CHAPTER 6

DISPUTE RESOLUTION

TEST YOUR KNOWLEDGE: TRUE OR FALSE?

1. The primary difference between mediation and arbitration is whether there is a binding decision.
2. The method of dispute resolution used in a society depends on a number of factors. The diversity and population size of a society are two of several determinants of whether individuals will overlook, settle, or litigate a dispute.
3. Most Americans view the legal process as helpful and fair.
4. Americans are quick to pursue their grievances in court, and the critics who claim that the United States is a litigious society have a valid point in this regard.
5. Alternative dispute resolution is discouraged by judges.

Check your answers on page 242.

INTRODUCTION

A **dispute** is a disagreement between two or more individuals or groups. Richard Lempert and Joseph Sanders write that legal disputes involve "conflicting interests. Usually one person has something the other wants and both parties make claims of entitlement." If both claims cannot be satisfied, there is a "true conflict" (Lempert and Sanders 1986: 137). Richard E. Miller and Austin Sarat note that a dispute begins as a **grievance**. A grievance is an "individual's belief that he or

she (or a group or organization) is entitled to a resource which someone else may grant or deny" (R. Miller and Sarat 1980–1981: 527).

You may have a grievance with a professor over a grade. A dispute arises because you believe that you deserve an A rather than a B in class. Brian C. Marquis, a 51-year-old paralegal, returned to study law and sociology at the University of Massachusetts. Marquis sued the university, claiming that the teaching assistant in his political philosophy class failed to follow the grading scale on the syllabus and instead "curved" the final grades in class. Marquis argued that he deserved an A–, that the C would impede his ability to get into law school, and that the grade had transformed his transcript into a "dismal record on non-achievement" and proclaimed that he would not take "no" for an answer and appealed to federal district court.

The teaching assistant wrote Marquis that "the students' numerical scores seemed too high to him so he graded everyone on a curve before assigning a letter grade" and that he "thought a 'C' was a good reflection of Marquis' work in the class." The head of the Department of Philosophy explained that the instructor made clear that the "number" on the tests had "[no] absolute meaning." Catharine Porter, the University of Massachusetts–Amherst ombudsman who was a defendant in the case, pointed out that "if every student that didn't like his or her grade started to do this, we'd have to hire . . . 25,000 attorneys." Peter Michelson, a lawyer for the university, told the judge that Marquis's suit was "more or less, baloney." He posed the question, "Does the court really want to put itself in the business of reviewing, under some constitutional or federal statutory doctrine, the propriety of the grades which a student has received?" Federal district court judge Michael Ponsor dismissed the legal suit on the grounds that the university had rejected Marquis's appeal of his grade and that his legal rights had not been violated.

The stages in the disputing process are described in the following section of the chapter.

■ STAGES OF DISPUTING

Anthropologists Laura Nader and Harry F. Todd Jr. have developed a three-stage typology of the disputing process (Nader and Todd 1978: 14–15).

1. *Grievance or preconflict stage.* An individual believes he or she has been "wronged or injured." The slight may be real or imagined. The individual now must choose whether to escalate the grievance into a confrontation or walk away.
2. *Conflict stage.* The individual who feels wronged (aggrieved party) confronts the offending party and communicates his or her feeling of injustice. At this point, both individuals are aware of the disagreement. The offending party may attempt to diminish the conflict by pressuring the aggrieved party to accept the situation, by offering to negotiate, or by settling the dispute.
3. *Dispute stage.* The conflict is made public, and a third (outside) party becomes involved in the dispute. The outside party may intervene at the request of one or both of the parties or their supporters or based on his or her own initiative.

A dispute may not progress through each stage. An individual may take his or her grievance directly to the dispute stage and file a complaint in court. The individual may take a grievance

to the conflict stage and then deescalate the conflict or may enter into a negotiation with the offending party.

A second description of the disputing process was developed by law and society scholars William Felstiner, Richard Abel, and Austin Sarat (Felstiner, Abel, and Sarat 1980–1981). The crucial step is the transformation from an "unperceived injurious experience (UNPIE)" to a "perceived injurious experience (PIE)." People who live downwind from a nuclear test site may experience physical problems and at some point realize they have contracted cancer. The individual at this point progresses to the first stage, which is learning of his or her illness and **naming** the grievance as cancer. Some cancer victims will attribute the cancer to the test site. This second stage is termed **blaming**. Other victims may harbor a generalized feeling of injustice without linking their illness to the test site. This general sense of injustice is a *complaint*. In the final stage, the aggrieved individual confronts the individual thought to be responsible for the harm and asks for a remedy. This stage of confronting the government about the operation of the nuclear test site is termed **claiming**. A claim that is rejected or greeted with inaction may lead to a dispute.

Each of these descriptions of disputing requires an individual to recognize that he or she has been harmed, identify the cause of the harm, and confront the individual or group thought to be responsible for the harm. The disputing process is driven by an individual's perception that he or she has been treated unfairly. Lawrence M. Friedman notes that a behavior that is condemned by some people may be considered completely acceptable by other individuals (L. Friedman, Pérez-Perdomo, and Gómez 2011). In some societies, there is an emphasis on peaceful coexistence, and individuals may be reluctant to "make waves" and enter into disputes. In other societies, individuals may be encouraged to assert their rights and file complaints. Individuals and societies, as discussed below, differ in the mechanisms used to settle disputes (S. Roberts 1979: 45–55).

Research on torts (personal injuries) shows that the number of cases are reduced as grievances progress to disputes and ultimately to trial. Richard Miller and Austin Sarat found that for every 1,000 grievances, 200 became disputes, 116 were referred to a lawyer, and only 38 (approximately 4 percent of grievances and 19 percent of disputes) were filed in court. The success rate for individuals bringing tort complaints is somewhat better than 52 percent at trial although this differs based on the type of claim. They found that legal actions for damage resulting from motor vehicles that were brought to trial proved much more successful than claims based on allegations of medical malpractice (R. Miller and Sarat 1980–1981).

Why do so many grievances for personal injury not find their way into court? Individuals who do not pursue claims may not view themselves as seriously injured, may not blame others for their injury, may find the remedy too expensive in terms of time or money, may find conflict emotionally difficult, or may lack understanding of the legal process (Robbenolt and Hans 2016).

METHODS OF DISPUTE RESOLUTION

There are various methods commonly used to resolve disputes. Most societies use several types of disputing procedures (S. Roberts 1979: 57–79).

Keep in mind there always is the alternative of *lumping*, deciding against pursuing a grievance and living with the situation. The individual swallows his or her pride and continues the relationship. Marc Galanter observes the decision to "do nothing" may be based on an individual's lack of awareness that he or she has suffered a wrong that may be remedied by the law. An individual

also may calculate that the costs of pursuing the matter outweigh the possible benefits. Individuals may not pursue a claim the first time they are victimized by a harmful act although the next time they may reach the "breaking point" and pursue the claim. A power or status difference between individuals also can discourage the weaker party from pursuing a claim because the weaker party may believe that "you cannot fight city hall." Consider the circumstances in which you are likely to "lump" a poor grade on an exam or on a paper (Galanter 1974: 124–125).

