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## The antecedents of disputes: complaining and claiming

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### Abstract

This paper focuses on the earliest stages of the problem resolution function of law and legal institutions: the emergence of grievances and their communication to a responsible party as complaints and claims. While the literature on this subject is broad, both in terms of methods and in terms of the fairly large number of countries where empirical research on this subject has been conducted, it seems appropriate to ask the question, what do we know and not know about this subject? This paper seeks to answer this question and to suggest fruitful avenues of future inquiry. I first discuss the primary metaphors used in the literature. Following that I describe the broad approaches that have been applied in empirical research regarding complaining and claiming. I then examine the explanations that have been advanced for variations in complaining and claiming patterns, both at the individual and the aggregate levels; in this section I identify points of general agreement and issues where agreement is lacking. Finally, I propose an agenda for future research related to complaining and claiming.

### Key words

Claiming; Complaining; Propensity to Sue; Litigiousness.

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## 1. Introduction

This paper focuses on the earliest stages of the problem resolution function of law and legal institutions: the emergence of grievances and their communication to a responsible party as complaints and claims. While the literature on this subject is broad, both in terms of methods and in terms of the fairly large number of countries where empirical research on this subject has been conducted, it seems appropriate to ask the question, what do we know and not know about this subject? This paper seeks to answer this question and to suggest fruitful avenues of future inquiry. I proceed as follows. In the next fairly brief section I discuss the primary metaphors used in the literature. Following that I describe the broad approaches that have been applied in empirical research regarding complaining and claiming. I then examine the explanations that have been advanced for variations in complaining and claiming patterns, both at the individual and the aggregate levels; in this section I will identify points of general agreement and issues where agreement is lacking. Finally, I propose an agenda for future research related to complaining and claiming.

## 2. Primary Models and Metaphors

Contemporary research related to complaining and claiming grew, in significant part, out of an interest in understanding the “propensity to sue.” While this term implies a focus on lawsuits in courts, its early use, and my use of the term in this paper, refers more broadly to the use of formal mechanisms of adjudication regardless of whether or not the venue is labeled a “court.” Most of the mechanisms are parts of the state apparatus: courts, commissions, tribunals, administrative bodies, but they can be privatized if the parties have contractually agreed to rely upon, and be bound by, a private system of adjudication such as arbitration. For simplicity in the discussion that follows, I refer to all cases that have been formally initiated under the auspices of an adjudicatory body as a “lawsuit” even that in actual practice that term is normally reserved for cases in bodies labeled “courts.”

A lawsuit does not simply spring into being. It develops. In my own work, I have referred to the “developmental theory of litigation” which describes the emergence of lawsuits as a series of stages, barriers, and transitions across the barriers (Kritzer 1991, pp. 401-02). This framework builds on the well-known work of Felstiner et al. (1980-81, see also Vidmar 1981, pp. 408-13) which described the emergence of disputes as involving a process of “naming, blaming, and claiming.” Disputes come into being through a process whereby first there is some “injurious experience” which is recognized by the injured party or her agent (“naming”) thus becoming a “perceived injurious experience” (a PIE); an unrecognized injury is an “unperceived injurious experience” (an “unPIE”). In the developmental theory framework, the movement from an unPIE to a PIE involves crossing the “recognition barrier.” The injured party then must attribute responsibility to another party (“blaming”) which involves crossing the “attribution barrier.” Once responsibility has been externalized and a potentially responsible party identified, the injured party may either choose to “lump it” (i.e., do nothing—see Felstiner 1974) or approach the other party either directly or through an agent, and communicate a complaint and/or a claim (“claiming” or crossing the “confrontation barrier”). While this is as far as one needs to go for purposes of this paper, one can go on to describe additional steps: a dispute emerges if the claim/complaint is not immediately satisfied at which point the grievant can abandoned the claim (lump it), seek to resolve the claim bilaterally (including mediated negotiation), or invoke some adjudicatory mechanism.

Actual litigation occurs only when efforts to resolve problems prior to initiating formal action fail, although in some situations a grievant may commence litigation before making any attempt to resolve the matter. However, except in situations

where the grievance arises in response to a formal institutional decision (e.g., a decision regarding eligibility for government benefits), understanding the propensity to sue must start with an understanding of the decision to seek redress of a grievance (i.e., the decision to complain or claim). Hence, the “propensity to sue” is best understood in terms of the propensity to claim.

The framework above is a model and hence an abstraction from a more complex reality. The attribution of blame may be more or less automatic in some situations and a claim or complaint may be implied by events rather than needing to be explicitly communicated. An injured party may seek a range of assistance, both in terms of assessing whether someone else is to blame and in asserting a claim or complaint. For example, Lloyd-Bostock (1984) points out that blaming may be a consequence of a decision to seek compensation rather than an antecedent. A similar issue arises in connection with assistance seeking (Genn 1999, pp. 67-103), including whether the injured party employs an agent, usually in the form of a legal professional (Kritzer 2008, 2010). One early analysis (Miller and Sarat 1980-81) treated seeking legal representation as a step in the process that came *after* a dispute had been established (i.e., blame had been externalized and a claim had been made but not accepted); in practice, legal representation can enter the picture at any of the stages of the process after an injurious experience has been perceived. A third complication is the distinction between a complaint and a claim. Strictly speaking, there is a difference because one can make a complaint without actually requesting any type of redress (i.e., without making a claim). However, in the context of the types of problems that may lead to legal redress, it is probably appropriate to treat complaints as implicit claims (see Kritzer *et al.* 1991b). **Hence in the discussion that follows, I will generally refer to both complaints and claims simply as claims.**

The metaphor that has been commonly used in analyses of the emergence of litigation is that of the “dispute pyramid” (Engel and Steele 1979, pp. 300, 317-18, Miller and Sarat 1980-81, pp. 544-546).<sup>1</sup> The base of the pyramid consists of all injurious experiences; the next level is perceived injurious experiences, then grievances, then disputes, then litigation, and then appeals. In some presentations, assistance-seeking such as consulting or hiring a lawyer appears as one level in the pyramid. In practical terms, actual representations of dispute pyramids start with either perceived injurious experiences or with grievances, either of which may be referred to as “problems.” As I will discuss below, one of the central findings of the research on claiming is that the shape of the dispute pyramid varies by type of problem. Figure 1 provides an example of several dispute pyramids from a recent study done in Japan (Murayama 2007).

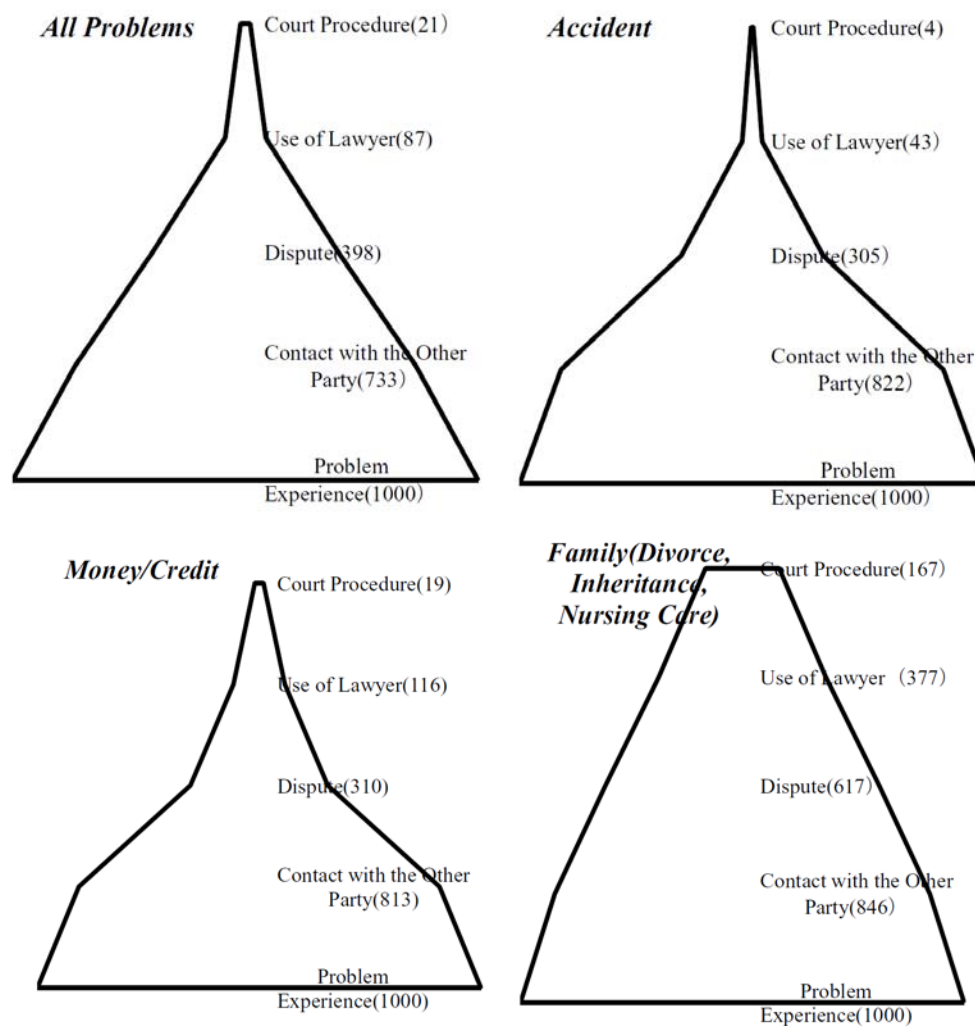
Empirical research on claiming behavior tends to focus on one of two broad questions. First, what is the shape of the dispute pyramid? That is,

