The Dispute Tree and the Legal Forest

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Abstract

Since the Civil Litigation Research Project in the 1980s, sociolegal researchers have referenced the metaphor of the dispute pyramid to understand dispute resolution. The pyramid focuses on formal legal dispute resolution and represents disputes as a linear process of attrition in which only a small proportion of perceived injuries proceed to adjudication. Although a fertile metaphor, the dispute pyramid approach left important processes undertheorized and understudied. We propose a new metaphor: the dispute tree. The dispute tree has many branches, both legal and nonlegal, through which grievances may be resolved. Grievances may move along several branches simultaneously, and dispute resolution may be a nonlinear process. Branches represent the evolving nature of disputes as living organisms that may bear flowers and fruit or may wither and die. Not only dispute trees but also their forests are subjects for study. Dispute trees exist in social environments that may foster or inhibit healthy growth; they may grow within public or privately governed forests. We argue that the dispute tree metaphor better represents decades of research on disputing, which has identified myriad disputing channels outside of courts, as well as both individual and collective mobilization. We also believe that this new metaphor for disputes and the dispute process will open new avenues of inquiry.

INTRODUCTION

Thirty years ago, findings from the landmark Civil Litigation Research Project (CLRP) transformed the way that sociolegal scholars conceptualized disputes and their resolution (Grossman & Trubek 1980). Rather than focusing on resolving those civil disputes that arrived at the courthouse door, the CLRP considered the social landscape of potential legal disputes and the processes that brought them to the legal system in the first place. CLRP investigators surveyed ordinary households about their experiences with potential legal problems and how they responded to these problems (Miller & Sarat 1980). They found many more potential legal disputes than they had anticipated. The vast majority of these disputes never reached a lawyer or courthouse, let alone a judge, and different types of potential disputes exhibited different patterns of resolution (Miller & Sarat 1980; see also Curran 1977, Kritzer et al. 1991). These findings challenged the dominant narrative of excessive American litigiousness by documenting the vast quantity of potentially legal problems that were never litigated.

To represent these startling findings, the CLRP employed the metaphor of the dispute pyramid (Miller & Sarat 1980). The dispute pyramid rests on a foundation of un-PIEs—unperceived injurious experiences—of which a subset become perceived injurious experiences. Only some potential claimants hold another responsible for those perceived injuries, and an even smaller number confront the responsible party to ask for redress. At this point, some disputes are resolved, other may progress into the formal legal system as complaints, and still others may be abandoned. Thus the dispute pyramid depicts attrition at each stage of the process from the incidents that begin as un-PIEs (the base of the pyramid) to the very small percentage of claims that are actually adjudicated (the tip of the pyramid) (Miller & Sarat 1980).

The dispute pyramid became a well-known and compelling metaphor that revolutionized how scholars understood legal problems and disputes. Scholars stopped regarding disputes as found objects in the world and instead recognized disputes as social constructs (Felstiner et al. 1980). Legal disputes arrived at the courthouse door through a process of naming, blaming, and claiming—that is, recognizing an injury, holding another responsible for it, and seeking a legal remedy. In addition, agents of transformation—family, friends, coworkers, employers, organizations—shaped how respondents viewed their experiences and their options for action (Felstiner et al. 1980). Not only resources (e.g., time, money, and lawyers) but also social meaning affected whether a potentially legal problem came to be perceived as such or reached a legal institution for resolution (Bumiller 1987, 1988). This insight opened up a broad new field of research focused on disputes in nonlegal social settings and on the factors affecting whether disputes progressed through the levels of the dispute pyramid (Bumiller 1987, 1988; Ewick & Silbey 1998; Morgan 1999; Quinn 2000; Albiston 2005, 2010; Morrill et al. 2010).

In this article, we argue that the dispute pyramid metaphor is an inadequate representation of the broad social processes that resolve justiciable disputes. By placing adjudication at the top of the pyramid, the pyramid metaphor focuses on legal resolution and legal remedies as the pinnacle. It does not sufficiently elaborate the differences between formal legal claiming and informal social claiming and, as a result, undertheorizes a substantial proportion of the ways in which people respond to injuries.

The pyramid metaphor also suggests a single linear path through which disputes progress (or not), obscuring alternative paths of resolution that may satisfy claimants as much as a successful legal claim. By focusing on the formal legal system as that path, this metaphor ignores the potential for legal pluralism in which disputes proceed simultaneously along many coexisting paths with multiple normative systems for resolving conflict (Merry 1990, Morrill et al. 2010). To be sure, scholars recognize that people may not always pursue legal channels and instead choose to lump it
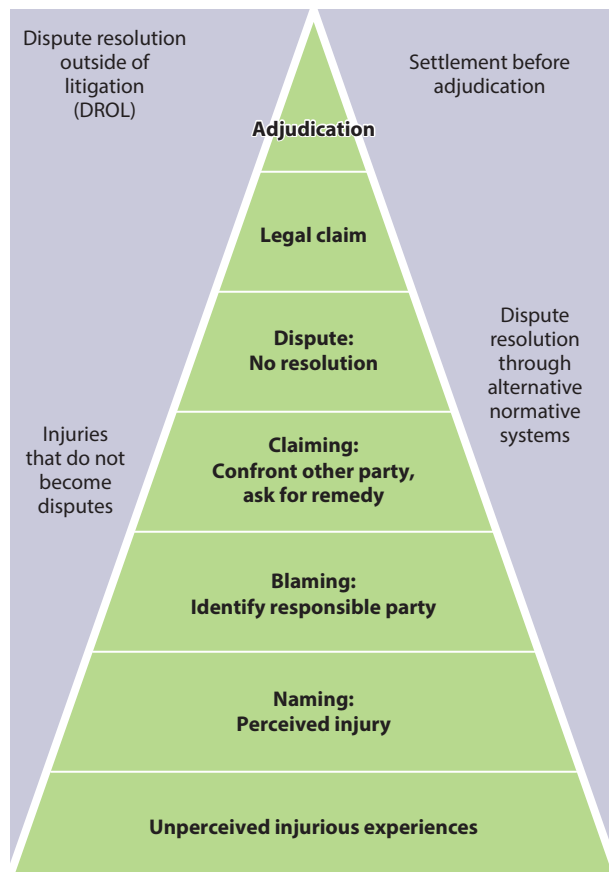
Figure 1

The dispute pyramid, with inverted triangles that represent alternative avenues or processes through which potential disputes may proceed (Miller & Sarat 1980).

or pursue alternative routes to resolution. The focus, however, is on the legal path and the factors that lead to attrition from it at each level of disputing.

Indeed, the very concept of dispute itself tends to focus on the narrow precipitating events that gave rise to the individual disagreement, rather than the fundamental structural features of society or the long-term social processes that generate conflict (Cain & Kulcsar 1981). In this view, claiming, or claim propensity, becomes a function of personality traits rather than larger structural forces (see Vidmar & Schuller 1987), perhaps reflecting the primarily behavioralist and individualistic approaches that were in fashion at the time the CLRP findings were published. The failure of subsequent work to address mediating mechanisms or organizational contexts of disputes, however, left many rich theoretical traditions in the social sciences off the table when it came to understanding dispute resolution.

We argue that the sliced-off triangles of attrition excluded from the pyramid may tell us the most about the social process of dispute resolution (see **Figure 1**). These triangles represent dispute resolution outside the litigation process, or DROL for short. DROL includes recognized injuries that do not become disputes, disputes resolved through alternative normative systems, and settlement before adjudication, as well as many other outcomes. The undertheorized and understudied

social phenomena in these triangles are important for understanding legal mobilization outside of legal forums, remedies for legal wrongs, and perceptions of justice, not to mention the links among "dispute processing methods and inequality, collective action, and structural imbalances" (Kidder 1980, p. 720). Morrill et al. (2010) offer a noteworthy revision to the dispute pyramid metaphor that speaks to these weaknesses. In their multidimensional model, perceived rights violations may result not only in formal legal action but also in quasi-legal action (such as using a formal organizational complaint procedure) or extralegal action (such as direct confrontation, appeals to the media, consulting friends and family, or even prayer). Although their approach is a significant improvement over the dispute pyramid approach, we advocate abandoning the pyramid metaphor altogether to capture better the nature of disputes and dispute handling in society.