Galanter distinguishes between types of litigants based on the frequency with which they go to court. One shotters (OSs) are contrasted with repeat players (RPs) who tend to be business firms and corporations that make frequent use of the courts over a significant period of time in similar types of cases. An example of an OS is an individual suing another individual for injuries suffered during an automobile accident or an individual suing a hospital for medical malpractice. RPs tend to be large and powerful organizations that constantly are in court: landlords, insurance companies, and large automobile manufacturers. An OS seeking return of a security deposit is at a decided disadvantage against an RP who knows how housing court operates, possesses the resources to hire expert and experienced lawyers, and is willing to devote significant resources as part of his or her property management business to winning in court. The landlord also has learned, based on past experience, to insert various clauses in the lease to the apartment signed by the renter, which makes it difficult for the renter to succeed in court. Under the circumstances, an OS may find "lumping" the best option and accept the loss of his or her security deposit.

"Lumping it" differs from *avoidance*. In avoidance, the individual who believes he or she is harmed decides to walk away from a situation and end the relationship rather than pursue the grievance. You may be tempted to drop a class and "exit" the course if the teacher is unresponsive or if you receive a second poor grade. Of course, this may be a required class, or the add/drop period may have passed and you may have no available alternatives (Hirschman 1970). A society may make the decision for an individual and "avoid" a conflict by banishing or expelling troublemakers. Consider a school that expels a troublemaker or a coach who kicks a player off the team (S. Roberts 1979: 65–66).

One of the individuals in a conflict may resort to *coercion* or to self-help. Coercion includes violence, public ridicule, revealing embarrassing information, and blackmail. The greater the stakes are, the more tempting it is to resort to coercion. An extreme and tragic example is the lynching of African Americans falsely accused of theft, rape, and murder by white mobs in the nineteenth and early twentieth centuries (L. Friedman 1993: 189–191). Sally Engle Merry, in an early study of disputing in a multiethnic housing project, found a surprising reliance on violence to settle disputes. The disputes rarely were permanently settled, and individuals' continuing sense of grievance led to the eruption of periodic acts of retribution (Merry 1979).

In some societies, blood revenge is an accepted part of dispute resolution. The tribe of an individual who is killed may obtain revenge by taking the life of a member of the offending tribe or group (S. Roberts 1979: 55–56). Another form of violent dispute resolution is trial by combat, which was part of the English common law between the eleventh and mid-fifteenth centuries and even has been unsuccessfully invoked by some litigants in American courts who claim that trial by combat continues to be part of American law.

Dueling or arranged combat between two individuals with matched weapons in accordance with agreed-upon rules was practiced in Europe and in colonial America to settle disputes. Duels followed strict rules articulated in the so-called twenty-six commandments first developed in Ireland. Dueling was condemned by figures such as George Washington and Benjamin Franklin

and by religious figures. The most famous duel involved Vice President Aaron Burr and Federalist and former secretary of the Treasury Alexander Hamilton in 1804, which led to Hamilton's death. President Andrew Jackson participated in several duels before assuming the presidency and in one duel killed a Nashville attorney. On September 22, 1842, future president Abraham Lincoln arranged to duel Illinois state official James Shields before supporters intervened to persuade the two principals to walk away from the confrontation. Between 1795 and the Civil War, the U.S. Navy lost two-thirds as many soldiers to dueling as the Navy lost to combat. Following the Civil War, dueling came to be viewed as institutionalized murder rather than as a means of defending honor but continued to be practiced in the southern states as late as the early twentieth century. Today, most states and the federal government have laws prohibiting dueling.

John Hagedorn has documented the use of violence by Chicago street gangs to settle disputes with other gangs over the control over turf and to retaliate for violent attacks. The resort to violence was so deeply ingrained that it undermined an effort to unify Latin gangs so as to maximize the gangs' profit from the drug trade (Hagedorn 2015).

Various forms of disputing direct an individual's frustration and anger into rituals. An example is the Eskimo *nith*-song. The parties to the dispute express their viewpoints through singing and dancing before the entire community. The community then decides which individual won the song contest (S. Roberts 1979: 59–61).

Talking is a central method of settling disputes. Talking allows individuals to express their points of view, release their frustrations, and reach an acceptable settlement. *Negotiation* involves a discussion between the two parties in which each individual attempts to persuade the other to change his or her mind. In some instances, individuals entering into a dialogue are able to reach a compromise solution. A successful negotiation requires individuals who are willing to recognize the other person's point of view has merit and who are willing to accept "half a loaf." Negotiation is particularly attractive when the time and costs of continuing to pursue the grievance outweigh the benefits of "winning." An instructor may be willing to negotiate a higher grade or an extra-credit assignment rather than take the time and energy to defend the grade before an administrative grade appeal board. There also is consideration that university administrators may support the student and the instructor will have wasted his or her time and appear irresponsible (Nader and Todd 1978: 10).

In *mediation*, the parties agree to the presence of an outside party who assists the parties to reach an agreement they likely could not reach on their own. In some instances, a mediator may be imposed on the parties. A family court may require the parties to enter into mediation before filing for a divorce. It is important the parties view the mediator as impartial and trustworthy. The goal of a mediator is to find a compromise solution through a process of "give and take." Each party is encouraged to give something to the other party in exchange for something that he or she wants. A department head may meet with both a student and a professor and encourage them to reach a compromise over a disputed grade (Nader and Todd 1978: 10).

In *arbitration*, the principals consent to the intervention of an outside party whose decision they agree to accept as binding. Arbitration, like mediation, involves an outside and impartial party that helps the parties to settle their dispute. The arbitrator considers the competing claims of the disputing parties and reaches a binding decision regarding the dispute. In arbitration, one of the parties likely will win, and the other party may lose (win-lose), whereas in mediation, the stress is on helping the parties voluntarily reach a compromise solution (win-win) (Nader and Todd 1978: 11).

Adjudication involves an impartial third party who, in response to a request, has the authority to intervene and issue a decision. In an arbitration, the two parties agree to accept the decision of

an arbitrator. In contrast, in an adjudication, one of the parties files a claim, and the other party is required to appear and accept the decision of the decision-maker, in most cases a judge. A party who fails to appear risks a judgment for the other party.

An individual may decide to engage in litigation, which involves the referral of the dispute to the official, formal court system.

Dispute resolution may not end a dispute and instead may lead to a continuing cycle of dispute or to a proliferation of disputes. A dispute between neighbors over property boundaries may lead to litigation over the placement of a fence. This in turn may result in a physical fight and lead to criminal complaints for assault and battery and to a cycle of complaints over zoning violations, overhanging trees, a failure to keep dogs on a leash, and complaints to the police over unnecessary noise.