- What is the frequency of (perceived) problems?
- What is the probability of a problem becoming a grievance?
- What is the probability of a claim being made?
- What is the probability that a claim becomes a dispute?
- What is the probability that a dispute leads to formal legal action?
- What is the probability that legal action moves to an appeal?

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<sup>1</sup> Almost certainly the pyramid metaphor originated prior to 1979. Hart and Sacks refer to the “Great Pyramid of Legal Order” in “The Legal Process” (1994, pp. 286-287) which, while not published until 1994, circulated in manuscript starting by 1958. According to one source, “Hart and Sacks were already working on the Legal Process course materials by 1954” (Feldman 2000, p. 241n96).

FIGURE 1: Examples of Dispute Pyramids



Source: Murayama (2007, p. 30).

Central to these analyses is how dispute pyramids vary by type of problem and by country (or possibly subregions of countries).

The second major question one finds in the literature on claiming (and propensity to sue more broadly) is what variables explain variations in claiming behavior at the individual and/or aggregate level? Typically the analyses focus specifically on the issue of claiming assuming that blaming has occurred. Little empirical research has been done on attribution of blame. As will be discussed in a later section, analyses have considered individual as well as institutional factors that might explain variations in claiming behavior.

### 3. Research Traditions and Methodologies

Studies of claiming behavior evolved out of two closely related research themes: access to justice and legal needs. The former focused on whether individuals were able to obtain redress for their legal problems and the latter focused on whether individuals were able to obtain expert legal assistance to deal with legal issues they experienced.

There are a variety of ways that researchers have approached the broad question of claiming behavior, although not all were framed in terms of the issue of initiating formal legal action.

### 3.1. Types of Studies

#### 3.1.1. Legal Needs

An early line of studies, one that continues today, focuses on “legal needs”; that is, what types of legal issues do citizens encounter, and do they get the legal assistance that they need to deal with those problems? The surveys that are the basis of most legal needs studies ask questions about a range of legal issues many of which involve transactional issues such real estate purchase or sale, drafting a contract, adoption of a child, establishing a guardianship, preparing a will, or succession (inheritance) after the death of a family member. However, many of the problems asked about in the surveys are contentious, and hence may get into questions about how individuals dealt with such problems beyond the simple question of whether or not they were able to obtain legal assistance.

While legal needs may go unmet regardless of financial resources, a central focus of studies of legal needs is the relationship between income and whether a lawyer was used. With only a few exceptions (e.g., Curran 1977, and possibly Mayhew and Reiss 1969),<sup>2</sup> these studies have limited the income range of the subjects (usually survey respondents) included in the study (Abel-Smith *et al.* 1973 {England}, Cass and Sackville 1975 {Australia}, Schuyt *et al.* 1976 {the Netherlands}, American Bar Association 1994 {the U.S.}, Coumarelos *et al.* 2006 {Australia}).<sup>3</sup> Some of the studies (e.g., American Bar Association 1994, Currie 2006) consider how low and moderate income respondents differ in their response to legal needs. However, those analyses also tend to lump all problems together rather than looking separately at different types of problems, an analytic issue that turns out to be very important.

#### 3.1.2. Dispute Processing

There have been three studies (Miller and Sarat 1980-81, FitzGerald 1983, Bogart and Vidmar 1990) that had a specific focus dispute processing, all explicitly building on the dispute pyramid metaphor. Using survey methods, these studies asked about a range of types of problems, and showed how patterns in dispute development differed by type of problem. All three studies defined as their purview “middle range disputes” which were defined as involving some minimum level monetary stakes (e.g., at least \$1,000) or some other type of significant problem. Two of the studies included multivariate analyses of claiming behavior with predictor variables including problem type, demographics (including income), prior legal experience, and type of opposing party. Some of the key findings from these studies will be discussed below.

In addition to these general studies there have been a variety of more focused studies examining how people deal with specific kinds of problems. One area that has received a lot of attention is consumer problems, both by legal scholars and by researchers interested in consumer behavior more generally (Warland *et al.* 1975, Best and R.Andreasenn 1977, Day and Hunt 1978, Best 1981, Ladinsky and Susmilch 1985, Office of Fair Trading 1986, Vidmar 1988); in fact for those working in the latter tradition there is a specialized journal, *Journal of Consumer Satisfaction, Dissatisfaction & Complaining Behavior*, published now on an annual basis.<sup>4</sup> Two related areas that have received significant attention from scholars are discrimination (Bumiller 1987, Bumiller 1988, Kritzer *et al.* 1991b, Hirsh and Kornrich 2008) and sexual harassment (Quinn 2000, Marshall 2003, Marshall 2005,

<sup>2</sup> See Curran (1977, pp. 1-9) for a review of early legal needs survey, the first of which (Clark and Corstvet 1938) was carried out in the 1930s, although the issue of the legal needs of the poor was discussed in earlier writings (see Wood 1916, Smith 1919).

<sup>3</sup> In the period since 1990 there have been a number of state-level legal needs studies in the United States (see Kritzer 2008, pp 905-06, for a list). all of which have limited their samples to low and moderate income individuals or households.

<sup>4</sup> In is important to note that the very extensive literature on consumer complaining is motivated by an interest in marketing rather than legal process.

Blackstone *et al.* 2009). One other area where there has been at least one study looking at the decisions of grievants to seek redress is medical negligence (May and Stengel 1990).<sup>5</sup>

### 3.1.3. Litigation Rates

Probably the most widely used approach to assessing claiming patterns is to examine litigation rates (number of cases per some unit of population). There have been longitudinal studies at both national and subnational levels (Grossman and Sarat 1975, McIntosh 1980-81, Daniels 1982, Daniels 1984, Daniels 1985, McIntosh 1989, Van Loon and Langerwerf 1990, Wollschläger 1990, Wollschläger 1997), cross-national studies (Galanter 1983, Blankenburg 1992, Blankenburg 1998, Wollschläger 1998), and at least in the United States studies comparing subnational units (Grossman *et al.* 1982, Yates *et al.* 2001, Jacobi 2009, Yates *et al.* 2010). Some of the studies are purely description, documenting differences and trends in litigation rates (i.e., patterns of secular increase, cyclical patterns, etc.). Other studies have taken a more analytic approach, examining the relationship between patterns in litigation rates and economic, political, and/or social variables.

Litigation rates are at best indirect indicators of claiming because, using the dispute pyramid metaphor, the invocation of formal legal proceedings is higher up in the pyramid than is claiming. The relationship between claiming rates and litigation rates varies depending on the type of problem and a wide variety of institutional and other contextual variables. Nonetheless, in policy debates litigation patterns and claiming patterns frequently get confused, with the former being treated as if it were the latter.