We propose a new metaphor for the dispute resolution process: the dispute tree (see **Figure 2**). Rather than narrowing to a single point at the top, the dispute tree grows many branches from
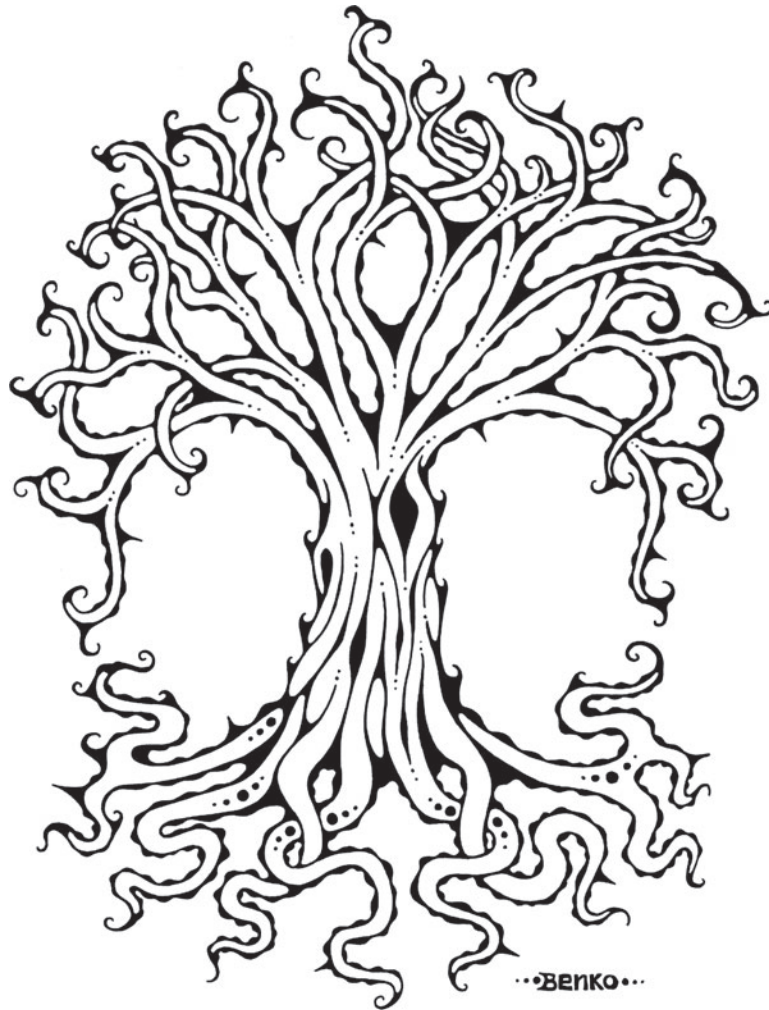

Figure 2

The dispute tree. Reproduced with permission from the artist, John Benko.

a central trunk. Some branches represent traditional paths through the legal system, with side branches for settlement and private ordering, truncated branches for injuries named and blamed but not claimed, and fruitless tips for grievances that were pursued without remedy then abandoned. Other branches represent quasi-legal alternative dispute resolution processes for potential legal claims, including grievance procedures within organizations, community mediation and dispute resolution mechanisms, and formal alternative dispute resolution (ADR), such as the formal processes often required by courts before adjudication. Still other branches represent extralegal alternatives to formal legal claims, such as informal legal mobilization, collective action, self-help, and even self-reflection and prayer. The tree imagery improves upon the pyramid not only because it better represents the multiplicity of options, but also because it reflects the living and evolving nature of disputes. Branches may produce flowers, fruit, or both, or they may wither and die. Flowers represent symbolic indicia of justice, such as the public opportunity to be heard, the recognition of injuries and responsibility (e.g., a formal apology), and the like. Fruit, by contrast, represents material remedies such as reinstatement at work or financial compensation for injury.

The dispute tree metaphor suggests new avenues of inquiry regarding the dispute resolution process. How has the shape of the tree changed over time? New branches for ADR and internal dispute resolution processes within organizations have grown dramatically in recent years, for example. Which branches bear only flowers (i.e., symbolic remedies without material compensation), which branches yield only fruit (i.e., compensation without symbolic recognition), and which branches produce both? Which branches are easily accessible, with low-hanging fruit if you will, and which branches are accessible only to those with ladders (i.e., significant resources)? Are there missing branches, branches we might expect to grow that haven't? How and under what circumstances do individuals engage with trees, by enjoying their flowers, eating their fruit, climbing them, sitting in their shade, jumping from branch to branch, or walking by without stopping? How often do individuals get lost in the legal forest, and do guides (i.e., lawyers) make a difference?

The metaphor may be extended further, into a forest of trees representing different kinds of disputes, such as contract, tort, or discrimination claims. Which trees grow vigorously and which are stunted? For example, which trees have been lopped off across the top through caps on damages or procedural barriers to bringing claims? Which trees are prevented from growing at all by pruning the trunk (named injuries) from the roots (un-PIEs)? Are there missing trees that perhaps should have grown but didn't? Which are most numerous and which are scarce, and who benefits as a result of this distribution? Are there both public forests and private orchards (i.e., public and private legal orders)? Who owns and controls these places? Who may enter and who is excluded? How does the environment (e.g., social structure and processes) affect the population, growth, and health of the forest? The dispute tree metaphor moves the inquiry away from focusing on the individual's trajectory up the pyramid toward theorizing the role of structural processes that shape dispute resolution more generally. In other words, the tree metaphor not only invites questions about whether and how individuals climb a given tree but also examines the conditions under which a particular tree and its many branches will flourish or die. It also sweeps more broadly to consider the overall health of the forest as well as individuals' paths through that forest.

In this article, we discuss the empirical work on dispute resolution with this new metaphor in mind. We begin by considering precursors to the dispute pyramid that offer alternative models for how disputes evolve and progress. We then review literature about the stages of the dispute pyramid, considering empirical evidence about social factors that influence claiming and remedial benefits along the traditional legal path. We go on to examine the literature about institutionalized noncourt alternatives for dispute resolution, with an eye toward the rapid development of these alternatives, how well they provide the flowers and fruit of remedies for injuries, and the implications for the forest of dispute resolution in general. Then, we step back to consider the

relationship between individual mobilization and collective claiming, including the construction of legal problems and the availability of remedies that are meaningful to claimants. Finally, we conclude by discussing questions for future research.

PRECURSORS TO THE DISPUTE PYRAMID

Even before the CLRP, anthropologists of law shifted away from studying formal law toward studying disputes and the social systems for their resolution. Studying disputes was considered less ethnocentric because it did not define law in terms of Western institutions and categories, such as courts or legislation (Abel 1974, Nader & Todd 1978a, Snyder 1981). This approach was analogous to the trouble case approach first set out in *The Cheyenne Way* (Llewellyn & Hoebel 1941). That pathbreaking book relied on cases Llewellyn & Hoebel (1941) collected as oral histories to depict the law in action among the Cheyenne. The authors argued that studying concrete "instances of hitch, dispute, grievance, trouble" was the best way to study law across a range of societies (p. 21). Examining disputes supplied a way to distinguish binding from nonbinding norms and to observe which persons and procedures embodied authority and what penalties were possible in practice. Studying trouble cases also supplied a window into the culture's power relations, values, and conception of the individual.

Dispute Processing: Linear Stages Versus Organic Development

Anthropologists of law recognized that disputes evolved in stages. For example, Nader & Todd (1978a) defined three stages: the grievance or preconflict stage in which an individual recognized her injury, the conflict stage in which the individual communicated that injury to the other party, and the dispute stage in which the conflict escalated into the public arena. Gulliver (1969) similarly characterized the emergence of a dispute as the stage at which a private conflict enters the public realm. Though remarkably similar to the naming, blaming, and claiming process identified by Felstiner et al. (1980), the trajectory contemplated by these theorists allowed for stages to occur out of sequence and for individuals to move back and forth across stages. Thus, anthropologists conceptualized the dispute resolution process as more fluid and less linear than the dispute pyramid approach later adopted by the CLRP. The dispute tree metaphor we propose harkens back to this organic and dynamic conception of dispute resolution processes.

Fieldwork by anthropologists and other scholars made clear that individuals not only had multiple avenues for handling conflict but also could draw on multiple normative frameworks for addressing disputes. Legal pluralism as a concept was well established by the time of the CLRP study and revealed that societies almost inevitably contained multiple legal, or at least normative, orders for resolving conflict that operated side by side. For example, Nader (1983, p. 997) noted that "the structures of vertical and horizontal pluralism...led us to realize early on that more than one legal system is operating within the borders of the state at any one time." Contrast this with the Weberian conception of legal authority as the state monopoly over the legitimate use of physical coercion (Weber 1978), and it becomes clear that detaching the concept of law from Western legal institutions enables a much richer analysis of disputes.