■ PRECONDITIONS FOR ADJUDICATION

Various procedural preconditions or hurdles must be satisfied before a judge will adjudicate a dispute. A dispute that satisfies these conditions is called **justiciable**, meaning that it is ready to be decided. These procedural requirements include the following (Nader and Todd 1978: 11):

Timeliness. A claim must be filed within a fixed number of years from the time of the original incident. This is known as the statute of limitations.

Jurisdiction. A tribunal or court may be authorized by law to hear a particular type of case (subject matter jurisdiction) that occurs in a particular geographical area (jurisdiction over the person).

Controversy. Courts limit themselves to deciding active and actual cases and controversies and do not issue advisory opinions or decisions on hypothetical questions. An individual bringing a case must actually be harmed by the law. You may not challenge a policy that the police are considering because the policy has not yet been implemented and you are not yet affected by the policy.

The results of an adjudication typically may be appealed to superior court in the judicial hierarchy. The decisions that result from adjudication have the advantage of being the product of established and respected judicial institutions. Adjudication has the disadvantage of being costly and time-consuming, and losing parties may find new and creative ways to return to court and to pursue their grievance. "Hot button" issues rarely are settled. Consider the steady stream of cases presenting innovative challenges to issues like abortion procedures, gun control, affirmative action, health care, capital punishment, same-sex marriage, and campaign finance.

Laura Nader, in her important study of disputing in a Mexican Zapotec court of law, makes the point that there are various styles of adjudication. Adjudication can aim at a "win-win" rather than a "win-lose" result. The Rincon is an isolated region populated by two thousand Zapotec Spanish-speaking individuals who earn their livelihood through agriculture. In the United States, adjudication involves a confrontation between two individuals. The judicial decision typically results in a victory for one side and a defeat for the other side. In contrast, the *presidente*, the Zapotec judicial official, seeks to achieve a "balance" or "equilibrium." This means locating a middle ground in which neither side leaves the court with a feeling of anger or resentment. The

presidente allows the parties to articulate their side of the story without interruption. He then issues a brief decision. The *presidente*'s goal is to provide a compromise solution that allows the parties to live with one another rather than to punish the wrongdoer and risk a continuing conflict. In one example, the *presidente* heard a case involving an angry husband who alleged his wife acted without consulting him, and an angry wife who accused the husband of not fulfilling his responsibilities to the family and a sick child. The *presidente*, rather than becoming embroiled in the heated dispute between the husband and the wife, directed the parties to focus on their child rather than on themselves (Nader 1969).

The important point is that a society typically has various mechanisms to settle disputes. An individual may seek to negotiate and mediate before turning to arbitration or adjudication. Each procedure may be appropriate for a different type of dispute and for a particular time and place. Mechanisms to settle disputes are part of all varieties of societies, including pirates, shipwrecked sailors, leper colonies, and miners during the California gold rush of the 1800s (Robinson and Robinson 2015). Mitchell Duneier documents how the largely homeless sidewalk magazine vendors in New York City developed their own system to settle disputes over the location of their tables and how other unhoused individuals supported themselves by charging the vendors to guard the tables overnight (Duneier 1999). Rebecca Solnit in her study of societies experiencing disasters demonstrates that when formal legal institutions collapse, people come together to regulate themselves (Solnit 2009).

■ SOCIAL INFLUENCES ON DISPUTING

Both the social structure of a society and a society's legal culture influence the form of disputing.

Anthropologist Max Gluckman observes that the nature of the relationships between individuals determines the type of dispute-processing procedure that will be used (Gluckman 1955: 18–20).

In a small-scale society in which people know one another and join together to fish, hunt, and raise crops, people are conscious of the fact that they depend on one another, and they go out of their way to avoid conflict. Another reason people in small-scale societies avoid conflict is that most people are connected to a large number of individuals through intermarriage and friendship. Pursuing a dispute runs the risk of dividing families and undermining relationships. As a result, individuals will tend to "lump it" or negotiate or mediate disputes. Anthropologists describe these societies in which people are tied together by a web of connections as being characterized by **multiplex relationships** (Gluckman 1955: 18–20).

Laura Nader and Harry F. Todd Jr. note that multiplex relationships require settlements that will "allow . . . relations to continue" (Nader and Todd 1978: 13).

Other observers caution that disputes in small-scale societies will not necessarily be settled in a cooperative fashion. In a dispute, an individual may place a greater value on land or crops than on a relationship, particularly when the property is scarce and in short supply (J. Starr and Yngvesson 1975).

Larger and more diverse societies are characterized by **simplex relationships**. In contrast to the multiple connections that tie people together in closely knit societies, simplex relationships in larger societies are limited to a specific type of connection. You likely will never see the nurse who assists you in the emergency room again, and your relationship with the postal worker is limited to the delivery of the mail. In simplex relationships, people are not greatly concerned about maintaining relationships and likely will not place a high priority on compromise and negotiation. Grievances

generally will result in adjudication or arbitration, and individuals will pursue "win-or-lose decisions" (Nader and Todd 1978: 13).

The nature of relationships in a society influences the nature of dispute processes. Dispute processing is also affected by the distribution of political power in a society. In a small-scale multiplex society, there are relatively few people with greater wealth or greater power than other individuals. Individuals are dependent on one another and have a large number of family connections and ties. The dispute process reflects individual equality and is based on avoidance, negotiation, and mediation. In multiplex societies, power tends to be concentrated in the wealthy and politically influential. The powerful are not dependent on maintaining good relations with the rest of society, and they will attempt to control and manipulate legal institutions to reflect their own self-interests and will pursue adjudication. In contrast, an individual who lacks power will make every effort to mediate a dispute with an upper-class individual who has the power to control the outcome of the dispute (Nader and Todd 1978: 19–22).

A third factor in determining the nature of dispute resolution in a society is culture. Legal culture refers to a society's view of the law and of legal institutions. One aspect of legal culture is views toward dispute resolution. Does the society have an approach to disputes that encourages non-confrontational modes of resolving disagreements ("win-win"), or does the society promote an adversarial approach and encourage formal adjudication ("win-lose") (Rosen 2006)?

In a study of the decline of the use of tort law in Chiang Mai in northern Thailand, David Engel and Jaruvan Engel found that in the past individuals looked to customary law administered by village elders to adjudicate disputes and only turned to the formal justice system when a litigant refused to provide a monetary remedy that was consistent with traditional Buddhist principles. The development of a more mobile, western-style economy resulted in the dismantling of village societies, and individuals resisted using the courts to seek remedies that they did not view as linked to the Buddhist religious principles of goodness, justice, and virtue (Engel and Engel 2010: 21–32).

Japan is a clear contrast to the American pattern of adjudication. Japan has relatively low rates of litigation and one of the smallest numbers of lawyers and judges per capita in the world. Litigation rates in Japan per one hundred thousand members of society are rising, but remain ten times lower than rates in the state of California.