A key problem that arises in such studies, particularly those that compare jurisdictions, is the definition of what should and should not be included, which can make a large difference in how jurisdictions look when compared. For example, if one defines the relevant court as “general jurisdiction courts” in the United States (omitting limited jurisdiction courts—those that handle only matters below some specific dollar threshold), one might observe large differences among states simply as an artifact of where the line is drawn between limited and general jurisdiction courts; in one state limited jurisdiction courts may hear cases up to \$10,000 while in another the limit may be \$25,000, and in yet another there be no limited jurisdiction courts so that general jurisdiction courts handle even the smallest cases. Similar problems can crop up with longitudinal comparisons, arising both as a result of inflation and as a result of jurisdictional changes made to adjust for inflation. Cross-national comparisons can be even more problematic because of differing definitions of what goes to “court” as opposed to other kinds of adjudicatory bodies; a good example is found in Wollschläger’s (1998) crossnational comparison in which Germany emerges as the most litigious by a substantial margin. The high litigation rate for Germany may simply reflect that Wollschläger included labor courts when he calculated the rate for Germany while in the other countries the kinds of matters dealt with by German labor courts go to some sort of administrative tribunal and hence did not get counted in those countries’ litigation rates. Alternatively, there may be significantly higher litigation rates in Germany (even controlling for what is and is not counted) due to the prevalence of legal expense insurance (see Kilian 2003; Blankenberg 1994, 1998).

Another issue that can arise concerns the quality of the institutional data that are the basis for litigation rate studies. Particularly when data flow into a central aggregating authority there can be major issues of data quality. Moreover, data collection systems change over time as technologies change, and those systems can affect the information collected. For cross national studies (or cross state studies in the U.S. and other federal systems), the quality of data collection

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<sup>5</sup> In unpublished work, Tom Durkin (1991) examined these questions in the context of asbestos related disease.

systems may vary from one place to another to a degree that comparisons are problematic.

#### 3.1.4. Compensation Studies

There have been at least three contemporary studies (Royal Commission on Civil Liability and Compensation for Personal Injury 1978, Harris *et al.* 1984, Hensler *et al.* 1991)<sup>6</sup> that were designed specifically to examine whether and how persons suffering physical injuries (including certain types of illness) obtained compensation for their expenses and lost income due to those injuries.<sup>7</sup> The injuries involved in these studies, located by survey methods, may have occurred in the home, at work, on the road, or on someone else's property. While most of the injuries examined did not involve events where a blameworthy third-party bore legal liability, all of the studies did include analyses of what injured persons did when someone else was potentially liable for the injury. A central focus (and finding) was that people behaved differently depending on whether the injury occurred in a road accident, at or in connection with work, or in the home, with claiming most likely in connection with a road traffic accident, and least likely if the injury occurred in the home.<sup>8</sup>

#### 3.1.5. Justiciable Problem Studies

Hazel Genn (1999) developed an approach that is something of a cross between the legal needs study and the dispute study that she labeled the study of "nontrivial justiciable problems." A justiciable problem arises from a "justiciable event" which is defined as a matter "which raised legal issues, whether or not it was recognised by the respondent as being 'legal' and whether or not any action taken by the respondent to deal with the event involved the use of any part of the civil justice system" (p. 12). An event is deemed trivial if it a respondent reports taking no action whatsoever *because* the problem was not regarded as important enough to take any action; certain types of problems may be deemed nontrivial regardless of what the respondent did in response to the problem (e.g., divorce, or being threatened with or subject to legal proceedings). Justiciable problem studies go beyond dispute studies because they are not focused on locating disputes and the stop short of legal needs studies because they omit transactional needs such as real estate sale or purchase, adoption, or drawing up a will. Studies based on the justiciable problem approach have been carried out in a variety of countries including England (Pleasence *et al.* 2003, Pleasence *et al.* 2004b, Pleasence *et al.* 2006), Scotland (Genn and Paterson 2001), Canada (Currie 2006, Currie 2009, Currie 2010), the Netherlands (van Velthoven and ter Voert 2004), Hong Kong (Hong Kong Department of Justice 2008), Bulgaria (Gramatikov 2008), and Slovakia (see Hadfield 2010, pp. 136-37).<sup>9</sup> The Japanese dispute study, carried out by a team of researchers led by Masayuki Murayama (see Murayama 2007<sup>10</sup>),

<sup>6</sup> See Kritzer (1991) for an analysis that explicitly compares results using these three studies.

<sup>7</sup> The Royal Commission had as its goal to assess the working of the tort system and consider alternatives. However, as part of its work, the Commission had a survey conducted that spoke more broadly to compensation issues, and collected data on whether injured persons attributed blame to someone else and whether they sought compensation from that other party.

<sup>8</sup> In addition to the general compensation studies, there have been specialized studies examining compensation in specific areas, particularly auto accidents. Such studies have been done in the US (Committee to Study Compensation for Automobile Accidents 1932, Connard *et al.* 1964, Meyer 1968, Rolph *et al.* 1983), the Netherlands (Bloembergen and van Wersch 1973), and Japan (Tanase 1990). Such studies have also been done focused on medical negligence in the US (Danzon 1984, Weiler *et al.* 1992, McMahon *et al.* 1994) and England (Genn 1995).

<sup>9</sup> Prior to Genn's work there were a number of studies that could be described as justiciable problem studies in that they examined how various kinds of grievances were dealt with. Areas covered by this research include auto accidents (Hunting and Neuwirth 1962), medical negligence (May and Stengel 1990, Sloan and Hsieh 1995), and consumer problems (Best 1981, Vidmar 1988).

<sup>10</sup> Murayama and his colleagues published a three volume report of the research in Japanese in 2010; the translated title of the set is *Civil Justice and Dispute Resolution in Contemporary Japan*. Volume 1 focuses on "Legal Attitudes and Disputing Behavior"; Volume 2 focuses on Trouble Experience and Advice Seeking Behavior"; and Volume 3 focuses on "Litigation Experience and Litigation Behavior."



combined elements of the justiciable problems approach with elements of the older dispute processing approach.

### 3.1.6. Community Studies

A final approach, which overlaps into methodologies, is the community study. These studies, which grew out of anthropological research on dispute handling in African and other less developed settings (Gluckman 1955, Hoebel 1961, Nader 1969, Nader and Todd 1978), involved intensive interaction with a specific community, whether defined geographically (Engel 1980, Engel 1983, Engel 1984, Yngvesson 1988, Yngvesson 1993) or in some other way (e.g., a church community, Greenhouse 1982, Greenhouse 1986). A general thrust of the analyses was that, in contrast to the image of the "litigious American," community members were reluctant to pursue legal remedies for many types of legal problems, viewing such actions as reflecting their own inability to deal with misfortune; this was particularly true for injuries suffered in accidents, even if the accident was someone else's fault (for a synthesis of three of the studies, see Greenhouse *et al.* 1994). One exception was contract problems where the expectation that people would abide by their explicit commitments allowed those who felt that a commitment had been breached to turn to legal means for redress (Engel 1984).

### 3.2. Research Methodologies

While I alluded to research methodologies in discussing the broad approaches to studying claiming and complaining, it is important to list and explicate those methods: structured surveys, institutional records, ethnography, and semi-structured individual and group interviews (focus groups).

The most widely applied method is random population surveys, sometimes restricted to a particular segment of the population (e.g., those below some income threshold) or stratified to insure that certain groups are sufficiently represented to permit valid statistical analyses. These surveys sometimes involve a two step process: first a large scale screening survey to locate respondents with the types of problems of interest (defined by seriousness, timing, particular kind, etc.) which is then followed by a more detailed interview focusing on one or more of the problems identified in the screening survey. In some cases the two stages are combined into a single interview with some procedure whereby the interviewer selects specific problems for detailed, follow-up questions. While most surveys have been done in-person or over the telephone, at least one recent study (from the Netherlands) has relied on a survey conducted via the internet.

Institutional records are the basis of litigation rate studies. Usually those records have been compiled into statistical reports by some administrative office. As noted above, the quality of institutional records and associated reports may be highly variable and categories used for summaries may be inconsistent across institutions and/or over time. Institutional records are also used in some studies to identify persons who experienced particular kinds of problems in order that these persons can then be interviewed about their experience and decision-making process; one problem with this is that all of those who sought redress through the institution have claimed. Even when institutional records are used for something other than litigation rate studies, they typically involve situations where someone has initiated a claim or filed a complaint (e.g., insurance closed claim records). One unique way that institutional records have been used is in the medical negligence arena, where hospital records have been used to identify patients who experienced a compensable injury that occurred in the course of medical treatment; researchers then seek to determine whether those who were injured made claims.

