the single most important key to the defend-

[4] According to Kritzer, about a third of these plaintiffs had fee arrangements that included such mixed arrangements as a flat fee plus a percentage. Nonetheless, he notes that over two-thirds of these net losers were paying a pure percentage plus expenses. He (*Broker*, p. 200) also points out: "About 15 percent of the contingent fee plaintiffs that ended up with net losses did recover some amount of money from the other side, but it was less than the expenses that they had to pay to their lawyers."

ants' success. Defendants paid less when their attorneys made offers substantially below the stakes sought by plaintiffs.

Overall, how successful were plaintiffs? The ratios in state and federal courts point to a moderate degree of success, but the proportions of "net losers" are reminders that winning may not lead to actual recovery. Kritzer measured a plaintiff's success by the ratio between net recovery (amount of recovery minus attorney fees and expenses) and the plaintiff's subjective estimate of the settlement value of the case or its stakes. The contingency fee arrangement usually limited the maximum value of this ratio because since recoveries infrequently exceeded the plaintiffs' stakes, the ratio almost invariably was less than 1.0 after the attorneys' fees were deducted.

Accordingly, plaintiff success seemed to depend on the fee arrangement. Plaintiffs with hourly fee attorneys were more successful than those with contingent fee attorneys as measured by the ratio of net recovery to stakes. Overall, the ratio was .60 for plaintiffs with hourly fee attorneys and .49 for those with contingent fee attorneys. Regression analysis confirmed that the major determinants of success for plaintiffs was whether they paid their lawyers on a contingency fee basis, which reduced their success, and by whether their lawyers bargained strategically, which increased it.

As Kritzer (*Broker*, p. 127) aptly remarks with regard to litigants who were net losers, "it is clear that litigation can be a losing proposition, even when the supposedly 'safe' mechanism of contingency fee is used." The same thing can be said of contingency fee attorneys: nearly 20% received no fees for their services. Winning, moreover, was not synonymous with high fees: a quarter of the lawyers earned "effective hourly fees" of $7 an hour or less. The median fee was $42 per hour, but this should be compared to the median of $50 for hourly fee attorneys who did not face these risks.

To some degree, as the stakes increased, the contingent fee lawyers' risks of no or minimal fees were counterbalanced by the opportunity to earn more. For example, when the stakes were under $10,000, the median hourly rate was $36, but when the stakes were between $10,000 and $50,000, the rate jumped to $57 per hour. The only other factor consistently related to contingency fee attorneys' hourly rates was the amount of time they put into the cases; their fees on an hourly basis declined with the number of hours worked in cases. When attorneys who earned either nothing or very high fees were excluded from the analysis, Kritzer found that strategic bargaining could enhance the attorneys' fees, but it was less important than stakes and time as an influence on the effective hourly earnings of contingency fee lawyers.

Kritzer (*Broker*, p. 157) argues that "the fee-paying relation-

ship between lawyers and their plaintiff clients has very important implications for the results achieved for the clients." This conclusion is derived from three regression models based on 57 hourly fee cases (of which 42 were contract matters) and 256 contingent fee cases (200 of which were tort cases). In addition to this overlap between fee arrangement and type of case, it also bears noting that the various comparisons of success ratios for different aspects of cases, such as size of recovery, often involved a relative handful of cases. After an initial qualification imposed by these limitations, Kritzer (ibid.) comments on which fee arrangement appeared most likely to benefit plaintiffs.

> Drawing firm conclusions here is difficult because of the almost total dominance of the contingent fee in the personal injury area. Nonetheless, the evidence suggests that clients are better served by the hourly fee lawyer in moderate to big cases [over $10,000] and by the contingent fee lawyer in small [under $10,000] cases.

While this comment is carefully and appropriately hedged, it nevertheless raises several questions. Recall that at least a fifth of the clients with hourly fee attorneys received nothing after paying their lawyers. Potential plaintiffs faced with a good chance of being "net losers" may be discouraged from using the courts. As a policy matter, this risk is one of the major arguments in favor of the contingency fee. Contingency fee attorneys probably practice a form of "risk pooling" by accepting cases with varying stakes and odds of success which allows them to make a living while facilitating the public's access to the legal system. It may be, as Kritzer (*Broker*, p. 154) mentions, that by accepting cases with small stakes that are "sure bets," in effect attorneys finance gambles on higher risk, higher stakes cases, although the proportion of attorneys who received no fees was 14% in cases with stakes under $10,000 and 18% for case over this amount (p. 139). An extended discussion of these kinds of trade-offs is missing, however, and the policy implications of Kritzer's conclusion are not explored.

Kritzer's conclusions also rest on the apparent decline in plaintiff success as the stakes go up, a common finding in civil litigation research. In tort cases, where plaintiffs were represented by contingency fee lawyers, Kritzer views the fall in plaintiff success relative to their stakes as a reflection of the lawyers' self-interest and economic motivations, which, he argues, is consistent with the broker image but which also may require professional autonomy to pursue effectively. In more general terms, Kritzer (*Broker*, p. 154) suggests:

> It is not hard to see why there might be a decreasing level of success as stakes go up. First, contingent fee lawyers are probably more willing to undertake cases involving substan-

> tial uncertainty as to outcome as the amount they might earn increases. . . . Second, the amount of effort that contingent fee lawyers put into cases rises quickly as stakes increase . . . ; as those sunk costs increase, the lawyer may well be anxious to achieve some return, even if that involves accepting a recovery that is far below the case's potential.