The Japanese place a high value on compromise, harmony, and mutual understanding rather than enforcing the letter of the law. Sometimes a dispute can be resolved by offering an apology. This type of cultural commitment to compromise is incompatible with a system of "winners and losers." Takeyoshi Kawashima, in a much cited article, argues the Japanese prefer extra-judicial informal means of settling disputes. He notes that during a housing and land shortage in Japan in the early twentieth century, the government anticipated an avalanche of lawsuits that would overwhelm the judicial system and organized a mediation process between tenants and landlords. The number of cases submitted to mediation was much greater than the number of cases filed in court. Kawashima explains that in Japan, the tenant is expected to defer to the landlord-owner who, in turn, is obligated, based on his or her greater power, to act in a kind and considerate fashion. This social expectation rules out reliance on "winner takes all" adjudication (Kawashima 1969).

The predominant mode of settling disputes in Japan is for the parties to reach a mutually desirable solution through personal discussion. Kawashima found that of the roughly 2,500 traffic accidents involving four Japanese taxi companies that resulted in either personal injury or property damage, only a single case resulted in litigation and was settled out of court. Kawashima notes the

Japanese are uncomfortable with the notion that there is a conflict in which one party is adjudged to be morally at fault. They prefer to negotiate a compromise solution.

The cultural explanation for a society's method of dispute resolution is criticized as being difficult to measure. It is difficult to accept that everyone in a society shares the same approach to resolving conflicts. Consider the variation in the personalities of Americans toward disputes.

Takao Tanase takes issue with Kawashima's explanation that Japan has a culture of conciliation and harmony. He argues that the Japanese in the world of business are as cutthroat as any people in the world. The reason the Japanese settle, according to Tanase, is that the government has created a structure that encourages out-of-court settlements and discourages adjudication. Court-affiliated mediation services resolve cases in 50 percent less time than court adjudication, and the total cost is one-seventh as expensive as a formal trial. There are limitations on the amount an individual can collect in court, and it makes sense to settle a case rather than wait years for a judicial decision that may not result in a significantly more lucrative financial award than can be obtained in a settlement. In Japan, alternatives to judicial adjudication are available in medical malpractice, construction disputes, environmental claims, and consumer complaints (Tanase 1990).

Eric Feldman, in his study of the Tuna Court at the Tokyo Central Wholesale Market's tuna auction, found that Japanese merchants are not necessarily opposed to litigation. He found that merchants do not hesitate to bring disputes to the court despite the tribunal's reliance on formal rules and procedures. Feldman notes the court offers quick, efficient, inexpensive, and reliable decisions that treat disputes as normal events in the buying and selling of fish rather than issues of right and wrong. He concludes that the Tuna Court, by avoiding declaring "winners" and "losers," dampens conflict and contributes to a harmonious and ordered marketplace (Feldman 2006).

Robert Kidder explains Japanese failure to sue as an expression of self-interest that is not terribly different from the motivation of Americans. He cites the example of the Japanese fishing village of Minamata in which babies were born deformed and brain damaged and adults were paralyzed. The disease was traced to the dumping of mercury into the village's fishing waters by a nearby chemical factory. Most villagers refused to sue and were content to rely on the good faith of the company to compensate them. Kawashima undoubtedly would point to the villagers of Minamata as an example of the desire for compromise and harmony.

Kidder dismisses the notion that this failure to sue was based on a cultural rejection of conflict and notes that the factory was the main employer in the town and the inhabitants were fearful of "rocking the boat." The company warned that if they were dragged into court, they would be forced to close medical clinics and schools. A similar mercury-induced epidemic broke out in Niigata, a fishing village farther downstream. Because the residents were not dependent on the factory and did not fear economic retaliation, they immediately filed legal actions (Kidder 1983: 46, 50–51, 77–78, 103).

The response of the villagers in Minamata is not terribly different from the response of workers in West Virginia who were victims of the Buffalo Creek disaster. The Buffalo Creek disaster resulted from a breach in a Pittston Coal Company's coal-waste refuse pile, which was used to artificially dam a stream. The breach allowed a twenty- to thirty-foot tidal wave of water and sludge traveling as fast as thirty miles per hour to sweep through sixteen small communities. More than one hundred people died, one thousand homes were devastated, and four thousand were left homeless. In the end, only two hundred adults chose to sue Pittston Coal, which was virtually the only source of employment in the area (Stern 2008). Kidder concludes by asking whether the Japanese really are more reluctant to sue than Americans and whether Americans are as "trigger-happy" as commonly described (Kidder 1983: 46–47).

A fourth factor influencing dispute resolution involves the economic and legal costs and time required to pursue adjudication. The United States, as we shall see later in the chapter, is viewed by many commentators as a **litigious** society in which people regularly resort to adjudication to remedy harms. Stewart Macauley, in his classic study of contractual relations in the American business community, found business executives prefer to bargain informally with one another rather than to bring a legal action to enforce the terms of the contract. A legal action is expensive and time-consuming, and it strains relationships between businesses and harms a firm's reputation (Macaulay 1963).

Oliver Mendelsohn documents that the Indian business community developed the practice of informally settling disputes rather than resorting to the courts. The Palanpuris in northern Gujarat are a tight-knit community who dominate the Indian and global diamond market. Disputes are settled among diamond merchants by enlisting a distinguished member of the community. In one instance, a Palanpuri diamond broker lost a valuable packet of diamonds. The broker would lose his livelihood if required to compensate the manufacturer for the full value of the lost diamonds. A respected diamond manufacturer intervened and after five hours of negotiation persuaded the trader to accept a reduced amount of money in compensation. Indian cotton traders in various cities enlist merchant associations to resolve disputes between traders and between traders and customers (Mendelsohn 2014).

An additional factor that may influence dispute resolution is the identity of the parties. Individuals may adopt different forms of dispute resolution depending on the identity of the other party. David Engel describes Sander County (a pseudonym), Illinois, as a traditional farming community that in the 1970s was experiencing social change as a result of increased diversity. Farm accidents in the past had been viewed as an accepted part of working life. This reflected a strong ethic of personal responsibility and accountability. An effort to blame others and seek monetary compensation for an injury was considered unethical and immoral. This attitude was reinforced by the close-knit nature of the community in which virtually everyone was connected through family or friendship. Even in the strongest of cases, juries awarded a modest financial recovery; as a result, most personal injury cases were settled before trial. Insurance companies, once having compensated an injured motorist, rarely sued the motorist who caused the accident to recover the payment. The pressure against litigation resulted in a woman accepting $12,000 in settlement for the death of her son in an automobile accident without even filing a legal claim (Engel 1987).

The roughly one in fifteen personal injury cases that did proceed to trial shared a common characteristic: the individuals were separated by a social distance that made any form of dispute resolution short of adjudication difficult. For example, a Mexican immigrant sued the owner of a bar for injuries suffered during a brawl. The plaintiff claimed that the workers behind the bar had passed a weapon to the assailant. The Latino family, although anticipating that people would view them as outsiders and as troublemakers, believed they had been wronged. The tavern owner was an established member of the community who owned a small business that was an important social center in the community. The parties viewed one another with a suspicion that prevented negotiation, and the parties only confronted one another at trial and ultimately reached a settlement.