The community studies described above all relied upon ethnographic methods. In these studies the researcher spent substantial time in the community being studied engaging in a combination of observation and ethnographic interviewing. In some

cases the researchers also looked at court records to document patterns in court use. However, the primary data gathered for analysis were in the form of detailed field notes and perhaps transcripts of some interviews.

The last method, semi-structured interviewing was not explicit in any of the broad approaches described above. However, such methods have been used either in combination with either surveys or ethnography or on a stand-alone basis. When used in combination with surveys, semi-structured interviews are an invaluable method to “get behind” the patterns revealed in the survey data (as an example, see Bumiller 1988).<sup>11</sup> Semi-structured interviews can also be used on their own if one can identify a sample of potential respondents who have experienced a specific type of problem to explore how the respondents dealt with the problem including whether or not they claimed or complained (as an example, see May and Stengel 1990, Marshall 2005). Semi-structured interviews may include as part of the interview some structured questions that facilitate certain types of comparisons (see Ewick and Silbey 1998)

#### 4. Explaining Variations in Claiming Behavior

##### 4.1. *The Incidence of Grievances*

A first question one might want to ask about the incidence of grievances that could lead to claims is how that incidence might vary across countries.<sup>12</sup> These comparisons are difficult to make given that specific study designs tend to vary in terms of (1) the time frame respondents are asked about (ranging from one to five years), (2) whether questions are asked about the individual or the household, (3) the list of specific problems asked about, and (4) the seriousness threshold used for inclusion. Occasional studies do undertake such comparisons. For example, using the dispute processing approach, Fitzgerald (1983, pp. 24-26) compared the incidence of grievances in Australia and the United States circa 1980, finding that Australians tended to be more likely to report tort, consumer and government-related grievances than were residents of the United States with the reverse for discrimination problems (there were essentially no differences for property, landlord, or post-divorce problems). Genn and Paterson (2001, pp. 83-84) provide a comparison of England and Scotland, finding that respondents to the Scottish screening survey reported fewer experiences of each problem type than did the respondents in England and Wales; they authors are unsure whether the difference reflects the frequency of actual problems or differences due to reporting patterns attributable to what I would label cultural norms

One theme in the legal needs studies and the later justiciable problems studies is how the incidence of problems varies by demographic factors. Curran (1977, pp. 99-134) provides an extensive analysis along these lines showing that the number of legal needs (not all of which are contentious) varies by age, income, gender, and race. She finds that the overall frequency of problems has a curvilinear relationship with age, peaking for those in the 35-55 age groups;<sup>13</sup> this is not surprising given that those in this age range will be dealing with children, home ownership, and other issues more than those both older and younger. She finds that the number of problems tends to increase with income, although it is not clear whether this is true

<sup>11</sup> Semi-structured interviews are also used for exploratory purposes at the beginning of a project. For survey studies, such interviews are often employed as part of the process of developing the survey instrument. Genn has spoken of the “quant sandwich” by which she means first using semi-structured interviews to develop the survey instrument, then doing the survey and preliminary analyses of the survey data, and then doing semi-structured interviews to understand better what those analyses mean (see Halliday and Schmidt 2009, p. 231).

<sup>12</sup> If one modifies the dispute pyramid so that the base is the household or individual and the next level grievance (i.e., builds into the pyramid the *question* of the frequency of disputes), the pyramid is transformed into a pagoda (see Michelson 2007).

<sup>13</sup> This curvilinear relationship with age is a pattern reported in other studies (see, for example, Pleasence *et al.* 2004a).

if the focus was limited to contentious matters (i.e., excluded transactional issues such as writing wills, buying and selling property, and the like, all of which tend to be more likely as income rises). Curran also provides a series of separate analyses for broad problem types (real property, employment, consumer matters, marital matters, torts, government issues, etc.). Generally, after controlling for problem type, Curran found mostly very modest relationships between experiencing specific problems and demographic factors; perhaps surprisingly, this was even true for "infringement of constitutional rights" (pp. 120-122).

The first of the studies done in the dispute processing tradition (Miller and Sarat 1980-81, pp. 547-51) also examined the relationship between various demographic factors (income, education, age, gender, ethnicity, family size) as well as specific risk factors (home ownership and the like) and prior use of a lawyer. Their conclusion was that "[o]verall, the independent variables do not account for much of the variation in grievance experiences." They did find that certain specific factors did correlate with specific types of grievances (race vis-à-vis discrimination, home ownership vis-à-vis property problems), but even these relationships were not particularly strong.

In her study of justiciable problems in England, Genn compares key demographic characteristics of those who experienced various types of problems to the demographic characteristics of the population as a whole (1999, pp. 59-65). She does find some differences. For example, the income distribution of those reporting consumer problems was more heavily weighted toward higher incomes than was true of the overall population (i.e., the likelihood of significant consumer problems went up as income went up); similarly, those with consumer problems were more likely to be home owners and more likely to have higher educational qualifications. She reports various differences for other types of problems. However, none of the differences she describes suggests that there are strong relationships between demographic variables and experiencing problems, and many of the differences she describes seem quite logical; it is not surprising that those with higher incomes experience more significant consumer problems because their incomes allow them to make more significant purchases of consumer goods, which in turn increases their exposure to potential problems with major consumer purchases.

Michelson (2007) conducted a survey in several areas of rural China (six provinces), and examined what factors might account for grievance experience. He found that grievances were most prevalent in economically distressed areas. He also found that families that had strong social connections to local government officials were less likely to experience grievances (and more likely to mobilize the official justice system when they did have grievances).

Perhaps the most interesting finding with regard to the incidence of problems is what Genn (1999, pp. 31-36; see also Genn and Paterson 2001, pp. 44-48) describes as problem "clusters." By this she means that certain types of problems often cluster in the sense that if a person or household experiences one type of problem in the cluster they are more likely to experience others. A simple example would be that someone experiencing a significant injury might be unable to work which in turn creates money problems and possibly puts significant pressure on family relationships. Drawing on data collected from households surveyed as part of the Legal Services Research Centre's Periodic Survey of Justiciable Problems (a study series modeled after Genn's 1999 study), Pleasence *et al.* (2004a) did a hierarchical cluster analysis of over 4,000 problems, classified into 21 problem types, reported by survey participants. They found that 17 percent had experienced two or more problems (something under half of those who experienced at least one problem). The analysis identified distinct clusters of problems around family issues, homelessness (which includes problems with the police), medical negligence combined with mental health problems, and a core cluster involving consumer

issues, money and debt, employment, and neighbors.<sup>14</sup> Of those with multiple problems, 73 percent fell within one or more of the problem clusters with the remainder experiencing a “random set of problems”. Pleasence et al. then identified respondents who experienced each cluster, and performed multivariate analyses to see what factors were associated with the clusters. This analysis revealed that older respondents (over 60) were less likely to have problems in the family cluster, economically “inactive” respondents were more likely to have problems associated with homelessness, and those with long-term illness or disability had were more likely to have problems in the medical negligence/mental illness cluster. Thus, in the words of Pleasence et al, “justiciable problems do not necessarily occur in isolation.”<sup>15</sup>

#### 4.2. *Why People Say They Don't Claim or Complain*

Overall, those who have problems are quite likely to voice claims and/or take action in some way:

- Curran (1977, p. 136) reports that for 16 of 22 broad problem types, 80 percent or more of those encountering the problem took some action to solve it, and only for eviction and job discrimination did fewer than 50 percent report taking action.
- Miller and Sarat (1980-81, p. 551) observe that “most, but by no means all, grievances result in a claim for redress.”
- Genn (1999, p. 69) reports that “only a very small proportion failed to take any kind of action to deal with their justiciable problems (one in twenty).”<sup>16</sup>