Sociolegal scholars too have engaged with pluralist approaches in several ways. Macaulay (1963) found that Wisconsin businessmen rarely resorted to lawyers and formal lawsuits when business disagreements arose, even if those disputes involved enforceable contracts. Instead, businessmen worked informally to make things right, and this community viewed bringing in a lawyer as a violation of unspoken norms of cooperation and reputation maintenance. A later study by Ellickson (1991) similarly found that ranchers in Shasta County, California, seldom resorted to formal

legal action for dealing with property damage caused by roving cattle. Instead, they engaged in informal exchanges of feed or animals in reciprocal efforts to replace lost crops or cattle. Free riders existed, as economists would predict, but the cattle ranching community viewed them with disdain, imposing social rather than legal sanctions upon them.

In both Ellickson's (1991) and Macaulay's (1963) studies, power and relationships within a community operated as important regulators of dispute resolution alongside law. Businessmen who wished to continue to do business in the tight-knit Wisconsin business community could ill afford the reputational damage of being viewed as litigious. In Shasta County, only newly arrived lifestyle ranchers resorted to legal actions, perhaps because long-time local ranchers excluded them from established, mutually beneficial informal methods of addressing cattle disputes. Thus, social factors such as inequalities of power, status, and relationships emerge as important determinants of parties' choices to communicate a grievance, avoid conflict by lumping it, negotiate informally, engage in self-help, or escalate conflict to the public arena by formally mobilizing law.

These early studies indicate that what appears as nonmobilization or attrition in the dispute pyramid in fact may involve informal, and perhaps more efficient, ways of resolving disputes. At the same time, alternative methods of resolving disputes may privilege already powerful actors over less powerful parties, privilege established community members over newcomers, and offer subtle methods of coercion and exploitation couched in terms of community norms. Along these lines, scholars have explored both positive and negative aspects of dispute resolution through alternative normative systems. Some contend it is more efficient, fair, and effective to resolve disputes informally through widely accepted community norms and informal negotiation. In their classic piece on "bargaining in the shadow of the law," Mnookin & Kornhauser (1979) argued that disputants would not resort to private ordering unless it offered something better than the likely outcome through adjudication. The more skeptical perspective is that community norms typically serve some interests and not others, and thus private ordering may replicate patterns of power, status, and social marginalization already reflected in the broader society (Engel 1984, Albiston 2005).

Social Relations, Social Structure, and Disputing Patterns

Pre-CLRP scholarship on the relations among actors involved in dispute resolution processes theorized disputes in terms of the structure of social interaction. These include the dyadic versus triadic relationships among the actors, whether disputants are intimates or strangers, the relative power of the parties, and the binding authority (or not) of third parties brought in to resolve disputes. Much of this early work addressed the likelihood that individuals would resort to the formal legal system rather than alternative means of handling disputes. For example, Galanter (1974, p. 130) proposed that human relationships that were "more inclusive in life-space and temporal span" were less likely to be regulated through official systems of dispute resolution, insofar as thicker relationships would make it more likely that the parties shared values and would be able to effectively sanction each other through nonlegal means. The anthropologists associated with Nader's Berkeley Village Law Project suggested that individuals chose to use local, less formal mechanisms within their communities rather than resort to state-run courts not only because of ease of access, but also because of the differing outcomes available within different systems, including their ramifications for community power relations (Starr 1978, Witty 1978). The Village Law Project researchers also suggested that those with access to common social networks were more likely to use informal systems to resolve disputes, whereas outsiders might be forced into formal systems (Todd 1978, Yngvesson 1978; see also Engel 1984). Similarly, Black (1971) reported that the relationship between the complainant and suspect affected the likelihood that disputes would enter the formal criminal justice system; arrests were most likely where the two

were strangers, rather than family members, friends, or neighbors. Focusing less on relationships between the parties and more on the potential claimant's position within the social structure, Mayhew & Reiss (1969) noted that both property ownership and race affect the likelihood that individuals will make use of the legal system.

Another theme explored by early dispute theorists involved the relationship between social structure and broader social patterns in disputes and dispute processing. Theorists developed typologies of the range of disputing processes, the actors involved in these processes, and the connections among social structure and available disputing processes (Schwartz 1954, Abel 1974, Felstiner 1974, Galanter 1974, Grossman & Sarat 1975; see generally Snyder 1981). Galanter (1974) identified not only adjudication and litigation, but also court-related settlement systems, private settlement systems, exit, self-help, and lumping it as possible paths to resolution. Some non-adjudication systems are appended to the legal system and range in formality from court-imposed settlement to informal negotiation between the parties. Other, private systems of resolution are more akin to alternative, but enforceable, norms, such as the norms of Wisconsin businessmen or the internal regulation of the Mafia (Felstiner 1974, Galanter 1974, Grossman & Sarat 1975, Snyder 1981). Felstiner (1974) identified not only adjudication, but also mediation, negotiation, self-help, and avoidance as potential paths to resolution. He argued that adjudication requires organized groups and enforcement mechanisms for its efficacy, mediation assumes a set of shared experiences as a basis for compromise, and avoidance is feasible only when multiplex relationships are rare and thus the costs of terminating specific relationships low. Other theories relating social structure and the role of law suggested that the relative complexity of societies and the availability (or not) of alternative, nonlegal, forms of social control might relate to variation in the prevalence of formal claiming. For example, Schwartz's (1954) study of two Israeli settlements found that formal legal systems arose where informal social control and shared norms were ineffective. Abel (1974) suggested that increasing social density and size would affect aspects of disputing institutions, such as their specialization, differentiation, and bureaucratization, and that these aspects of dispute institutions might themselves reciprocally affect social evolution going forward. Building on prior work, Grossman & Sarat (1975) theorized that overall levels of formal legal activity would rise with economic modernization and the move away from traditional political culture, insofar as such developments fostered more conflictual and/or competitive relationships, but they found only mixed support in US historical patterns.

Access to Justice and the Social Construction of Legal Need

The access to justice movement in the 1960s and 1970s, predicated on the claim that poor individuals had significant unmet legal needs, was a driving force behind not only the CLRP but also the rapid expansion of legal aid offices across the nation. As a result, early theorists were particularly interested in social structures that impeded equal access to legal remedies. Carlin et al. (1966) documented stark class differences in the use of lawyers but also noted that awareness of a problem as a legal matter, willingness to take action, and simply gaining access to a lawyer, all important precursor steps to making use of counsel, were largely overlooked (and hence poorly understood) stages in the process. Mayhew (1975) pointed out that the likelihood of claiming depends heavily on institutions of representation, such as legal aid agencies; such organizations, by offering services in particular areas, can actively shape claiming patterns in ways that do not necessarily reflect claimants' felt needs.

Several scholars identified naming, broadly defined, as a key issue, as well as other subjective processes such as believing that hiring a lawyer would be useful. Early empirical work reported that individuals' structural position in society correlated with their likelihood of naming, or perceiving,

problems. For example, one early study of consumer issues found that lower-income households perceived proportionally fewer problems than higher-income ones and that African Americans perceived fewer problems than whites (Best & Andreasen 1977). Best & Andreasen (1977) theorized that the lower rate of naming was due not to a lower incidence of problems but rather to the lower expectations or felt powerlessness of these households. An American Bar Association national survey of legal needs in 1973–1974 similarly found that lower-income respondents, less-educated respondents, and minority respondents reported fewer numbers of perceived problems (Curran 1977). Those groups also expressed more doubts regarding the advisability of consulting lawyers. Emphasizing the role of subjective beliefs in formal claiming, Mayhew (1975, p. 411) reported that in his 1967 survey of Detroit residents, often the failure to hire a lawyer was due less to income constraints than to "an absence of the perception that seeing a lawyer would be useful or appropriate."

Other critics of the legal needs approach argued that many problems could be, and often were, solved by nonlegal strategies (Zemans 1982). The access to justice movement and the research that accompanied it contributed to a growing interest in developing noncourt alternatives for dispute resolution, especially in cases involving poor individuals or collective action problems, such as consumer disputes. For example, as part of the so-called war on poverty, in the 1960s the federal government began to sponsor neighborhood justice centers as a new model for access to justice (Johnson 1974, Zemans 1982). In 1971, President Nixon called for a study of existing procedures for resolving consumer disputes, which revealed that businesses and government agencies were heavy users of small claims courts against individual defendants and that these courts served as a de facto collection agency for creditors (Ynvgesson & Hennessey 1975). In 1977, the American Bar Association sponsored the National Conference on Dispute Resolution and established a Special Committee on the Resolution of Minor Disputes (Zemans 1982). In this way, the access to justice movement and the ADR movement became increasingly intertwined.