In another case, a mother brought a case against an automobile dealership for injuries suffered by her 5-year-old daughter when a large trash container on which she had been climbing fell on her. The mother sued for $250,000, and the case ultimately was settled before trial for $3,000. The woman was new to the community and considered herself an outsider. Long-time residents indicated they would have accepted personal responsibility for the injury to the child and would have privately communicated any disappointment to the dealership. New residents believed they

were viewed as outsiders and felt discriminated against and typically used the law to communicate their resentment over being dismissed as second-class citizens. Because the newly arrived residents had no relationship with long-time residents, there were no social or economic costs to bringing a legal action.

An interesting twist is that it was considered socially acceptable to sue an individual for a breach of a contractual obligation. A farmer might be sued for failing to meet the payments for a tractor or for failing to pay for animal feed. Long-time residents accepted that although some flexibility might be provided, people were responsible for failing to meet their commitments.

Sander County illustrates the impact of a culture of long-time residents that rejects adjudication as a method of dispute resolution for personal injury claims. In the case of personal injury claims by newly arrived individuals against traditional residents, adjudication provided the only method to bring outsiders and insiders to the negotiation table. These two groups of residents existed in separate worlds, and new residents did not want to risk retribution or retaliation for pursuing adjudication.

As Sander County changes, there likely will be increased adjudication on personal injury claims, and filing these claims will no longer be viewed as an attack on a way of life based on a shared commitment to common values.

Engel's description of Sander County is similar to descriptions by Carol Greenhouse of Hopewell, located near a major southern metropolis, and Barbara Yngvesson of Riverside, Massachusetts. In each instance, long-term "insider" residents viewed themselves as part of a culturally homogeneous community in which disputes were overlooked or settled in a non-confrontational fashion. This "insider" ethic of law avoidance contrasted with the view of the "outsider" newcomers whose resort to the law was denounced as litigiousness and illustrated their refusal to integrate into the community and to settle disputes in "civilized" fashion (C. Greenhouse, Yngvesson, and Engel 1994).

After reviewing the factors influencing the type of dispute resolution that individuals will pursue, we consider the attitudes of Americans toward the law and the legal system.

■ AMERICAN ATTITUDES TOWARD THE LAW

A number of studies have explored the **legal consciousness** of Americans. Legal consciousness is the attitudes and views of individuals toward the law and how these attitudes and views influence individuals' willingness and ability to pursue legal remedies. Legal consciousness is a dynamic process that is the product of a variety of influences. Your early education and experience with government agencies may be positive, and you may learn in school that America is unique in protecting the civil and political rights and liberties of all of its citizens. These positive attitudes and beliefs may change as a result of a bad experience with the police, difficulties and frustrations with the Internal Revenue Service, or learning that, despite the fact that your landlord is mistreating you, you cannot easily get out of the lease you signed (Nielsen 2004: 6–10). A number of studies of legal consciousness are summarized below.

Styles of legal consciousness. A leading study of legal consciousness is Patricia Ewick and Susan S. Silbey's 1998 book, *The Common Place of Law: Stories From Everyday Life*. The authors conducted far-ranging interviews with 430 New Jersey residents in order to explore how people think about and use the law in their daily lives.

Ewick and Silbey identify three types of legal consciousness. The *before the law* consciousness is held by individuals who view the law with awe and respect and as an objective and respected set of institutions and rules. They turn to the law when they experience severe problems and often experience frustration at trying to accomplish something in the legal system. Individuals who possess the *with the law* legal consciousness view the law as a "game" with a set of rules that can be used and manipulated by skillful players to achieve concrete goals. The last type of legal consciousness is *against the law.* Individuals with this consciousness view themselves as caught in the complexity and power of the law and engage in what the authors call "acts of individual resistance" to avoid being controlled by the law. Examples include claiming to be disabled to avoid jury service, using a high-pitched voice "like a woman" to ensure the police respond to a call for assistance, or a juvenile's lying about her age at a hospital emergency room to receive treatment without her parents' permission (Ewick and Silbey 1998).

The authors tell the story of Millie Simpson, a housekeeper earning $18,000 per year, who drove a series of old gas-guzzlers. She parked her 1984 Mercury automobile in front of her house and left it there because she could not afford the insurance payments required to operate the car. Millie was surprised to receive a summons to appear in court for leaving the scene of an accident and driving without insurance. She appeared in court and truthfully explained to the judge her son's friend had taken the car without her permission. The judge accepted Millie's explanation and her plea of not guilty. At her second appearance, Millie assumed the second judge was aware of her earlier explanation and that there would be no problem obtaining an acquittal. She was surprised when she was found guilty (*before the law*). Millie's wealthy employer intervened and hired a powerful law firm that managed to reopen the case and succeeded in having the verdict overturned and Millie's fine returned to her (*with the law*). Millie subsequently was convicted of three charges relating to the condition of her automobile and, unknown to the court, performed her community service at the church where she had been active for many years (*against the law*).

Monica Bell documents that African American mothers view the police with distrust as a result of police violence, lack of responsiveness, racial bias, and a failure by the police to pursue offenders *(against the law)*. As a result, they generally rely on self-help to resolve conflicts (M. Bell 2016).

The mothers in Bell's study, however, employ the police in a strategic fashion *(with the law)*. One strategy is "domain specificity" in which the police are trusted for problems related to the home such as escorting violent partners out of the house, locating runaway children, or calming noisy neighbors. On the other hand, the police are unlikely to be called to address drug dealing or violent crime where there is a strong norm against "snitching," a risk of retribution, and the prospect of lengthy imprisonment for the offender. Another strategy is "therapeutic consequence" in which calling the police is viewed as a mechanism to get a family member into a social service program, to prevent a young person from slipping into criminality, or to protect a friend who is a victim of domestic violence.

Legal consciousness and working-class Americans. Sally Engle Merry studied white working-class individuals in two New England towns and the legal consciousness that motivated them to pursue legal remedies in court (Merry 1990).

Merry found that before bringing a complaint to the legal system, people typically first resort to gossip, zoning boards, complaints to the police and social welfare agencies, and self-help. Individuals threaten to pursue legal remedies more often than they actually file court actions. They recognize that filing a complaint in court intensifies and escalates the conflict and as a result pursue a legal remedy only as a last resort after exhausting other alternatives.

Merry found that working-class individuals turn to the legal system to solve their problems because they believe as Americans they are entitled to the assistance of the legal system and that the courts have a responsibility to protect the rights, safety, and security of Americans. They appreciate that settling disputes through "legal rules and authorities is more civilized and reasonable than violence." Complainants are disappointed when they find the disputes they brought to court are dismissed by prosecutors and judges and by the other criminal justice personnel as insignificant "garbage cases" in which the courts are being asked to solve a problem with a noisy neighbor, an unfaithful lover, a violent husband, or an undisciplined child. These types of small-scale disputes fall within the jurisdiction of lower criminal courts, juvenile courts, and small claims courts (Merry 1990: 2).