Before turning to the statistical analyses of claiming behavior in the following section, one might ask how the respondents themselves explained why they did not claim or complain. Many of the studies asked open-ended questions along the lines of “why did you not complain?” (the exact form of the question varies from study to study), and then grouped or coded the responses along a set of themes (see Harris *et al.* 1984, pp. 70-76, Bumiller 1987, pp. 425-26, Vidmar 1988, pp. 780-82, Bogart and Vidmar 1990, p. 30, Hensler *et al.* 1991, pp. 169-70, American Bar Association 1994, p. 25 (low income), 46 (moderate income), Genn 1999, pp. 106-35, Currie 2010, pp. 56-57). Common responses to this question include:

- The respondent did not feel that taking action would make any difference. (“nothing could be done”)
- The respondent did not want the hassle of dealing with the problem.
- The respondent had removed him or herself from the context where the problem occurred (i.e., left the job, moved, changed service providers, etc.)
- The problem had sorted itself out in some way
- Reluctance to disrupt valued relationships (e.g., with a neighbour)
- Costs of obtaining necessary legal assistance
- Fear of potential negative consequences of complaining
- Did know whom to complain to

Vidmar (1988, see also, Kritzer *et al.* 1991b, pp. 885-86) relates the decisions not to complain in part to ideas that Hirschman (1970) labeled “exit, voice, and loyalty”; some of the above explanations relate to the ability to exit and some to what might be labeled loyalty (e.g., to friends and neighbors). It is likely that the

<sup>14</sup> Currie (2010, pp. 42-55) reports very similar patterns for Canada.

<sup>15</sup> Further exploration of the cluster phenomenon can be found in Buck et al. (2004), Buck et al. (2005), Balmer et al. (2006), Pleasence and Balmer (2007), and Pleasence et al. (2008)

<sup>16</sup> Genn is referring only to problems deemed to be “nontrivial.” A problem was deemed trivial if no action was taken because the respondent did not feel the problem was “important enough to warrant action” or when respondents reported that “they were not in dispute or believed the others side was right” (Genn 1999, p. 36).

distribution of these explanations varies by problem type (some of the studies provide at least some indication of this), but the analyses tend to be too brief to allow strong conclusions on this point regarding such variation or the basis of the respondents' explanations for inaction.

### 4.3. Factors Influencing Claiming

#### 4.3.1. Contextual Characteristics—Type of Problem

I now turn to the question of what factors best account for decisions to seek redress of legal problems. Across a range of studies applying various survey approaches and undertaken in a variety of different countries there is a consistent finding that the single most important factor accounting for whether citizens seek redress for their legal problems is type of problem:<sup>17</sup>

- “The results of the multivariate analysis confirm that problem type tends to swamp other considerations ...” (Genn 1999, p. 141).
- “The extent to which persons consulted lawyers about their problems or sought alternative sources of advice or help varied widely by the type of problem involved” (Curran 1977, p. 138; see particularly Curran’s Figure 4.29, p. 143).
- “Levels of claiming vary substantially with the type of problem” (Bogart and Vidmar 1990, p. 48).
- “The [results] indicate very strongly that by far the most powerful explanatory factor for the various aspects of disputing behavior is the actual type of grievance involved (e.g., tort, consumer, post-divorce)” (Fitzgerald 1983, p. 39).

Importantly, there are striking similarities in cross national patterns by problem type. Fitzgerald (1983, p. 39) compared the rate of claiming for the United States and Australia (Victoria State) for seven types of problems; only for discrimination problems was there a sharp difference, and for four of the problem types there was little difference at all.

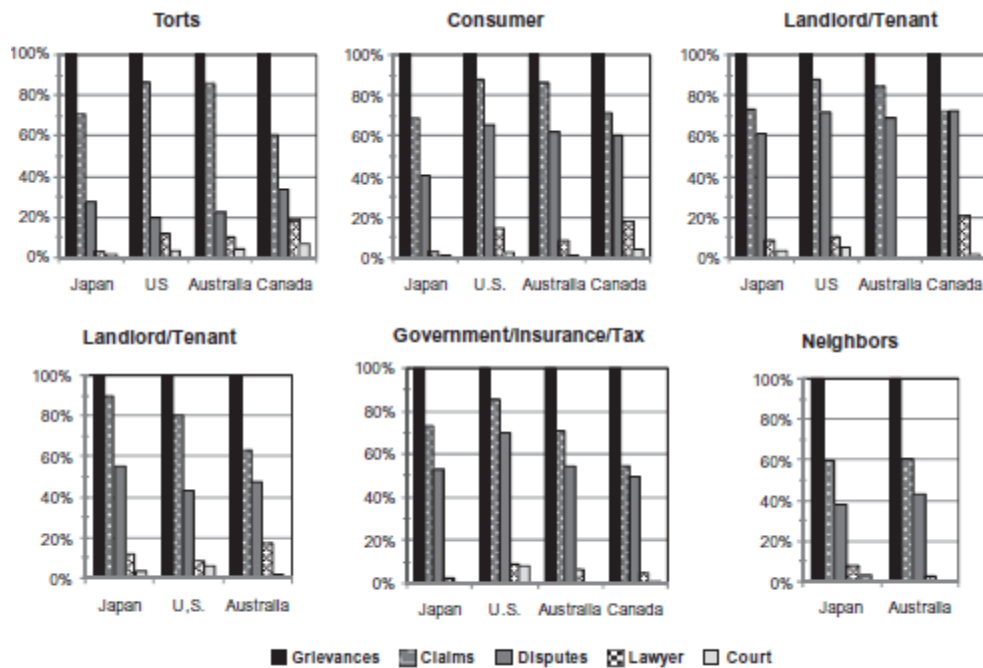
Figure 2 shows a comparison of disputing behavior for six problem types for the United States (Miller and Sarat 1980-81), Canada (Bogart and Vidmar 1990), Australia (FitzGerald 1983), and Japan (Murayama 2007). With some exceptions, the most striking aspect of the figure is the cross-national similarity when one looks within problem type.

Most of the studies of claiming behavior group problems into broad categories such as those shown in Figure 2. The significance of problem type as a predictor of the response to the problem is shown to be even stronger by studies that broke down the problem types further and examined differences in behavior for the subtypes.<sup>18</sup> These studies show that within broad problem types, the problem *subtype* is the major predictor of claiming behavior. For example, in looking at injury problems, the distinction among road traffic accidents, workplace accidents, and other accidents is by far the best predictor of claiming behavior (Kritzer *et al.* 1991a, see also Sabry 2004), and looking at discrimination problems, the best predictor is the

<sup>17</sup> Miller and Sarat (1980-81, p. 561) observe that “with the exception of discrimination and tort problems, claiming and disputing rates are relatively similar among different types of problems.” Nonetheless, their statistical analysis of claiming behavior shows that demographic and resource variables reduce predictive error vis-à-vis claiming behavior by only 2.5 percent while adding in problem type increases this to 24 percent.

<sup>18</sup> Some studies have examined other characteristics of the problems, such as the amount at stake and the nature of the opposing party (i.e., individual vs. organization), and found that they have some association with disputing behavior (see FitzGerald 1983, p. 39).

FIGURE 2: Responses to Legal Problems in Four Countries



NOTE: A dispute exists when a person with a grievance asserts a claim (a request for redress) and that claim is not immediately satisfied. For sources, see discussion in text.

Source: Kritzer (2008, p. 879).

context in which the discrimination took place—job, education, or housing (Kritzer *et al.* 1991b).<sup>19</sup>

What accounts for the variation across problem types and the relative similarity within problem types cross-nationally? In their study of using lawyers, Mayhew and Reiss (1969, p. 312) speak in terms of “the social organization of the institutional arena subject to legal regulation.” While they relate this to the nature of legal practice (not surprising since they specifically focus on contacting lawyers in connection with legal problems), the broader implication is there is something fundamental about the nature of different problem areas. Perhaps the best way to think about this is to recognize that a dispute is fundamentally a social relationship, and that social relationships take on different characteristics depending on the context in which the relationship is formed, what value is placed on the relationship, whether the relationship is pre-existing, and whether one or more parties to the relationship desire to continue it.

