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Evidence of the Need for Aggregate Litigation

Comment

by

THEODORE EISENBERG

1 Introduction

In the experimental game designed by GÜTH *et al.* [2007], player 1 has promised to render a service to player 2. Player 1 either invests proper effort or shirks and performance may succeed or fail depending on random fluctuation. When player 1 fails to invest proper effort, and performance occurs or not through luck, player 2 must decide whether to punish player 1's nonperformance. When the transaction fails, punishment may be sought through suing. When the transaction fails, player 2 may seek revenge or punishment though doing so incurs costs to player 2. The game's design resembles civil enforcement rather than criminal-type punishment. As the authors state, "Note that we are not dealing here with punishment in a criminal law sense, but rather with nondelivery of a service, which results in restitution regardless of whether there is any guilt involved" (GÜTH *et al.* [2007, p. 145]). The noncriminal nature of the punishment decision and the freedom to seek or not seek punishment are both reminiscent of systems of civil justice.

The experiment may provide important results with respect to rational choice theory and to evolutionary behavior. My focus is on the evidence the experiment provides about individuals' inclination to sue. This experimental evidence resonates with real-world findings about individual behavior. The evidence also helps support recent movement towards authorizing aggregate litigation in several countries.

2 Evidence that Individuals Are Averse to Litigation

An interesting result of the experiment is the generally low rate of claiming behavior, notwithstanding the fact that a significant fraction of nonperformance incidents, about 25 percent, are attributable to shirking. For those participants without monetary inducements, the average share of players 2 "engaging in revenge" ranges from 0.056 to 0.081 (GÜTH *et al.* [2007, p. 150]). "As to participants in the investor-role, only one in each treatment and order is found to retaliate over all periods. The percentage of those who sue at least half of the times is around 5%" (p. 150). With respect to those in the possible suing role who receive monetary incentives,

“[P]layers 2 who are predicted to retaliate do not act in accordance with their monetary incentives” (p. 155). I think it a fair summary of what the authors find to conclude that punishment/suing behavior occurs at a lower level than expected.

This finding has important implications for civil justice generally and for civil justice reform initiatives. It is especially important because it is based on findings in Germany, as indicated below. The litigation aversion demonstrated in the Güth *et al.* experiment resonates with other findings around the world. In the United Kingdom, Pascoe Pleasence *et al.* report a “low rate of [actual – not experimental] respondents acting to resolve personal injury problems” (PLEASENCE *et al.* [2004, p. 312]). The action referred to is seeking advice, not even filing a lawsuit. The low rate of action is reported to be similar to earlier studies of England and Wales (PLEASENCE *et al.* [2004]). Most visibly, the United States is surprisingly nonlitigious. Professor Patricia Danzon and colleagues found that “at most 1 in 10 negligent injuries results in a claim” (DANZON [1985, pp. 23f.]). Professor Deborah Hensler and colleagues reported a low rate of claiming for various accident types (HENSLER [1991, p. 121]). The Harvard Medical Practice Study estimated “that eight times as many patients suffer an injury from medical negligence as there are malpractice claims” (HARVARD MEDICAL PRACTICE STUDY [1990, p. 7–1]).

That the Güth *et al.* findings emanate from Germany is all the more interesting because, by at least one measure, Germans are among the most litigious westernized citizens. In overall litigiousness, the United States is far from the leading country. Professor Herbert Kritzer provides a useful summary of the evidence:

“On the litigiousness issue itself, patterns are not as clear as the popular perception might suggest. In his study of law and disputes in Morocco, Lawrence Rosen observed that ‘one seldom meets an American who has been involved in an actual lawsuit and almost no Moroccan who has not.’ My own comparative work on propensity to sue suggests that broad statements about differences in propensity have to be conditioned by the type of issue involved. While it may be the case that persons in the United States are more likely to bring claims and suits for personal injury, Britons may be equally likely to seek redress for consumer problems and perhaps more likely to pursue claims related to employment and rental residences. Finally, the most comprehensive effort to compile cross-national data on litigation rates [see Table 1] shows that the United States is not the most litigious nation, nor is the United States all that different from England and Wales.” (KRITZER [2002, p. 1981])

Güth *et al.*’s finding that German subjects are surprisingly reluctant to sue in an experimental setting suggests that even one of the most litigious populations is, in an absolute sense, not eager to commence lawsuits.