Despite these growing calls for expanding informal processes of dispute resolution, there were many skeptics. Richard Abel (1982a), one of the leading critics, argued that informal justice mechanisms would expand state control over more areas of social life, individualize and defuse grievances with collective roots, delegitimize conflict, advantage more powerful disputants, and fail to provide full redress (see also Lazerson 1982, Erlanger et al. 1987). As discussed below in the section titled Institutionalized Noncourt Alternatives, subsequent researchers explored these concerns about informal dispute resolution in significant depth.

THE DISPUTE PROCESSING LITERATURE

Research about dispute resolution increased dramatically after the CLRP study published its findings, and many studies eagerly adopted the dispute pyramid metaphor as their implicit model. Some studies sought to explain differential claiming rates for different types of perceived injurious experiences, particularly the very low claiming rate for discrimination (Miller & Sarat 1980, Bumiller 1988, Kritzer et al. 1991, Morgan 1999, Quinn 2000, Wakefield & Uggen 2004). Others explored the role of various actors, or agents of transformation, in socially constructing the meaning of disputes (Sarat & Felstiner 1986, 1988, 1989; Lawrence 1991; Edelman et al. 1993; Marshall 2003, 2005; Albiston 2005). Still others examined structural factors that contributed to attrition up the levels of the pyramid (e.g., Galanter 1974, Albiston 1999). And some drew on aggregate data on dispute processing to contest the stereotype of the overlitigious American (Galanter 1983, Saks 1992). Collectively, these studies reveal the roles power, existing social inequality, and subjective perceptions shaped by culture, lawyers, and others play in forming individuals' understandings of potentially justiciable social events.

Individual Determinants of Claiming

After the CLRP study revealed that individuals forgo claiming in many potential legal actions, important questions remained about the individual determinants of claiming decisions. Lack of resources and access to lawyers frequently have been offered as explanations, and studies suggest that claiming behavior varies inversely with socioeconomic status (Sandefur 2007, 2008). Other factors may be just as important, however. Some scholars focus on individual differences in personality traits or perceptions as predictors of claiming behavior (Vidmar & Schuller 1987, Lind et al. 2000), whereas others focus on the effects of subjective perceptions, social interactions and relationships, and structural factors on claiming (Bumiller 1987, 1988; Edelman et al. 1993; Morgan 1999; Quinn 2000; Albiston 2005, 2010; Major & Kaiser 2005; Morrill et al. 2010).

Research indicates that once presented with a problem, individuals with higher socioeconomic status are more likely to take some action, and to take legal action, than are people of lower socioeconomic status (for an excellent review, see Sandefur 2008). Scholars often model the choice about claiming as a balance of costs and benefits, usually monetary but sometimes including the cost to ongoing relationships (Trubek et al. 1983, Sloan & Hsieh 1995, Wakefield & Uggen 2004, Sandefur 2008). Factors beyond costs, such as a sense of entitlement or feelings of powerlessness, may also matter, as may past experiences with claiming or otherwise resorting to law (Bumiller 1988; Major & Kaiser 2005; Sandefur 2007, 2008). The type of problem encountered may influence claiming (Miller & Sarat 1980, Kritzer 2011). Some problems, such as marital dissolution, require legal action (Sandefur 2008; see Mayhew & Reiss 1969). Others present individuals with a choice about whether to resort to law at all, and in these instances how an individual understands the problem in its social context may influence her decision (Merry & Silbey 1984, Sandefur 2007). Socioeconomic background and identity affect the perception of legal injury as well as mobilization behavior (Morrill et al. 2010). Individuals with potential discrimination claims who choose not to act report fear of retaliation, fear of not being believed, and concern that they will be viewed negatively by others even if the claim is justified (Bumiller 1987, 1988; Major & Kaiser 2005).

To take one example, Bumiller (1987, 1988) used qualitative interviews to investigate significant underclaiming among the CLRP survey respondents in civil rights disputes compared to other kinds of problems. She found that individuals with potential discrimination claims who did not take action said they resisted taking on a victim identity, preferring instead to view themselves as self-reliant and resilient in the face of illegal discrimination. Bumiller's work suggests that by labeling potential plaintiffs as discrimination victims in need of protection, antidiscrimination law may have inadvertently discouraged claiming among those the law was meant to protect. Moreover, the existence of the law seems to shift responsibility for the harm onto individuals who could have, but chose not to, claim their rights. Bumiller's study exemplifies the shift in scholarship away from case processing, resource-driven ways of thinking about dispute resolution and toward theories about the social construction and meaning of disputes more broadly.

In similar studies, Morgan (1999) and Quinn (2000) used qualitative interviewing methods to understand the well-documented phenomenon of low rates of claiming in response to sexual harassment in the workplace. Morgan (1999) found that women deciding whether to sue over sexual harassment considered not only the material costs and benefits of litigation, but also how litigation would affect their relationships with spouses and family more broadly. Her findings show the influence of family members as agents of transformation in interpreting the right thing to do in situations involving sexual harassment, but they also suggest that individualistic, rational models of cost-benefit analysis do not adequately represent the complex reasoning that goes into litigation decisions. Quinn (2000) went even further to try to understand the phenomenon of

injury recognition and naming with regard to sexual harassment in the workplace. Her female respondents exhibited a pattern of denying that difficult exchanges in the workplace amounted to sexual harassment, often emphasizing that their male colleagues' questionable comments didn't bother them even as they burst into tears while discussing them. Quinn identified a culture of male teasing and chain yanking to which women must acquiesce to be accepted into the workplace. Objecting to sexual harassment would mark women as unable to take a joke, and thus it became rational to choose not to mobilize rights in a workplace that subtly excludes women through sexualized teasing. Quinn's findings are particularly striking given recent doctrinal developments that give employers a defense to sexual harassment claims where the plaintiff unreasonably failed to complain, as in *Burlington Industries*, *Inc. v. Ellerth* (1998).

Following the suggestion in Felstiner et al. (1980) that agents of transformation shape how individuals understand conflict, researchers also have explored the role of various actors in socially constructing the meaning of disputes (Erlanger et al. 1987, Edelman et al. 1993). For example, early studies of divorce lawyers indicated that divorce lawyers engaged in cooling out and lowering their clients' expectations regarding the outcome of their cases (Sarat & Felstiner 1986, 1988, 1989; see also Mather et al. 2001). Lawyers thus emerge as important mediating agents between the formal law and the expectations and behavior of their clients, and in some instances they actively construct the meaning of legal rights through this process (Erlanger et al. 1987). Similarly, Albiston (2005) found that workers struggling to mobilize family and medical leave rights faced a variety of interpretations of their plight from their employers, family, coworkers, and partners. Although some of those interpretations referenced legal rights to leave, others tracked the entrenched social beliefs that the law was intended to change, such as the idea that men work to support families and women stay home to care for babies. Organizational actors also play important roles in the interpretation and social construction of workplace conflict, frequently seeking to reinterpret conflicts as personality or management problems and redirect workers away from legal rights claims (Edelman et al. 1993; Marshall 2003, 2005; Albiston 2005).

These studies challenge the premise that claiming behavior results solely from stable, individual personality traits, and instead suggest that propensity to claim is context dependent and quite malleable through social interactions. Qualitative methods become especially useful for teasing out these counterintuitive and subtle mechanisms that may have profound influences over claiming behavior, especially in civil rights cases, where moral meanings are at the forefront. These studies also reveal a set of stunted branches on the dispute tree, along which naming is rare and claiming even rarer because of social meaning and environmental influences on claiming decisions.

Individual and Structural Factors in Litigation Behavior and Outcomes

Another line of research investigates how individual and structural factors influence movement up the dispute pyramid and, importantly, likely outcomes as disputes are resolved. Galanter's (1974) landmark article "Why the 'Haves' Come Out Ahead" examined how structural features of courts and the litigation process tend to favor repeat players, who have more resources, better information, and more control over the context of many disputes than one-shot litigants and therefore are more likely both to win and to generate favorable law for the long term. Galanter's article generated much research testing (and for the most part confirming) his thesis, but virtually all of these studies focus on outcomes rather than mechanisms.