Perhaps the best evidence in support of the role of the social context of the disputing relationship is the analyses of problem subtype discussed above. It is clearest in the analysis of discrimination problems that compares claiming behavior in the US, Canada, and Australia. For all three countries, claiming is least likely in issues of housing discrimination (i.e., discrimination in the rental or sale of housing), the area where exit (i.e., to go elsewhere) is easiest and there is no existing relationship to maintain. It is most likely for education discrimination. Discrimination related to employment falls in between. For Canada and Australia, employment-related discrimination is further broken down into being denied or losing a job, conditions of employment (including salary), and other types of employment discrimination. Claiming is most likely when the issue is salary or

<sup>19</sup> An unpublished analysis that examined consumer problems as a subtype found that the best predictor was whether the problem was a major purchase, a nonprofessional service, or a professional service (see Kritzer *et al.* 1991c [available at <https://netfiles.umn.edu/users/kritzer/www/research/MPSA-1991.pdf>]).

conditions of employment, and considerably less likely for other types of employment-related discrimination.<sup>20</sup>

One caveat worth noting here is that within a given type problem, all grievances are not created equal. That is, from the potential claimant's perspective some grievances may be more important than others. One simple example of this deals with the significance of the injury in a tort-type case. Hensler et al. (1991, pp. 165-66) report that "[t]hose who feel their injury was extremely serious are ... six times as likely to take some injury, as those who feel their injury was not at all serious. Those who feel their injury had a very important effect on their household are [also] six times as likely to take some action, as those who say the injury had little or no effect on their household." In an earlier article I report a study that found that the only factor other than problem type that had a substantial impact on employing a lawyer in connection with a legal problem was the amount at stake (see Kritzer 2008, pp. 898-900).

#### 4.3.2. Individual Characteristics

Whenever one focuses on the behavior of individuals the question of the impact of individual characteristics inevitably arises. These individual characteristics can include various demographic characteristics (income, education, age, race, gender),<sup>21</sup> prior experiences and other kinds of resources (e.g., personal contacts), and psychological factors (broadly defined to include personality and attitudinal measures). The research on claiming behavior has extensively explored the relationships of that behavior to demographics and various resource variables. Very little work has been done examining psychological factors.

Many but not means all (see FitzGerald 1983, p. 39) analyses report at least some relationship between one or more of the demographic variables and taking action in response of legal problems. For example, while Genn reports that "the results of the multivariate analysis confirm that problem type tends to swamp other considerations" she goes on to say that "some personal factors, such as level of education, are [also] important" (Genn 1999: 141). Miller and Sarat (1980-81, p. 553) report multivariate analyses within problem types, and find some individual characteristics important for some problems, but there is no clear pattern.<sup>22</sup>

Analyses also examine other types of personal resources such as experience and contacts. Again, with one notable exception, while specific relationships are uncovered here and there (e.g., those with a prior dispute experience or who have previously used a lawyer may be more likely to claim for some types of problems), no clear pattern is evident in the various studies. The notable exception is Michelson's finding in his study conducted in 37 villages across six provinces of China that families with strong political connections were more likely to pursue grievances than were families without such connections (Michelson 2007).<sup>23</sup>

As noted above, few studies have sought to examine the potential role of psychological variables on claiming behavior, and what has been done does not show strong relationships.<sup>24</sup> For example, in their recent study of responses to

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<sup>20</sup> Further analyses of the data discussed by Kritzer et al. (1991b, p. 885) "teased out few relationships between individual level factors and complaining/claiming behavior."

<sup>21</sup> See Sandefur (2008) for an overview of research on race, class and gender influences on access to civil justice.

<sup>22</sup> Murayama and his colleagues have reported on additional results (not yet published in English) from the study summarized in Murayama (2007); these results show that most socio-economic variables do not predict claiming behavior; social capital and legal experience variables do seem to have some relationship but those relationships are fairly weak.

<sup>23</sup> Studies that have focused on what might be thought of as the next step in the dispute pyramid, seeking legal assistance, have also found little connection between demographic variables and seeking such assistance (see Mayhew and Reiss 1969; Curran 1977, pp. 147-158; Kritzer 2008).

<sup>24</sup> The Japanese dispute study includes some variables that reflect attitudes toward legal institutions and legal practices (e.g., reliance on contract), but it would be difficult to label these variables as psychological in the sense described in this paragraph.

sexual harassment, Blackstone et al. (2009) included a measure for personal efficacy (a person's belief about his or her own ability to obtain a desired result), but found that it had no relationship with seeking redress. The most extensive examination of psychological factors was done by Vidmar and Schuller (1987) who report a series of four studies examining "claim propensity," which they measured as a combination of six components: aggressiveness, competitiveness, assertiveness, perceptions of control, preference for risk, and preference for winning over compromise. The four studies involved both surveys and an experiment using university students. From these studies they found that differences in the proclivity to report experiencing problems and to engage in claiming behavior were positively associated with their measure of claim propensity. One study compared the claim propensity measure for individuals who had taken a case to small claims court to those with no experience with small claims court; that study found that the court users scored significantly higher on claim propensity than did nonusers. What is unknown is whether the higher propensity score led to or resulted from taking a case to court.<sup>25</sup>

#### 4.3.3. Institutional Characteristics

To what degree do institutional factors affect claiming patterns? The kinds of institution factors that might be important include:

- Damages through either case law standards (as exist in England and some other common law countries) or statutory limits (as exist in some of the American states, particularly in medical negligence cases)
- Costs, both pecuniary (e.g., court fees) and nonpecuniary (e.g., time required)
- The availability of legal representation (legal aid, legal expense insurance, no-win, no-pay fee systems)
- The nature of risks associated with claiming (loser pays fee systems)
- Limits on claiming (vis-à-vis tortfeasors) created by no-fault compensation systems
- Specific legal rules such as "joint and several liability" or those dealing with how contributory negligence impacts recoverability (i.e., whether it bars recovery or simply reduces recovery proportional to the claimant's own negligence)
- The role of the welfare state in providing alternative avenues of compensation (or in mitigating the need for claiming by providing benefits, such as medical care, as a social responsibility).

Some of these operate directly on the actions of potential claimants and others function by limiting access of legal assistance needed to bring claims. There has been a lot of speculation on the influence of these kinds of factors (e.g., Atiyah 1987, pp. 1019-27, Polinsky and Rubinfeld 1998), but empirical analyses are often difficult to conduct because of confounding factors.<sup>26</sup>

Empirical research on these types of questions is generally done in one of three ways: cross-national comparisons (Blankenburg 1994), comparisons across the American states (Low and Smith 1992, Low and Smith 1995, Yablon 1996,

<sup>25</sup> Researchers working in the field of consumer complaining have devoted more attention to psychological and attitudinal factors including personality factors (Zaichkowsky and Liefeld 1977, Fornell and Westbrook 1979, Grabicke *et al.* 1982, Richens 1982, Nantel 1985); personal values (Morganosky and Buckley 1987, Rogers and Williams 1990); propensity to complain (Day and Landon 1977, Richens 1982), degree of consumer alienation (Beardon and Mason 1984); and attitudes toward complaining (Beardon and Crockett 1981, Day *et al.* 1981, Richens 1982, Day 1984, Beardon *et al.* 1989).

<sup>26</sup> A number of studies have related various institutional factors to the frequency of actual lawsuits, looking either cross-nationally (see Posner 1997, Boyle 2000) or across the American states (Grossman *et al.* 1982, Yates *et al.* 2001, Jacobi 2009). Recent work by Sean Farhang (2010) has traced the rise of certain types of lawsuits directly to the growth law that creates causes of action.



Abrahamse and Carroll 1999, Yates *et al.* 2010), or comparisons over time when institutional factors change (Weisberg and Derrig 1991). The results of this body of research—almost all of which has been done in the United States—are mixed, sometimes showing that the institutional differences affect claiming behavior and other times not showing such effects.