Working-class individuals' experience with the courts typically is discouraging. They find the "system complex, the judge hard to find, and the penalties surprisingly light" (Merry 1990: 3). The reaction of litigants is that courts are indifferent to the problems of the average person. Plaintiffs, rather than receiving legal protection, are met with lectures and advice about how to organize their lives and are told to return for mediation. Mediation is viewed as a dead end. The discussion is not a calm and cool meeting of the minds. It instead is a war of words, an emotionally intense exchange in which the participants shout and accuse one another of being a "bad person" and unwilling to compromise.

Individuals who pursue a legal remedy in a family or neighborhood dispute experience the satisfaction of embarrassing and inconveniencing a resistant neighbor or family member who is forced to appear in court. The downside of seeking a legal remedy is that the judge now is able to dictate the outcome of the dispute.

Merry found that women are more likely than men to resort to the courts because they feel that they lack personal power and are in need of a strong ally to protect themselves against domestic violence, to retain child custody, or to gain leverage in conflicts with neighbors or local merchants. They are disappointed because they find that domestic violence complaints, rather than being treated as serious claims, are dismissed as emotional outbursts. Women say their domestic violence complaints antagonize the men against whom the complaint is filed and place the women at risk of violent retribution (Merry 1990: 70, 180).

An important aspect of Merry's study is that people are combative and resist the efforts of judges and lawyers to minimize the importance of their complaints and dismiss their cases. They refuse mediation, insist on going to court, and challenge the judge in the courtroom. Individuals are not deterred when a judge dismisses their criminal case. They respond by filing new charges in small claims courts or suing for civil damages.

Merry discovered that despite the disappointment with the legal process, working-class Americans have a strong sense of their legal rights and view themselves as entitled to seek legal remedies. The legal system, by stressing that each individual has a right to his or her "day in court" and that the "courthouse door is open to every American," and by highlighting the power of law to protect individuals, reinforces the belief that individuals have the right to ask the courts to protect them. The more people make use of legal institutions, the more comfortable they are in turning to the courts.

Merry's study showed that working-class Americans feel the same sense of entitlement to use the courts as wealthier Americans. The difference is whereas working-class Americans employ the courts for family matters and for neighborhood disputes, middle-class Americans tend to use the courts for disputes over real estate, construction contracts, and consumer problems.

The last point is that although Americans are encouraged to use the courts, they are disappointed with their treatment and with the outcome of their cases. It appears this negative experience affects their belief in the American system of justice. Merry writes that litigants "come to see the particular court . . . as corrupt and flawed . . . [and] come to see that their entitlements are not taken as seriously as those of other people." Working-class people have learned that although they have access to the courts, it takes skill and determination to be taken seriously. Despite their experiences, they continue to believe strongly that it is their right to ask courts to protect their rights and liberties (Merry 1990: 145, 161, 171).

Offensive speech. Laura Beth Nielsen's study of offensive public speech explored the attitudes of Americans toward freedom of speech. She found that individuals' experiences shape their view of the law. Nielsen studied the reactions in three Northern California cities to offensive public speech (including racist and sexually suggestive speech aimed at women and at gays) and the reactions to individuals soliciting funds on the street (begging) (Nielsen 2004). In the United States, unlike in most other countries in the world, the First Amendment protects racist and sexist speech as part of the marketplace of ideas. One woman interviewed by Nielsen reported a man walked up to her and said, "I hate women, they're all sluts." Another commented, "Suck my d---." Yet another man commented, "I would have liked to have been there this morning when your man put that smile on your face. . . . I'll bet he f---ed you so long you'll be smiling all day" (Nielsen 2004: 1).

Nielsen explores whether people believe that offensive speech should be protected under the First Amendment despite the fact that protecting this type of speech creates a "license to harass" (which is also the title of Nielsen's book). Nielsen asked a sample of white men, white women, and people of color whether they believed that such speech should be prohibited. The three groups that were interviewed agree that racist and sexist speech is offensive although they believe the speech should be protected under the First Amendment. The interesting finding is that the groups differed on the reason why the speech should be protected under the First Amendment.

It is not surprising that people of color were much more likely than whites to view racist speech as the "most serious [personal] problem" and women were much more likely than men to view sexually suggestive speech as the "most serious [personal] problem." There nonetheless was recognition among all groups that racist and sexist speech constituted a "social problem" (Nielsen 2004: 75, 81, 97).

Whatever their personal reaction to offensive speech, the individuals interviewed by Nielsen generally did not support legal regulation of offensive speech. The interesting point is that various groups offer different reasons for protecting offensive speech. A majority of white men believe racist and sexist speech should be protected under the First Amendment (before the law). White women and people of color tend to oppose regulation of offensive speech because they believe it would be difficult to draw the line between offensive and inoffensive speech and the restriction on offensive speech could be used to restrict their own speech (against the law). A significant percentage of women also believe the police lack the resources to enforce laws against offensive speech and that offensive speech is best addressed by the individual who is confronted with the comments (with the law).

Nielsen speculates individuals' views toward racist and sexist speech reflect their personal experiences. She speculates white men adopt a First Amendment approach because they are not the target of verbal insults and attacks and do not fully appreciate the impact of verbal assaults. Women have learned that they cannot rely on the law to combat gender bias and, as a consequence, they doubt the capacity of the law to protect them from offensive speech. Views toward regulation of sexist and racist speech have little relationship to individuals' occupation or income (Nielsen 2004: 92, 93, 106, 112–127, 129–130).

There is no significant difference between groups in terms of their views toward begging. Eighty percent of individuals in Nielsen's study reported encountering "beggars" on the street, and 35 percent of respondents favor restricting begging. The individuals who oppose restrictions on begging believe individuals have no alternative to begging and should have the ability to do what is required to survive. Nielsen notes that while racist and sexist speech is tolerated, begging that directly impacts white men and businesses is prohibited in various cities, suggesting legal regulation reflects the public policy preferences of influential business owners who are fearful beggars will interfere with shoppers (Nielsen 2004: 163–164, 176).

Calvin Morrill and colleagues studied "rights consciousness" among young people. They found that although minority youth experience a violation of their rights in school to a greater extent than do Asian and white young people, they are no more likely to pursue a legal remedy. Regardless of race, students are more likely to take extra-legal rather than legal action in response to discrimination. Examples of extra-legal remedies are the rallies and lobbying efforts relied on by undocumented young people intent on securing legal protection. The authors theorize the experience of minority youth with the legal system has convinced them that pursuing legal remedies is not likely to result in the vindication of their rights (Morrill et al. 2010).

This study, along with Nielsen's findings, confirms that Americans view legal remedies as a last resort and are reluctant to make legal complaints.