Articles in a special issue of *Law & Society Review* published on the 25th anniversary of Galanter's article, however, explored some of the mechanisms that privilege repeat players (Kritzer & Silbey 1999). For example, Albiston's (1999) study of judicial decisions interpreting the Family and Medical Leave Act showed how the rules of procedure and court norms about publication of decisions

tend to produce authority favoring defendants. She argued that although plaintiffs often obtain material gains through settlement, disputes resolved by settlement do not generate precedent for future cases, and over time, the common law comes to favor employers. Edelman & Suchman (1999) examined how large organizations increasingly use their size, experience, and resources not just to benefit from repeat-player status but to actually create and control private legal fora within their organizations.

Several studies have examined individual litigation and outcomes in the employment discrimination setting, a context in which law addresses inequality across many dimensions. Some studies find that employment discrimination plaintiffs seldom succeed (Colker 1999; see also Clermont & Schwab 2004, 2009; Nielsen et al. 2010; Best et al. 2011), and others indicate that plaintiffs have at least partial success in formal resolutions approximately 60% of the time (Burstein & Monaghan 1986, Burstein 1991). Success is a relative term, however, and difficult to measure because of selection effects and the prevalence of settlement (Clermont & Eisenberg 2002). Litigation does not always end in a court judgment but instead proceeds through a series of breaking points at which a case may be dismissed or settled (Albiston 1999, Clermont & Eisenberg 2002, Nielsen et al. 2010). Many employment discrimination claims settle before the court issues a decision, which arguably can be seen as partial success (Siegelman & Donohue 1990, Albiston 1999, Clermont & Eisenberg 2002, Nielsen & Nelson 2008, Eisenberg & Lanvers 2009, Nielsen et al. 2010). Parties have some control over whether to proceed through the steps of litigation, and specific features of the claim also affect its progress. As a result, selection bias affects which cases advance at each step of the process and makes it difficult to identify factors that affect outcomes with any accuracy (Clermont & Eisenberg 1998, 2002; Albiston 1999). Moreover, selection bias affects which claimants make it to court in the first place because not only parties but also their prospective counsel shape that selection process (Trautner 2011).

Nevertheless, several studies attempt to identify factors associated with success, at least in the formal record of outcomes reported by the courts. Some research suggests that when repeat-player organizations, such as the Equal Employment Opportunity Commission (EEOC) or public interest law firms, represent plaintiffs, plaintiffs are more likely to win (Burstein 1991, Albiston 1999, Nielsen et al. 2010). Indeed, Galanter (1974) argued that this kind of structural support of one-shot parties makes them more like repeat players and therefore more likely to win. Kessler (1990) found, however, that public interest firms supported by the private bar faced repercussions when they challenged the private bar's clients in court. Legal representation and collective litigation (e.g., class actions) also have been found to improve the likelihood of success (Nielsen et al. 2010; see also Sarat 1976). Myrick et al. (2012) found racial disparities in legal representation, suggesting that at the systematic level, the groups most likely to be affected by discrimination are the least likely to command the resources that predict success in court.

Individual status matters as well. Nielsen et al. (2010, p. 190) found that "managerial and professional employees, older plaintiffs, employees with more tenure on the job, and plaintiffs working at unionized establishments are less likely to be dismissed or settle early." Similarly, Eisenberg & Hill (2003) found that lower-wage plaintiffs are less successful than higher-wage plaintiffs in arbitration proceedings. Best et al. (2011) found that plaintiffs who have intersectional claims (e.g., based on race and age) or intersectional status (e.g., black women) are far less likely to succeed than are plaintiffs who allege single bases of discrimination or have only one disadvantaged status. These findings indicate that plaintiffs who bring institutional support and personal clout to the table tend to fare better than those who do not.

This literature speaks to our inquiry regarding the fruit and flowers of litigation. Galanter's (1974) work suggests that litigation seldom produces fruit for the weaker party. Albiston's (1999) study suggests that in employment litigation, flowers and fruit are often separated for plaintiffs for

whom published opinions (flowers) are rarely available because material remedies (fruit) typically come from largely invisible, and confidential, settlements. Similarly, Nielsen et al. (2010) found that, on average, employment discrimination settlements were relatively modest. Confidentially agreements, however, prevented the authors from obtaining the amount of the settlement in nearly 80% of their sample. Thus it is difficult to know the degree to which dispute tree branches bear substantial fruit for discrimination plaintiffs through settlements.

Even if settlements are relatively substantial, this type of fruit may have drawbacks. Settlement sacrifices the more general benefits of adjudication, such as setting legal standards, clarifying ambiguous legal rules, or publicly articulating and reinforcing the values embodied in legislation and the Constitution (Fiss 1984, Galanter 1990, Albiston 1999). In this way, settlement pits benefits to the individual parties, such as saving resources and reducing risk, against broader general benefits that we describe using the metaphor of the developing and flowering dispute tree. Plucking the fruit of settlement before a formal decision reduces the growth and flowering of that particular branch of the dispute tree, even if settlement benefits the disputant who receives the fruit. Waiting for a final decision may risk the fruit failing to mature. If it does mature, however, the legal precedent from that final decision represents a fully developed branch that benefits not only the current parties but also future tree climbers (and shade sitters under the tree).

There is also a broader question of how to measure, or conceptualize, the outcome of dispute resolution processes. To the extent that party satisfaction with the outcome matters, studies of procedural justice suggest that parties actually prefer formal procedures that provide an opportunity to be heard and involve a neutral third party (Lind & Tyler 1988, Galanter 1990, Tyler 1990). Critics of the procedural justice framework point out that fairness itself is a contextual, situated perception not well captured by the abstract approach of procedural justice research. They note that formal processes may encourage compliance and satisfaction, but they do not guarantee substantive fairness (Berrey et al. 2012). In addition, process can be intertwined with the nature and severity of the dispute, as well as the eventual outcome a grievant seeks. For example, Merry & Silbey (1984) argued that by the time a conflict becomes significant enough to warrant intervention from an outsider, the grievant wants vindication, or at least a third-party declaration of who is in the wrong. In short, measuring winning through litigation outcomes and remedies cannot capture all the nuances of outcomes from the perspective of litigants.

INSTITUTIONALIZED NONCOURT ALTERNATIVES

Alternative Dispute Resolution

Most institutionalized alternatives to formal litigation now fall under the broad rubric of ADR, a general term used to describe methods of handling disputes that tend to be less formal than litigation. Beginning in the 1970s, the nascent ADR movement claimed that ADR offered a more flexible forum that would empower parties to produce more creative and mutually beneficial solutions to conflict (Morrill & Rudes 2010). Very quickly, support for ADR for both individual and organizational disputes grew among legal practitioners and policy makers alike (Westin & Feliu 1988, Ewing 1989), and federal law and policy began to endorse and incorporate various forms of ADR (Edelman & Suchman 1999). By the late 1990s, nearly half of all state and federal jurisdictions were operating ADR programs of some kind (Reuben 1996, 1997).

Forms of ADR include mediation, arbitration, the mini-trial, conciliation, private judges, ombudspersons, settlement conferences, neutral evaluation by an expert, collaborative lawyering, peer mediation or conflict resolution (typically found in schools), and restorative justice, a form of ADR involving crime victims and their offenders. All, to varying degrees, seek to avoid the

adversarial character of litigation and to encourage the parties to participate in the negotiation of resolutions.

There is a sharp debate, both within the legal community and among academics, between those who believe ADR provides a better and more just form of dispute resolution and those who argue that ADR favors the more socially powerful party even more than litigation does. Advocates of ADR, especially of mediation, believe that adhering to strict notions of legal rights or entitlement and the adversary nature of the formal legal process often lead to outcomes that harm relationships and even harm society generally. Mediation advocates in particular claim greater efficiency (lower cost, less risk) as well as much broader benefits of mediation, including empowering disputants, building community, and achieving peace (Fisher & Ury 1981, Menkel-Meadow 1984, Moore 1986, Westin & Feliu 1988, Bush 1989, Rosenberg 1991, Bush & Folger 1994, Lande 1998; cf. Edelman & Cahill 1998, Edelman & Suchman 1999). Mediators often disdain extreme positions or parties who claim that their rights are being violated, instead encouraging parties to think about needs and interests rather than rights, to find shared underlying values that they can agree upon, and ideally to come up with win-win solutions that benefit both parties (Fisher & Ury 1981).