Kritzer cavalierly dismisses the possibility that defense strategies influence this pattern by noting that the proportion of plaintiffs who received nothing in recovery was smallest in high-stakes cases (*Broker*, p. 151). However, in light of the evidence that defense attorneys bargained strategically and made proportionately smaller offers as the stakes in cases rose, the success ratios could easily fall without increasing the proportions of plaintiffs who recovered nothing. Indeed, in *Let's Make a Deal*, it appears that defense attorneys used a two-pronged strategy. In cases with stakes under $5,000, the defense's offer was equal to or greater than the stakes in half of the cases, suggesting a "nuisance" approach. At the other extreme, when the stakes exceeded $50,000, the attorneys offered less than 70% of the stakes in three-quarters of the cases (*Make a Deal*, p. 49). As a consequence, minor cases may have been "overcompensated" while major cases were "undercompensated" relative to the plaintiffs' perceived stakes, again a common finding in the literature. Perhaps, as a consequence of this defense strategy, contingent fee attorneys found it unnecessary in the first instance and futile in the second to bargain as strategically as the defense. In support of this interpretation is Kritzer's (*Broker*, p. 152) comment that "the inverse relationship [of success] with the number of court events may mean that plaintiff success goes down as the contentiousness of the case goes up (i.e., the more the defendant resists the plaintiff's claim, the less success the plaintiff achieves)." Bargaining is a bilateral affair. Kritzer's emphasis on the business interests of contingent fee lawyers is only part of the picture.[5]

A final matter of concern is the tough problem of defining "success." As Kritzer (*Broker*, p. 156) acknowledges, many pitfalls await those who expect to measure success in simple, unequivocal ways. However, instead of employing multiple measures to show readers the variability of what might be considered success, Kritzer chose to use the plaintiffs' estimates of stakes in the success ratios of defendants as well as plaintiffs; for plaintiffs, this is a defensible decision, but for defendants it becomes problematic. The two sides, not surprisingly, did not agree on what was at stake. In an endnote,

[5] In criminal court research there is little evidence that the behavior of defense lawyers varies with how they are paid (Flemming 1989). In one exception to this pattern, the behavior of a group of attorneys paid on a contractual basis to represent indigent defendants differed from privately retained lawyers, but the reason was not the fee arrangement but the expectations and demands of the courts (Flemming 1986).

Kritzer (p. 203) points out that in 202 cases with information from both sides, the plaintiffs' estimates were higher than the defendants' in more than two-thirds of the cases. The defendants' success looks less impressive when their estimates of stakes are used. Kritzer (ibid.) alerts the reader to this through another endnote where he mentions that in an earlier article (Trubek et al. 1983): "Using the defendant's stakes estimates, the savings achieved exceed the lawyer's fee for 24 percent of the respondents; using the plaintiff's estimate of stakes, savings exceed fees for 67 percent of respondents." It also warrants mentioning at this point that the decision to rely solely on stakes and not to include recovery amounts or other traditional, more accessible indicators of case outcomes as supplements to the analysis makes it is difficult to compare the results in *Justice Broker* and *Let's Make a Deal* with other civil research and thus creates an obstacle to determining whether the arguments in these books are peculiar to the way the dependent variable was defined.

Conclusions

These two books strain against the limits of CLRP's data. A sample of more than 1,600 court cases at first glance seems adequate. However, the sample's potential soon diminishes once cases with missing data on stakes and those with nonmonetary stakes are dropped. Thus, out of 1,649 cases, 1,382 attorneys were interviewed, but only 859 could describe the stakes in their cases in monetary terms. The actual number of cases available for analyses centering on the outcomes of litigation shrank even further after cases without information on other variables than stakes were excluded. As a consequence, the problem of disentangling the effects of side, fee arrangements, and area of law becomes nearly insoluble. Moreover, the remaining cases with monetarized stakes tended to be tort matters with individual plaintiffs using the contingent fee arrangement to hire attorneys to sue organizational defendants who retained their lawyers on an hourly fee basis.

Despite this situation, Kritzer emphasizes how different fee arrangements, especially contingent fees, shape the financial interests and hence the behavior of lawyers. In *Let's Make a Deal*, Kritzer, to make his point about these economic incentives, relies on Genn's (1987) study of personal injury cases in England where there is greater variability in how plaintiffs retained solicitors to press their cases against the insurance companies. The most vigorous and effective advocates were union solicitors who did not have to worry about their fees (ibid., p. 113). Even so, one wonders if side does not matter: England's unions, historically more militant and class conscious than their

U.S. counterparts, may make it clear to their solicitors how they expect their members to be represented.[6] Fee, side, and type of client once again overlap.

The image of lawyers as brokers, while valuable at times, is like an undersized blanket; Kritzer tries to use the image as a general concept, but it is not large enough to cover all the empirical relationships that he discusses. At times, he seems satisfied to show that lawyers have financial interests that divide them from their clients. Yet, this makes the professional model a mere strawman to be knocked down; surely there is more to understanding the role of lawyers in civil litigation. There are ample hints that the brokerage role of lawyers varies. The problem is finding out why.

Data limitations also hobble the discussion in *Let's Make a Deal*. Once the cases with the required data are selected, the description of the bargaining process spins closely around a central core of personal injury cases. As in *The Justice Broker*, Kritzer tries to lift his analysis to a higher, more general plane. His three modes of negotiation have a ring of reality to them. The remaining problem is that the data at hand do not allow him to show how the form and frequency of the modes vary across the heterogeneous landscape of ordinary civil litigation.

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[6] For an analogous example from the criminal courts, see Eisenstein and Jacob's (1977:155–60) description of the adversarial, aggressive legal aid lawyers in Detroit's criminal court.

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