Sexual harassment. Sexual harassment is an issue of concern to both private industry and the government. Most large corporations and government agencies have training programs and detailed regulations addressing sexual harassment, and there are examples of companies like ESPN that have terminated employees for inappropriate remarks and conduct. A number of studies have found that sexual harassment is most likely to occur in male-dominated workplaces that tolerate and even encourage discriminatory attitudes toward women. This, of course, is not the only explanation. Most universities have strong policies against sexual harassment, and yet roughly 60 percent of college students state that they have been harassed, in most instances by fellow students. The number of complaints of sexual harassment filed with the federal Equal Employment Opportunity Commission continues to rise at a rate of roughly 12 percent a year (Boland 2005; L. Howard 2007).

The data indicate only about one-sixth of sexually harassed women pursue legal action. Phoebe A. Morgan studied thirty-one women who considered filing a complaint and found that only four of them ultimately pursued legal action. Most of the women feared a legal action would strain relations with their husbands or significant others and would cause their children to experience stress and strain (Morgan 1999).

Sexual harassment claims are very different from the local family and neighborhood disputes discussed by Merry and by Ewick and Silbey. Women must hire expert lawyers, engage in years of litigation against powerful governmental or business organizations, and subject themselves to intense examination of their personal lives. The women interviewed by Morgan believe they were victimized and are entitled to legal remedies although they have reluctantly concluded that practical considerations prevent them from pursuing their claims (Morgan 1999).

Abigail C. Saguy found very different attitudes in France toward sexual harassment. She found that sexual harassment statutes in France are not entirely respected and that lawyers and plaintiffs who bring these suits are "discredited" and "stigmatized." In France, sexual remarks and flirting tend to be accepted as part of the natural relationship between the sexes, and the American laws are viewed as intrusive and as an interference with personal freedom.

French female employees hesitate to condemn sexual harassment at work because of a fear of being identified with American feminism. Judges also want to avoid being criticized for adopting the ideology of American feminism and are reluctant to award significant monetary compensation (Saguy 2003).

Employment discrimination. Kristin Bumiller studied the response of African American women to job discrimination. Bumiller notes that the individuals she interviewed did not decide against pursuing claims of discrimination based on a lack of knowledge of their rights or a lack of access to a lawyer or as a result of being frustrated by technicalities (Bumiller 1987).

The individuals in Bumiller's study for the most part were angry over their treatment by employers whom they viewed as "tyrants." They prided themselves as possessing a strong "ethic of survival," strength, integrity, and a sense of self-sacrifice that allowed them to continue to work despite discrimination.

The women resisted filing a legal claim for discrimination based on their "group identity." They rationalized that "everyone confronts mistreatment" or that the individual who discriminated against them was a "bad apple" who was not representative of the people in their workplace. The women, though recognizing that they had a strong legal claim of discrimination, did not want to disrupt their work environment and were skeptical about the prospects for success, believing that their supervisor would deny what was said, their colleagues would resent them, and they would be subject to retaliation.

In sum, although they were aware of their legal rights, the individuals interviewed by Bumiller did not view legal protections against discrimination as effective protection because they perceived the costs and consequences of litigation as outweighing the rewards.

Rights consciousness and the Americans with Disabilities Act. David M. Engel and Frank W. Munger interviewed sixty individuals with learning disabilities or physical disabilities regarding the impact on their lives of the Americans with Disabilities Act (ADA) of 1990. The ADA was intended to combat the day-to-day areas of discrimination confronting people with disabilities. Despite confronting discrimination, none of the individuals interviewed by the authors had filed a claim under the ADA. They possess an understandable fear that requesting an accommodation will result in a perception that they are unable to achieve their career potential without special treatment (Engel and Munger 2003).

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PHOTO 6.1 The Americans with Disabilities Act (1990) is intended to combat the day-to-day areas of discrimination confronting individuals with disabilities.

Engel and Munger asked whether the law has made

a difference in individuals' lives. They found that a large number of individuals with mental and physical challenges have come to view themselves as fully able to reach the heights of their profession. The ADA has helped individuals reinterpret their past and understand that their life situation is the product of discrimination and a lack of support rather than a result of a lack of ability or intelligence. The law also has educated the larger community about the need to take affirmative steps to assist individuals who are intellectually and physically challenged.

The authors found that individuals differ in their ability to take advantage of the opportunities afforded by the ADA. Individuals possess differences in drive, ambition, and resilience and in their capacity to avoid viewing themselves as limited by their disability. Individuals with strong family support and with economic advantage have opportunities that are not available to individuals who find their lives limited by a lack of money or by race or gender. Individuals' opportunities also may be limited by the nature of their disability and how late in life they became disabled. Individuals who lack resources and whose mental disability is undetected may go through life without realizing the extent of their disability.

Engel and Munger conclude that despite the positive impact of the ADA on the lives of individuals, the general pattern is for Americans with disabilities to "lump" a denial of their rights rather than to pursue a legal remedy. They characterize Americans as a nation of "law avoiders." As a result, the violation of rights remains unchallenged, wrongdoers remain undeterred and continue to engage in unlawful behavior, and victims continue to suffer because of their failure to pursue legal remedies. The very individuals the ADA is designed to protect are the least likely to bring claims that their rights are being violated.

Rights consciousness. Anna Kirkland interviewed activists in the "fat acceptance advocates." Federal law does not prohibit discrimination based on obesity, and only a handful of state and local jurisdictions prohibit discrimination based on obesity. These activists experienced discrimination and yet resisted the notion that they merited legal protection. Although "fat acceptance advocates" adopted various defense techniques to counter discrimination and negative remarks in their daily lives and argued that they deserved accommodation based on their weight, they conceded that their condition was based on voluntary behavior and was different from disabilities protected from discrimination under the law. They stressed that individuals deserved to be judged based on their performance and should be free from discrimination and yet resisted the notion that they merited legal protection (A. Kirkland 2016).

Kirkland's findings confirm other studies that found although Americans may not view themselves as possessing legal rights, they are committed and concerned with expanding the protections provided by the law. George Lovell analyzed letters written by American citizens to the newly established Civil Rights Division of the Department of Justice between 1939 and 1941, long before the scope of civil rights and liberties protected under the Constitution was expanded by the U.S. Supreme Court. Lovell found that individuals expansively interpreted the Constitution as extending to areas that had not yet been recognized by the Supreme Court such as the rights of criminal defendants in state courts. The Department of Justice explained in almost every instance that the citizen's complaint had no legal basis. Roughly 12 percent of individuals responded by writing back and insisting that their complaint was grounded in the Constitution. Lovell notes that a significant number of individuals did not passively accept the prevailing view of their rights and wrote letters that viewed rights in idealistic terms and as a dynamic and evolving legal concept (Lovell 2006).