Critics of ADR tend to focus on mediation, which due to its informality, emphasis on party empowerment, and disdain for law and rights differs the most substantially from litigation. Critics point to the potential of ADR to exacerbate inequalities between the parties; to undermine rights provided by law, especially those designed to protect those parties without clout; to discount the force of precedent; and to depoliticize disputes in a way that may undermine important public values (Abel 1982a, Fiss 1984, Delgado et al. 1985, Hofrichter 1987, Fineman 1988, Silbey & Sarat 1989, Edelman et al. 1993, Nader 1993, Bryan 1994, Edelman & Cahill 1998). Critics argue that mediators often seek to preserve relationships even where disputants want to end those relationships, as in the divorce context (Weingarten 1986, Fineman 1988; see also Edelman et al. 1992, Edelman & Cahill 1998).

Critics also worry that ADR—especially mediation—undermines legal rights. By reconceptualizing law-related conflicts as psychological problems or pathologies that can be resolved through therapeutic solutions, mediation's therapeutic focus deprives disputants of their status as rights-bearing subjects and reconstitutes them as individuals who need help (Silbey & Sarat 1989, Edelman et al. 1992, Nader 1993, Edelman & Cahill 1998). Talesh (2012) showed that the structure of ADR matters for outcome: Dispute resolution forums administered by the state or other third parties have a greater potential for benefitting the "have-nots" than do those operated by an interested party.

Edelman & Cahill (1998) also criticized an "ethic of reasonableness" in mediation. Because mediation encourages compromise and attention to shared interests, parties who maintain firm positions based on legal rights tend to look unreasonable (see also Aubert 1963, Morrill & Rudes 2010). Mediators use the ethic of reasonableness as a way to pressure parties to compromise rather than assert their legal rights (Silbey & Merry 1986, Amy 1987, Fineman 1988, Grillo 1991, Bryan 1994).

Although advocates of mediation emphasize the value of empowerment, critics are skeptical because the parties to mediation are often unequal. Although social inequality creates advantages and disadvantages in formal litigation as well (Galanter 1974, Albiston 1999), the absence of formal protections and lack of direct participation by lawyers in mediation may perpetuate or even exacerbate these inequalities and benefit parties who enjoy greater social, political, or economic clout (Fiss 1984; Delgado et al. 1985; Silbey & Sarat 1989; Grillo 1991; Bryan 1992, 1994; Edelman & Cahill 1998). Furthermore, many of the repeat-player advantages that Galanter (1974) discussed in the context of litigation also exist in the context of ADR, insofar as mediators are often not neutral. Research indicates that mediators are insufficiently aware of power disparities, may be

structurally aligned with the more powerful repeat players' interests, and frequently pressure the parties toward particular options over others (Fineman 1988, Greatbatch & Dingwall 1989, Cobb & Rifkin 1991, Bryan 1992, Edelman et al. 1993). Some research suggests disputants may recognize the danger of power disparities and choose their forum accordingly. Hoffmann (2005) found in a study of a worker cooperative that men, who had strong informal ties, tended to use informal dispute resolution, whereas women, who were underrepresented and lacked informal ties, tended to use formal grievance procedures.

Dispute Resolution in Organizational Settings

Following Strauss (1978), who argued that organizational life is a negotiated order and the resolution of conflicts a daily event, sociologists have studied conflict resolution in a variety of organizations (Barley 1986, Martin 1990, Kolb 1992, Morrill 1992, Hoffmann 2005). Early work in sociology showed how workers within organizations draw upon informal social ties to handle some types of disputes (Gouldner 1956, Dalton 1959). Sociolegal scholars became interested in dispute resolution in organizational settings in the late 1980s, in part in response to the rise of ADR and ADR-like structures in the work context. Following the growth of ADR in the public legal order, federal and state agencies, civil rights statutes, and the judiciary all endorsed or required ADR in various contexts, despite concerns that mandatory arbitration in particular might cause parties to give up their legal rights (Lipsky & Seeber 1998).

At the same time, work organizations have created a variety of ADR mechanisms within organizations, which Edelman et al. (1993) call internal dispute resolution, or IDR. IDR techniques vary in formality. The most informal include open-door policies in which a high-level manager is available to address any complaints. More formal IDR looks more like union grievance procedures with multistep appeals procedures. Organizations have also become far more likely to support or adopt various types of ADR for interorganizational disputes or disputes with their clients and suppliers (e.g., Talesh 2009).

The diffusion of dispute handling structures in organizations.
Selznick (1969) first called attention to organizational grievance procedures as evidence of the development of the rule of law within organizations. Edelman (1990) developed this idea, incorporating neoinstitutional organization theory, to argue that organizations incorporate institutionalized elements from their environments to garner legitimacy. Edelman showed that, in response to the civil rights movement and legislation of the 1960s, organizations created grievance procedures for their nonunion employees. In so doing, organizations sought to demonstrate attention to due process and general fairness. The earliest organizations to create nonunion grievance procedures were those in the public sphere, including private organizations with public contracts, but larger organizations and organizations with personnel offices were also more likely to incorporate grievance procedures as they became institutionalized (Edelman 1990, 1992; Sutton et al. 1994).

Surveys of organizations have shown that various types of grievance resolution mechanisms have become increasingly common over the past 35 years (Westin & Feliu 1988; Edelman 1990, 1992; Galanter & Rogers 1991; Sutton et al. 1994; Edelman et al. 1999; Dobbin 2009; Talesh 2009). The organizational embrace of ADR-like procedures for both the intraorganizational resolution of employee grievances and interorganizational business disputes is also evident in several recent surveys of Fortune 1000 companies. A 1997 survey found that most large companies were turning to arbitration, mediation, and other forms of ADR to avoid the high cost and risk of litigation; the fear of excessive judgments; and the expense of legal counsel, experts, preparation time, and discovery (Lande 1998, Lipsky & Seeber 1998, McEwen 1998). By the late 1990s, commercial contracts

often included provisions for mediation as a precondition for either arbitration or litigation (Stipanowich & Lamare 2014). A 2011 survey of Fortune 1000 companies showed an increased willingness to turn to ADR rather than litigation and to litigate selectively, using ADR for all other disputes (Stipanowich & Lamare 2014).

The debate over IDR. Although the debate over internal grievance resolution parallels that over ADR generally, there are important differences as well. With regard to similarities, proponents argue that alternatives to litigation tend to be faster, less expensive, and more efficient for companies; that they help to preserve relationships; and that participants can devise solutions that are better suited to the industry or context (Dunlop 1976, Mnookin & Kornhauser 1979, Dunlop & Zack 1997, Lande 1997). The critique of organizational dispute resolution calls attention to its potential to undermine employees' legal rights and to give management the upper hand.

Organizational actors also play important roles in the interpretation and social construction of workplace conflict (Edelman 1992; Edelman et al. 1992, 1993; Albiston 2005; see also Marshall 2003, 2005). For example, Edelman et al. (1993) found that dispute handlers reinterpreted potential civil rights violations into personality conflicts or poor management decisions, thus keeping conflict within the organization and out of the courts, often without providing any meaningful symbolic or material remedy. Even so, in some instances, organizational complaint handlers were willing to resolve issues that would not be legally actionable and were willing to take steps to satisfy employees when a court would not. Consistent with their focus on good management, however, complaint handlers tended to employ managerial norms rather than legal standards in resolving disputes. Consequently, IDR remedies tended to be pragmatic (e.g., transferring the complaining employee to another unit), therapeutic (counseling, arranging for apologies), or educational (arranging for sensitivity training) and almost never involved a finding or declaration of rights violations. Edelman et al. (1993) concluded that IDR tends to privatize and depoliticize disputes, de-emphasize legal rights, and subsume law into the managerial realm, a process that Edelman et al. (2001) later labeled "managerialization." Albiston (2005) found a similar pattern in which employers interpreted family and medical leave disputes as personal problems, and organizational actors implemented leave to be consistent with managerial objectives, even when those objectives conflicted with the law. In general, organizations' internal grievance procedures may cool out grievances before they become public claims, regardless of whether they provide any meaningful remedy (Edelman 1992, Edelman et al. 1993).

An important difference between ADR and IDR is that whereas arbitrators and mediators in ADR are at least ostensibly impartial, organizational complaint handlers are structurally biased in that they are generally members of management, often in human resources, and their paychecks and opportunities for promotion depend on the satisfaction of their superiors. Edelman et al. (1993) reported that organizational complaint handlers tend to be conscious throughout the process that if the matter should proceed to litigation, their role would generally convert to a witness on behalf of the organization. The structural constraints on complaint handlers' impartiality in the organizational setting may introduce a consistent managerial bias in organizational dispute resolution.