Some institutional factors clearly matter. Formal limits on the types of claims that can be filed do in fact affect claiming. For example Abrahamse and Carroll (1999, p. 138) show that road traffic accident tort claims tend to be much lower in the American states that place limits on such claims as part of no-fault insurance systems, and the reduction is greatest where the limits are the strongest.<sup>27</sup> For other kinds of limits, the evidence is more mixed (at least with regard to claiming). For example, Donohue and Ho (2007) find that limits on damages in malpractice cases have no impact on claims filing; in contrast, data from Harris County, Texas, show a sharp drop (approaching 50 percent) in filing of medical malpractice lawsuits in the wake of the passage in Texas of a limit on noneconomic damages in such cases (Daniels and Martin 2010).<sup>28</sup>

While there is some quite convincing evidence regarding the impact of limits on damages, the evidence regarding other incentive elements does not necessarily demonstrate the effects that one might expect. A good example comes from England. As reflected in Atiyah's writing (Atiyah 1987), there is a perception that tort claims are less likely to be made in England than in the United States. While Atiyah cites many reasons that this may be true, one element is the availability of legal representation. Prior to 1995 such representation was not available (at least in theory) on a no-win, no-pay basis although a significant portion of the English population had means of obtaining third-party funding of representation (through legal aid, legal expense insurance, or as a union benefit); those who did not have access to third-party funding also had to be concerned about having to pay the defendant's costs should a claim go to litigation and prove unsuccessful. This situation changed in 1995, and then changed further in 1999. The key changes were (1) allowing solicitors to charge on a no-win, no-pay basis (through what in England is called a "conditional fee"), (2) the creation of "after-the-event" insurance that protects the claimant from having to pay the defendant's costs in an unsuccessful claim, and (3) making the higher fees paid for a conditional fee and the costs of the after-the-event insurance recoverable from the defendant in a successful claim.

In the wake of these changes, claims management companies developed which aggressively advertised for clients and then brokered those clients to solicitors as needed (Yarrow 2001, pp. 8-9). This advertising led to expressions of concern that England was developing a "compensation culture" marked by sharp increases in the likelihood that claims would be filed. The perception that a "compensation culture" had developed was fanned by the popular media (see Better Regulation Task Force 2004).<sup>29</sup> The relevant question here is whether in fact the frequency of claiming did

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<sup>27</sup> The data source used by Abrahamse and Carroll is a study conducted by what is now known as the Insurance Research Council (IRC). This organization has done a series of closed claim studies of auto accident claims that provide a potential source of data for analyses that compare patterns across the American states. The IRC also publishes a periodic report detailing trends in auto injury claims, including the frequency of such claims (relative to the number of insured cards and relative to property damage claims); these trend data, which are by state, go back to 1980, and hence have a strong potential for assessing impact of change in legal rules as well as comparisons across states.

<sup>28</sup> Using lawsuit filings as a proxy for claiming is tricky because large numbers of claims are resolved without filing. Medical malpractice is one area where the filing of lawsuits is probably a reasonably good proxy for claim filing because the overwhelming majority of such claims end up in suit if they survive the initial screening by a lawyer. There is a significant body of research that examines the impact of institutional and political factors on the filing of lawsuits (Lee *et al.* 1994, Di Pietro and Carns 1996, p. 63, Schmit *et al.* 1997, Browne and Puelz 1999, Yates *et al.* 2001, Browne and Schmit 2008, Jacobi 2009, Yates *et al.* 2010).

<sup>29</sup> Morris (2007, p. 353) reports that "of over 2,000 reports in the (English) national press since 1993 featuring the term 'compensation culture, all but nineteen of them appeared after 1998."

increase in the wake of the changes making legal representation more available and removing the risks associated with seeking compensation? The best evidence on this is reported by Morris (see also Lewis *et al.* 2006, 2007). She uses data from the "Claims Recovery Unit", the agency charged seeking reimbursement for government benefits paid out to injury victims from tort recoveries obtained by those victims. These data show no clear pattern of increase in the number of claims between 2000 (when the last set of changes went into effect) and 2006; some types of claims increased while others decreased.<sup>30</sup> However, data subsequent to what is reported in Morris's article does show a sharp increase in the number of claims associated with road traffic accidents, with a 47% increase from 2005-06 to 2009-10 (from 460,097 to 674,997); none of the other categories (clinical negligence, work-related, or public liability) show patterns of increase.<sup>31</sup> In fact, from 2000-01 through 2003-04 there was actually a decrease in the number of road traffic accident claims, and if one looks at the increase starting from 2003-04 through 2009-10, there is an 80 % increase over the period. The annual rate of increase has averaged 10% per year, but has varied between 8% and 14%. What accounts for the sharp increase? First, the evidence does not support the view that the introduction of a form of no-win, no-pay fee in 1995 itself led to significant changes in claiming behavior.<sup>32</sup> However, the fact that those changes, plus additional changes in 1999, led to aggressive advertising by claims management companies,<sup>33</sup> does seem consistent with the pattern. To this one might also add the public discussion of the growth of a "compensation culture," which in itself would heighten claims consciousness and could account for some of the increased claiming. Thus, what one sees here might be best describe as *indirect* effects of institutional change; that is, the institutional changes created incentives for claims management companies to troll for potential claimants which in turn produced significant discussion about how public attitudes were changing, and those two elements taken together may have produced attitudinal and behavioral change.

Most of the work that has been done on the impact of institutional factors on claiming behavior has focused on tort claims. This probably reflects two issues. First, tort claims have been a major political issue in the United States for some time and have become something more of an issue in England in the wake of changes that started in 1995 described in the previous paragraph. Second, because of the existence of insurance for tort liability, data on the frequency of claims as distinct from filing lawsuits, are potentially available (and in some settings are routinely reported).<sup>34</sup> Outside of that area, obtaining information on claiming patterns requires what are often expensive and cumbersome data collection efforts. The result is that we know relatively little about the impact of institutional factors

<sup>30</sup> The data she reported do indicate significant increases from decades earlier for most types of claims (the major exception being claims related to accidents at work), but those increases appear to predate the institutional changes.

<sup>31</sup> Figures for 2006-07 were provided to me by Annette Morris. Figures for later years were obtained from <http://www.dwp.gov.uk/other-specialists/compensation-recovery-unit/performance-and-statistics/performance-statistics/> [Accessed 2010 Jun 27].

<sup>32</sup> A House of Commons committee reached a similar conclusion: "The statistics demonstrate that the number of claims has not risen since CFAs were introduced as the primary method of funding personal injury claims" (Constitutional Affairs Committee [House of Commons] 2006, pp. 11-12).

<sup>33</sup> Solicitors do not have a monopoly on representation in compensation claims; only once a claim becomes a formal court action are nonlawyers barred from representing claimants.

<sup>34</sup> One interesting institutional development that could increase claiming activity is the development of ombudsmen who serve as intermediaries between a complainant and a respondent. While most such ombudsman offices are designed to assist citizens with complaints and problems with government agencies (Hill 1976), there are ombudsman programs that provide mechanisms for resolving complaints with private entities (see Hannigan 1977, Fea 1983). One particularly interesting such program is the Financial Ombudsman Service (FOS) in England which assists consumers with problems with banks, insurers, and investment companies (Gilad 2008, Schwarcz 2009). The empirical question is whether the presence of an entity such as the FOS increases the willingness of aggrieved consumers to initiate complaints?

that apply beyond the tort arena (e.g., fee shifting, the availability of legal expense insurance, etc.)

The best summary of our current understanding of how claiming behavior is affected by institutional factors is that clearly those factors make some difference, particularly when they directly limit what claims can be filed. The impact of institutional factors that work indirectly through controlling the incentives to bring claims is murkier. Some research shows such effects, some does not, and we lack an understanding of what might condition whether or not such effects do occur.

#### 4.3.4. Cultural Differences

How do cultural factors impact claiming behavior?<sup>35</sup> Here I use “culture” to refer to norms and expectations concerning what constitutes appropriate behavior.<sup>36</sup> At a crude level, some might characterize the differences between the response of Americans and the response of the English as reflecting English stoicism, the stereotype of the “stiff upper lip.” Sorting out what differences might be labeled “cultural” is challenging because the research that raises these explanations for claiming behavior seldom has a design that permits strong inferences. Still, there are some patterns and research that are suggestive of cultural effects.