3 Coordinating Experimental and Observational Studies

The litigation aversion finding also provides an opportunity for experimental and real-world observations to complement one another. Real world data from the several studies cited above strike the respective researchers as suggesting that citizens

Table 1
Cases Filed per 1,000 of Population

Country	Cases per 1,000 population
Germany	123.2
Sweden	111.2
Israel	96.8
Austria	95.9
U.S.A.	74.5
UK/England & Wales	64.4
Denmark	62.5
Hungary	52.4
Portugal	40.7
France	40.3
South Korea	39.8
New Zealand	37.7
Ireland	32.7
Turkey	27.3

Source: WOLLSCHLÄGER [1998, pp. 587f.].

in a range of countries are less litigious than is widely believed. The new experimental findings suggest that the real-world observations are not an artifact of inevitably limited samples or other limitations of observational data. Similarly the observational data suggest that the experimental findings are not spurious. When experimental and observational results support the same conclusion, the modes of study support one another.¹

4 Implications for Legal Reform

The experiment's nonlitigiousness finding also relates to an important topic of legal discussion across countries. Güth *et al.*'s work suggests that individuals with righteous but relatively small claims tend not to seek redress. This creates a perverse incentive for large institutions to try and extract a little value from a large number of victims, knowing that retributive action is unlikely. It is unlikely both because people are apparently averse to litigation and because the economics of bringing a lawsuit for a small amount of money are unfavorable. One may not recover one's full costs even if one prevails. These facts support the need for a method of aggregating a number of small claims into a larger economically viable legal action.

One such device is the class action. Evidence from the United States suggests that class actions do deliver value to individual class members. As the size of

¹ When experimental results differ from real-world observations, the researchers should try to reconcile the findings (EISENBERG, RACHLINSKI, AND WELLS [2002]).

the amount recovered by the class increases, the percentage of the recovery that goes to attorney fees decreases (EISENBERG AND MILLER [2004]). Because of the difficulty individuals face in using legal systems to challenge small deprivations, other countries have enacted legislation facilitating group action against wrongdoers. In 2005, Germany's *Bundestag* enacted an Act on Model Case proceedings in Disputes under Capital Markets Law² which allows for "model case" actions for claims "due to false, misleading or omitted public capital markets information" or claims "based on an offer under the Securities Acquisition and Takeover Act." Denmark,³ France,⁴ and several other countries have taken action with respect to consumer class actions. The results in Güth *et al.* help explain why such consumer-protective legislation is felt to be necessary.

5 Conclusion

The evidence reported by Güth *et al.* shows how well-designed experiments can yield results that directly relate to important policy questions. One challenge for the academy is to assure that experimental results and observational results do not sit in intellectual vacuums with no set of researchers knowing about the full set of results. Each kind of work can take on added value in light of results from the other. Experimentally-oriented departments need to strive to assure that researchers know about related real-world studies. Researchers who use actual data should strive to relate their results to experimental findings. The synergies that experimental and real-world observation can yield when viewed in light of one another are obvious but too often not explored.

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² <http://www.bundesjustizministerium.net/media/archive/1110.pdf>.

³ <http://www.forbrug.dk/english/dco/dcpressreleases/skjultpm/news/classaction/>.

⁴ French Finance Minister Thierry Barton is quoted in *Le Figaro* as follows: "Avec l'apparition de nouvelles formes de commercialisation, de contractualisation et de paiements, le consommateur a souvent le sentiment d'être ligoté et isolé face à des groupes industriels de taille mondiale. Nous allons redonner au consommateur sa liberté de choix, rééquilibrer le rapport de forces en lui donnant des droits et une marge de négociation nouvelle." (see http://www.lefigaro.fr/eco/20061107.WWW000000306_itw_breton.html).

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