Another important question concerning IDR is whether it encourages or discourages employees from pursuing their legal rights. The CLRP study (Miller & Sarat 1980) showed that employees who perceived rights violations were less likely to mobilize their rights formally than were any other category of rights-violation sufferers. More recent studies, focusing on later stages of the mobilization process, also find low rates of rights mobilization. Clermont & Schwab (2009) reported that although the number of employment discrimination lawsuits filed in US district courts rose dramatically between 1990 and 1997, the number of lawsuit filings fell sharply between 1997 and 2006 even as complaints to the EEOC continued to rise. Nielsen et al. (2010) reported that of 1,672

employment discrimination cases filed from 1977 to 2003, only 6% proceeded to trial. Hirsh & Kornrich (2008) conducted a quantitative analysis of the determinants of rights mobilization by employees and found that both workplace conditions (such as size, formalization, and workplace segregation) and institutional environments (industrial sector and federal contractor status) affect workers' charges of race and sex discrimination. Morrill et al. (2010) found that students in schools are similarly reluctant to mobilize rights in response to perceived rights violations. By contrast, under some institutional conditions, disempowered individuals may overcome the hurdles to claiming through IDR. For example, Hoffmann (2003, 2005) found in a study of two taxicab companies that more internal grievances were filed in the company with the flatter workplace hierarchy and that in a less hierarchical environment, women expressed more willingness to file formal grievances than their male coworkers. Calavita & Jenness (2013) found that most prisoners in the highly legalized total institution of prison filed internal grievances. More research is needed to understand the conditions under which institutional contexts inhibit or encourage claiming.

INFORMAL MOBILIZATION AND COLLECTIVE CLAIMING

Outside the realm of formal legal processes and ADR, there are two additional significant trends in sociolegal research that have destabilized the dispute pyramid metaphor. First, the cultural turn in the social sciences (Geertz 1973, Bonnell & Hunt 1999) gave new vigor to approaches that deconstruct the concept of disputes by focusing instead on broader conceptions of trouble or conflict in dyadic relationships (Black 1976, 1983; Morrill 1995). Understanding the disputing process against this broader landscape of trouble puts disputes in historical and social context, shaped as much by social meaning as by legal rules or coercive institutions. With this shift, researchers became interested in how legal schemas permeate the everyday fabric of society and how conflict is a lens onto broader social phenomena (Ewick & Silbey 1998, Seron & Silbey 2004, Morrill & Musheno 2014). This work harkens back to the early studies of conflict resolution and trouble cases, such as *The Cheyenne Way* (Llewellyn & Hoebel 1941), as well as neo-Marxist theories about how law constitutes the fundamental categories of social life (e.g., contract, property, marriage) to legitimate inequality and to suppress challenge (Llewellyn & Hoebel 1941, Thompson 1975, Spitzer 1983).

A second, related trend goes beyond individual dispute resolution to consider collective legal mobilization (McCann 1994, Levitsky 2008, Albiston 2011, Nejaime 2011, Leachman 2014). Questions in this vein include how collective legal action serves purposes beyond dispute resolution, as well as the potential constraints and opportunities for change that collective mobilization presents. Both these developments move away from instrumental, behavioral approaches centered in the legal system toward more constitutive understandings of how, and where, law shapes social life. In contrast to the relatively narrow and linear process of naming, blaming, and claiming, these perspectives view social processes related to conflict as nonlinear, diffuse, and constitutive of social reality.

Individual, Informal Legal Mobilization

One hallmark of the work in this cultural vein is that it detaches the study of conflict and law from legal institutions and actors, such as courts, judges, and lawyers. Instead, it seeks out the influence of law, or legality, in addressing conflict in everyday life. Using our metaphor of the dispute tree, this research studies both the roots of the tree and the soil, sunlight, and water that nurture its growth, along with the occasional branch that sprouts far from the formal legal processes at the tree's trunk. Several studies in this vein have focused on reactions to discontent

in response to interpersonal trouble (see, e.g., Ewick & Silbey 1998, Morrill 1992, Tucker 1993, Nielsen 2000, Emerson 2008), rather than framing that trouble at the outset in legal terms. For example, Emerson's (2008) study of responses to trouble among college roommates suggested that troubles that arise between the acquainted or among individuals in ongoing relationships may be not only handled informally but also understood through relational consciousness rather than legal consciousness. By contrast, Ewick & Silbey (1998) suggested that legal consciousness and legality permeated all aspects of informal conflicts among their subjects, albeit in different ways and with different interpretive meanings in different social contexts.

Thus, constitutive approaches to trouble cases invite exploration of the conditions under which responses to conflict in everyday life track legal discourse and meanings or instead follow alternative patterns of interpretation and response. What are these alternative patterns? What do they suggest about the limits of legal action in the context of ongoing relationships, especially when power relations are asymmetrical or exit is difficult or costly? Law can be a discursive resource for interpreting problematic social relations (Ewick & Silbey 1998, 2003; Marshall 2003; Albiston 2005, 2010; Morrill et al. 2010), but individuals also draw on other, competing frameworks of meaning to understand their experiences (Levine & Mellema 2001; Marshall 2003; Albiston 2005, 2010). Some scholars suggest that the form and reach of legal schema may vary with respondents' social position and past experiences with law (Hirsch 1992, Nielsen 2000, Levine & Mellema 2001). And even when individuals see legal frames as relevant, there is no straightforward relationship between that awareness and action. For example, Morrill et al. (2010) found that high school students who said they were very likely to mobilize their rights in response to hypothetical situations nevertheless seldom acted in response to the potential rights violations they encountered in real life. Thus, individuals may fully recognize conflict and interpret it in legal terms yet choose a branch other than legal mobilization in response.

Typically, doing nothing, or lumping it, is viewed as inaction in the dispute pyramid model, but Sandefur (2007) argues that this undertheorizes both instrumental and cultural reasons why individuals do not take action. Sandefur notes that potential claimants' past, often frustrating, experiences with problems color their responses, including their decisions about what options to explore and pursue. She argues that rather than waiting for claimants to come to a legal aid office, a more effective policy "would meet people where they are, either by changing the way problems' solutions are institutionalized or by aggressively seeking out people with problems and marketing solutions to them" (Sandefur 2007, p. 127). Such an approach may actively shape potential claimants' interpretation of their situation, perhaps offsetting stigma associated with claiming rights and benefits, or even encouraging claimants to recognize that they have a claim in the first place (Bumiller 1987, 1988; Quinn 2000; Kaiser & Miller 2003; Albiston & Sandefur 2013). Providing multiple avenues for help with disputes also allows potential claimants to avoid obstacles embedded in the organizational contexts in which they live (Edelman et al. 1993; Albiston 2005, 2010; Marshall 2005). Recent large-scale surveys of dispute resolution and claiming in the United Kingdom confirm that law offices are only one of many sources of help for individuals seeking advice about justiciable problems. Individuals turn to employers, insurance companies, financial institutions, and health-care providers for advice, and variation in the advisors chosen relates to the type of legal problems individuals confront (Pleasence et al. 2003).

Scholars of law and everyday life note that laws may also constitute social relations and identities even outside the context of trouble or conflict. For example, Engel & Munger (1996, 2003) found that their subjects came to understand their identities and their social relationships differently with the advent of laws prohibiting discrimination on the basis of disability. These laws also provided their employers with guidelines and benchmarks about proper treatment of workers with disabilities, prompting positive changes in their work environments without the need for

claiming or confrontation. Here, the metaphor can be extended to suggest those whose rights and identities are recognized by law benefit from sitting in the shade of the tree, even if they do not actively seek to pluck the fruit or flowers of its branches (see also Abrego 2008).

Very little research investigates outcomes in these informal, everyday life branches of the tree. More needs to be done to theorize and study these branches, perhaps comparing both fruit and flowers to those on the more formal legal channels. The lingering problem, however, is one of interpretation and theory, rather than empirical findings. Formal branches may produce flowers, in terms of acceptance of outcomes, perceptions of legitimacy (of the tree and the forest), and satisfaction with the outcome, but fruit smaller than that produced by more informal branches. By contrast, informal avenues may produce larger fruit but re-create inequalities that leave respondents dissatisfied with the distribution of the crop. Indeed, both fruit (substantive outcome) and flower (perceived fairness) are important products of the branch. Those primarily concerned with the overall health and sustainability of the forest (i.e., the legitimacy of the legal system) are likely to focus on the flowers, whereas those concerned with inequality in the distribution of resources will focus on the fruit.