One analysis that could be seen as providing support for cultural differences as explaining claiming differences in England and the United States considered how blaming might factor into the decision to claim (Kritzer 1991). That study used several extant data sets to divide persons who had been injured into three groups: those who did not blame someone else for their injury, those who unambiguously blamed someone else for their injury, and those who were unsure whether someone else was responsible for their injury. There was relatively little difference in claiming behavior between the two countries for the first two groups, but there was a sharp difference for the third group. Americans who were unsure whether someone else should be blamed were much more likely to claim than were those similarly unsure about blaming in England. Conceivably the differences might reflect the greater risk associated with an unsuccessful claim in England, but the nature of the pattern does seem consistent with a cultural explanation.<sup>37</sup>

There is a perception, and at least some evidence, that claiming is higher in urban environments than in rural settings (Daniels 1982, Patel et al. 2008). An anthropological study by David Engel in a nonurban community he called “Saunders County” provides insights on the cultural factors that might support this (Engel 1983, Engel 1984). Engel found local norms against seeking compensation for routine injuries even if someone else was arguably to blame. The local ethic was that one took care of oneself, and that one should not try to foist that responsibility on to others. According to Engel, this set of norms reflected rural living, and the inherent dangers associated with work common in such settings (i.e., farm work). Importantly, Engel did not find that there was a generalized norm against claiming, but that it was specific to personal injury. There did not appear to be norms against claiming when the matter arose from someone’s failure to live up to a contract; in those circumstances claiming was acceptable because people were expected to abide by their promises and a contract constituted a promise. While the patterns the Engel reports have an understandable logic, it is difficult to draw strong conclusions, either that what he found generalizes to other nonurban communities or that these are real differences compared to urban setting. Moreover, even if the

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<sup>35</sup> The frequently commented on “American litigiousness” is often traced to American culture (see Friedman 1985); one interesting analysis (Hoffer 1989) links this to American notions of honor

<sup>36</sup> Erhard Blankenberg (1994, 1998) uses the term culture to mean something different in his comparisons of the legal cultures of the Netherlands and Germany and the impact of those cultures on disputing behavior.

<sup>37</sup> This discussion has not dealt with the complexities of attributing responsibility. Is there a difference between “responsibility” and “blame” (Kritzer 1991), and how do any differences relate to expectations about who, if anyone, should provide redress?

differences are real, to what degree do they reflect norms and to what degree do they reflect ease of access of legal services or other types of assistance (Blacksell et al. 1991).

At least one study (Greenhouse 1986) suggests that the norms created within a community defined by religious and congregational affiliation might impact claiming behavior. In some ways this makes sense: of one's religious beliefs tell you that events are predetermined or reflect God's will those beliefs could lead adherents to view unfortunate events as something that is to be accepted and coped with as part of one's faith. Alternatively, religious beliefs might lead to the de-emphasis of conflict (see also Kidder and Hostetler 1990) which in turn could reduce claiming behavior. In contrast, religious beliefs could view debate and conflict as natural and positive, and communities of adherents to such beliefs could create their own mechanisms for dispute resolution (see Bernstein 1992, Richman 2006).

As suggested by the previous reference to the supposed "stiff upper lip" to be found in England, comparisons of claiming behavior across countries often reference differences in cultures (e.g., Markesinis 1990). Most prominently, Americans are seen as prone to seek redress for the slightest reason, while in contrast residents of other countries, Japan, for example, are seen as avoiding conflict and disputes (Kawashima 1973, Miyazawa 1987, Kidder and Hostetler 1990, but see Ginsburg and Hoetker 2006). The contrast of Japan and the United States is very sharp, and the differences are often attributed to culture although procedure may account for differences as well (Tanase 1990). As is true in other arenas, culture often seems to be a residual explanation: when other factors fail to account for differences in behavior, attribute behavioral patterns to culture. The challenge is getting at culture empirically. One interesting attempt to do this asked citizens of the United States and Japan to describe what the appropriate response would be to various situations, with the scenarios designed to get at the question of how individual responsibility is perceived in each country (Hamilton and Sanders 1992).<sup>38</sup> While the study does not directly deal with claiming behavior, it does demonstrate differences in perceptions of responsibility and methods of redress that are relevant to understanding any differences that appear to exist in claiming behavior in the two countries.

#### 4.3.5. Future Research

As indicated in the preceding discussion, a number of findings have been consistently reported, both within and across countries. Most particularly, we know that individual characteristics (demographics, resources, experience, attitudes) are relatively weak predictors of claiming behavior (where they predict at all). The dominant factor in explaining claiming behavior is the type of issue in dispute with some additional exploratory power to be found in other problem characteristics such as the severity of injury or amount in dispute.

What then are the fertile areas for future research on claiming behavior? An obvious first step is to better understand why type of problem is so dominant in explaining claiming behavior. Does it genuinely reflect the relative ease of exit? How important is loyalty (including either a desire or a need to maintain a relationship)? Does it reflect specific norms and expectations within problem types (as described by Engel in his study of "Saunders County")? The best avenue of research to explore these kinds of questions is likely to be qualitative: creating "life histories" of disputes, group interviews where people can interact over their views, and ethnographic research that is able to build in comparisons of the type that are not usually found in such research to insure that the patterns are not specific to a particular group or setting.

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<sup>38</sup> Later work (Sanders and Hamilton 1992) extended the research to include Russia.

A second area that requires much more work is research directed to understanding the role of attribution in the claiming process (see Coates and Penrod 1980-81; Hensler *et al.* 1991, p. 143). We use different terms in talking about this issue: blaming, responsibility, fault, and the like; each word has different implications, some invoking a moral connotation while others seem more neutral. What difference does it make how people are asked about the attribution process? How do people come to make attributions regardless of what terminology is used?<sup>39</sup> While what might be labeled the standard model, "naming, blaming, and claiming" (Felstiner *et al.* 1980-81) suggests that attribution precedes claiming, is that necessarily the case? When does attribution lead to claiming and when is attribution a rationalization for claiming (see Lloyd-Bostock 1984)? One area where claims may frequently be filed (at least in the United States) in the absence of clear attribution is medical negligence, but the explanation for that is attribution requires good information, and potential medical negligence claimants often have to initiate a claim in order to obtain the information necessary to determine if someone is responsible for an injury. To what degree is this true in other areas (e.g., potential discrimination claims)?

A third area that has received virtually no work concerns claiming in situations where identifiable groups of potential claimants are involved. Such situations typically arise in the context of mass torts or what in the United States is called "class actions." While mechanisms for aggregation are probably most highly developed in the United States, they are by no means unique to that country (Hensler *et al.* 2009). Interestingly, there is very little research on claiming behavior in the context of mass torts and class actions. While many studies of class actions and mass torts report the number of claims that have been made, efforts to estimate *claiming rates* are much less common (but see Kritzer 1988-89, p. 225, Hensler *et al.* 1999, p. 549). There are many obvious questions one might ask about the factors that could affect claiming in such situations, including the seriousness of the injury involved, the amount of compensation that is to be paid, the complexity of the claim-filing process,<sup>40</sup> the nature of any formal notification process, the incentives of third parties to assist in the claiming process, etc. However, to date there has been little more than speculation on these issues.

A final area that is clearly understudied is organizational claiming whether by government, business, or other types of organizational entities. Macaulay's seminal study of contract problems (Macaulay 1963) suggests that businesses with ongoing relationships may tend to avoid legal claiming, and treat problems as simply part of day-to-day business to be dealt with in ways that preserve the relationship.<sup>41</sup> While there is some research on business versus business litigation (Dungworth and Rogers 1996, Cheit and Gersen 2000), there is little research on how businesses respond when they have a problem with another business or with government.<sup>42</sup> Business claiming is by no means limited to problems with other businesses or with government; claims can be brought against individuals (or very small businesses). Leaving aside routine debt collection, when do businesses (or government or other organizations) bring claims against individuals? When is such claiming routinized and when is it done to create precedents and reputation (e.g., copyright infringement actions brought against individuals who have shared or downloaded music in violation of copyright laws)? How are decisions reached about bringing such claims? Who in the organization are the major actors in this decision making

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<sup>39</sup> It might be fruitful to consider the psychological literature on blaming related to actions we think of more in criminal terms (see, for example, Alicke 2000, Robbenolt 2000, Solan 2003).

<sup>40</sup> For example, filing a claim in a class action (once a settlement has been proposed) may require documentation or information that potential claimants no longer have in their possession and which are either costly to obtain or unobtainable.

<sup>41</sup> I found something very similar in a study done in Toronto of the relationship between large corporations and their outside law firms (Kritzer 1984).

<sup>42</sup> Two studies that touch on this question are by Unah (2003) and Public Citizen (Public Citizen 2004).

process? Organizational claiming is a potentially fruitful area of inquiry, although it will require creative methods by those undertaking such research.

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