Collective Action

A second limitation of the dispute pyramid metaphor is that it presumes an individual claim in search of individual remedy, effectively ignoring collective legal mobilization such as class actions or systemic claims and other nonlegal forms of collective claiming. This approach leaves off the table analysis of the ways in which the legal system, and more specifically litigation, provides access to the polity and policy-making function of the courts for groups otherwise excluded from the political process (Zemans 1983). In a common law system, even an individual case can have broad effects by setting a precedent that affects future cases (Zemans 1983). Burstein (1991) also argues that in the aggregate, individual antidiscrimination litigation is a social movement activity directed toward bringing about social change. He found a remarkable degree of success in these cases and noted that individuals who had institutional support from public interest groups or the government fared better. In his study of the equal pay movement, McCann (1994) found that litigation, even with mixed legal success, provides a social movement with extralegal benefits, such as increased participation, resources, media coverage, and leverage in negotiations. NeJaime (2011) argues that losing in litigation can push movements into alternative venues, such as legislative or political activism, that ultimately produce success, perhaps in part because of outrage over litigation losses. Thus, from a collective perspective, the primary fruit of legal mobilization may be legal benefits beyond dispute resolution, which the dispute pyramid's narrow focus on the outcome of the legal process tends to overlook.

Although much of the collective mobilization literature is relatively celebratory of the potential for collective gain, there are pitfalls as well. More work is needed about the circumstances under which collectively oriented litigation produces these wide-ranging social effects, as well as the factors inhibiting or encouraging collective legal mobilization. Rosenberg (1991) shows that even landmark litigation victories do not always have the immediate transformative effects they seem to promise, and litigation strategies may siphon resources from other strategies. Indeed, scholars have long cautioned about the ephemeral nature of litigation victories, especially when the details of implementation must be worked out (Scheingold 1974, Handler 1978, Tushnet 1984, McCann 1994). And litigation may have negative effects on social movements such as privileging the perspectives of elite activists, marginalizing more-radical claims and less-powerful participants, and subtly deradicalizing the movement from within despite legal victories (Ferree 2003, Levitsky 2006, Albiston 2011, Leachman 2014).

Researchers tend to study social movements that engage in litigation, but they seldom investigate why widely shared injustices fail to evoke collective action seeking legal redress. In a rare exception, Levitsky (2008) investigated the absence of a social movement among families financially and emotionally crushed by long-term-care obligations. She found that even caretakers sinking under the burden of long-term care believed, consistent with liberal individualism, that family was a private matter for which the state bore no responsibility. Her work suggests that cultural dynamics are a double-edged sword. On one hand, social movements can mobilize law informally to change ideas and beliefs, eventually resulting in cultural shifts. On the other hand, even with widespread discontent, a social movement may not arise if the social and legal culture defines certain problems as private and thus beyond the reach of the state. Once again, the social malleability of grievance, dispute, and remedy becomes central in these approaches.

CONCLUSION: FLOWERS, FRUIT, AND FOREST(S)

The dispute tree metaphor not only provides a more apt description of dispute resolution in society but also has the potential to reshape inquiry into the role of law in resolving conflict and reproducing social relations in society. To give a sense of what we view as the most promising and interesting possibilities for research within this new rubric, we return to some of the questions raised in our introduction. How has the shape of the dispute tree changed over time? Research on ADR suggests that the canopy is much broader than it was 30 years ago because new dispute resolution venues, or branches, have developed in courts, organizations, and communities. Some new branches, previously classified as lumping it, have been discovered and studied more closely.

More research is needed into the consequences of following different branches of the dispute tree. Which branches bear only flowers (symbolic remedies), which yield only fruit (material compensation without recognition), and which branches produce both or neither? Theoretically, we know the possible benefits and drawbacks of various avenues, but there is relatively little comparative research about the fruit- and/or flower-bearing features of these paths, especially outside of litigation. Research of this kind is challenging because selection effects confound comparisons about different routes to resolution, yet understanding these outcomes from a comparative perspective is vital to understanding the forest of dispute resolution. Along those lines, we wish to be careful to avoid comparing the nonlegal branches of the tree with an idealized version of the legal route up the tree; there are complex issues even when individuals follow the trunk of the tree straight to the top. Nevertheless, we know very little about how law, self-help, prayer, ADR, IDR, or even informal negotiations compare in terms of legitimacy, satisfaction, and outcomes. What seems universally clear, however, is that there are many more branches or paths than have been explored by research; that the branches are not mutually exclusive; and that access, even to some of the lower branches, remains a serious problem.

Which branches are easily accessible, with low-hanging fruit, and which branches are accessible only to those with ladders and cranes (significant resources)? Although lack of resources can be a barrier to access to justice, the relationship between socioeconomic status and claiming is complex. Research indicating that low-income households perceive fewer legal problems and are less likely to consult lawyers suggests that poverty can impair naming and blaming as much as it limits claiming, by lowering subjective expectations that law or lawyers have much to offer. Scholars also point out that institutions of representation, such as legal aid offices, actively shape perceptions to produce claiming patterns that do not necessarily reflect the underlying incidents of justiciable claims. When claimants do seek representation, however, lawyers as guides through the forest do seem to improve outcomes, though not in every type of claim.

Broadening the scope of inquiry, one might think of the public legal order as a public forest and ADR as a private forest. Although in theory available to all, the public forest (litigation) in fact has a very high entrance fee, and to enter, one must be accompanied by a trained professional at all times, willing to endure long delays, and willing to accept the resolution offered by a public official or specially designated group of private citizens. The private forest has a lower entrance fee and promises fewer delays as well as a greater opportunity to participate and possibly to work out one's own resolution. It may be, however, that the more foreboding public forest actually provides greater protection to weaker parties, whereas the private forest is a rather unregulated playground in which more powerful parties may exert greater pressure toward outcomes they favor. Also, as litigation and ADR become increasingly intertwined, it may be more appropriate to think of single trees as comprising both public and private branches. Some branches of the trees begin as ADR but merge into litigation branches, others began as paths toward litigation and branch off toward ADR, and still others separate and then become reintertwined much like a braided ficus.

Outcomes also remain important in terms of distributive fairness, particularly where some orchards are public and others are reserved for the more privileged few. A flowering tree that does not bear fruit may be beautiful, but it does not provide sustenance. The formal procedures of the legal branches may hide this reality by making disputants happy with the outcome, even when it is negative. Research suggests this phenomenon is not limited to formal legal procedures but also extends to other processes that track the appearance of procedural fairness. And outcomes must be considered in terms of not only individual access to fruit, but also the continued health and vitality of the forest. This requires measuring the effect of pruning and access not only on the individual level, but also on the institutional and societal levels as well.

Along these lines, it is important to consider broader environmental effects on the forest as a whole. Damage caps, the tort reform movement, mandatory arbitration, private courts for those who can afford them, and sovereign immunity, to name a few developments, constitute the modern enclosure movement of the dispute resolution forest. Yet when formal legal avenues become cordoned off, perhaps new branches will spring in their place, much as severely pruned roses produce abundantly in the spring, or espaliered trees, though not as high and thick at the top, sometimes yield more fruit. New trees of a different variety may also grow to replace trees stunted by these strategies. Collective rights mobilization could be a social movement strategy for generating new growth on stunted trees (e.g., sexual harassment doctrine), planting new trees in the forest (e.g., recognizing legal standing for environmental claims), and forcing fruit from a recalcitrant orchard. Cultivation, sunlight, and water remain necessary, however, to ensure the forest as a whole remains healthy.

Finally, one goal of this new metaphor is to encourage more inquiry into how and under what circumstances individuals engage with (dispute resolution) trees. We note with some concern that, subjectively, some individuals believe that the trees are not for them, and thus walk by without stopping. Others may avoid climbing a tree but nevertheless benefit from its shade, which represents subtle changes in social relations brought about by law and deterrence of lawbreaking more generally. More research about the systemic, or ecological, effects of the dispute tree forest is needed to put individual dispute resolution processes in social context. An expanded inquiry about the trees and forest of conflict resolution will reveal much broader social processes and patterns connected to resolution of trouble, conflict, and justiciable problems.

DISCLOSURE STATEMENT

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