American "legal consciousness." Americans have a strong commitment to the Constitution and to the core principles of the American Republic. Regardless of their social class and income, they strongly believe that they are entitled to their "day in court." Contrary to common belief, Americans are not "quick to pull the trigger" and view the filing of a legal challenge as a last resort. It is surprising that despite the fact that the system of justice does not always meet expectations, there is a strong commitment to resolving conflicts through the legal system rather than through intimidation or coercion (D. Engel 2016).

Most individuals find that pursuing a legal remedy exacts considerable emotional and financial costs for themselves and for their families. The prospect of taking on a large organization in a long drawn-out sexual harassment or discrimination claim is particularly intimidating and requires significant resources and self-confidence.

Average Americans' interactions with the legal system leave them with a sense of being disrespected and disappointed. Individuals resent their claims being channeled into mediation, which they consider to be an unsatisfactory substitute for adjudication in court. They are confused by legal procedures and quickly come to understand that they must fight to be heard and to enjoy their "day in court." Women and minorities are particularly skeptical about the ability of the law to protect them. There is a perception that the legal system seems to be more interested in addressing the problems that confront the wealthy and well-off members of society and that judges and lawyers have little interest in expending the time and resources to address the family and neighborhood "garbage" problems that concern working-class Americans. The end result is that the average American "lumps it" rather than pursue legal remedies. It is the better-off members of society who are less likely to "take no for an answer."

Numerous studies conclude that the extent to which injured Americans "lump" their injuries is startling. Nine out of ten injured Americans do not pursue a claim. Only 3 percent of individuals suffering a minor injury, for example falling on an icy sidewalk, hire a lawyer. Among those who suffer modest injury, 78 percent of individuals "lump" their injury. Even in the case of severe, life-threatening injuries, two out of three individuals do not take an action (Hensler et al. 1991). Only 3–4 percent of individuals pursued cases involving medical errors (T. Baker 2005).

David Engel in a recent book challenges the view that individuals make a conscious and rational decision whether to proceed from one level on the "pyramid" of dispute resolution to the next level on the pyramid. He argues that the decisions of "real human beings" whether to pursue tort claims are determined by a range of factors, including the debilitating impact of physical pain, the stigma attached to people who complain, the societal ethic of accepting personal responsibility for injuries, and the influence of family and friends on decisions. The complex factors that combine to cause Americans to "lump" their injuries, according to Engel, are not accounted for by the notion that individuals make a rational decision whether to lump or to pursue a legal claim (Engel 2016: 31–36).

The failure to pursue claims and lumping unlawful conduct means that tortfeasors will be undeterred in continuing their harmful conduct such as distributing harmful products. The costs of injury will be absorbed by individuals who are harmed rather than by those responsible for the injury. The trajectory of an individual's entire life can be changed by an injury. Consider the costs and consequences of failing to bring a legal action against a construction company for the use of cancer-inducing building materials. A successful case can inspire other individuals to pursue legal remedies and force the company to change the type of building materials that are employed (Engel 2016: 180–181).

A crucial dimension of legal consciousness is **procedural justice**. The perception whether a case was "justly" decided is dependent on whether the procedures are viewed as fair. Americans are concerned about whether they are given the opportunity to articulate their views and to be heard and whether decision-makers are fair, neutral, and unbiased and treat them with respect and regard. In those cases in which procedures are viewed as fair, a significant percentage of individuals will accept the result, even when they lose the case. Tom Tyler notes that individuals who are allowed to participate in reaching a decision are likely to accept the result (Tyler 2006: 163–165).

Individuals at times resort to extra-legal and legal methods of resistance to an unresponsive legal system or employ these tactics to call attention to an issue.

Resistance, according to James Scott, is the "weapon of the weak" and involves creative methods to attack an institution ranging from a waiter spitting in a customer's soup to a worker sabotaging an assembly line (Scott 1985). Mindie Lazarus-Black and Susan Hirsch in *Contested States* (1994) discuss how oppressed groups use law as a tool to combat powerful institutions and to achieve a measure of personal independence. Susan Coutin documents how church groups defied what they viewed as the American government's unlawful refusal to recognize the asylum claims of Central American refugees fleeing civil war and offered the individuals sanctuary in churches and community centers (Coutin 1993). Kitty Calavita, in her book on law and society, discusses how prison inmates flood the courts with complaints to harass guards and swamp the prison administration with paperwork, thereby expressing their anger while maintaining a sense of dignity (Calavita 2010: 41).

Despite the reluctance of Americans to rely on the legal system, commentators warn that the American court system confronts a crisis and is at risk of being overwhelmed by an avalanche of litigation. The claim is made that we have too many laws that have opened the door for too many "nonsense cases" that do not belong in court. These cases limit the ability of the judicial system to devote attention to important legal issues. Businesses respond to these "nonsense suits" by raising their prices to pay the costs of defending themselves in court against these groundless cases. The next section asks whether the litigation crisis in America is a reality or a myth.

■ THE DEBATE OVER LITIGATION IN AMERICA

The conventional wisdom is that the United States is characterized by rampant litigiousness. *Litigiousness* is derived from Latin and characterized by a quarrelsome, contentious individual. For purposes of this discussion, it connotes an eagerness to litigate. Our response to any insult or slight is "I will see you in court," and we urge our friends and relatives "to sue the bastards" (Lieberman 1981; W. Olson 1991).

The issue of litigiousness has been of concern for a number of years. In 1970, Chief Justice of the United States Warren Burger in a talk to the American Bar Association urged a solution to what he viewed as the crisis created by increased litigation. Chief Justice Burger noted that federal judges had a backlog of cases and called for an increased number of judges and appointment of professional court administrators to manage court dockets, and endorsed a study by the late Harvard law professor Paul A. Freund calling for a new National Court of Appeals to alleviate the workload of the U.S. Supreme Court. In 2005, President George W. Bush condemned the rush to the courthouse when he observed that "we're a litigious society; everybody's suing . . . there are too many lawsuits in America" (Haltom and McCann 2004: 291).

Why is litigiousness considered a problem? After all, everyone has a right to have "his or her day in court." According to critics, the courts are jammed and overwhelmed with cases that have little legal merit. The entire system is in danger of collapse. The tyranny of law has replaced logic and reason, and Americans suffer from the tyranny of too much law and too many lawyers. Philip K. Howard complains that more than sixty steps are required in New York City to suspend a student for more than five days. A school principal recounts being required to suspend a first grader for carrying a weapon to school, who, after being asked by the teacher to bring her favorite possession to class, brought a pen knife given to her by her grandfather (P. Howard 2009: 104, 106). In the criminal area, defendants raise what Alan Dershowitz terms "abuse excuse," blaming their diet, parents, genes, or childhood trauma for their criminal activity (Dershowitz 1994: 3).

As a result of what Lawrence M. Friedman calls "hyperlexis," courts are unable to focus their full attention on important issues. There are considerable costs to this avalanche of litigation. Taxes are raised to support the judicial branch; businesses are dragged into court, driving up the prices they charge consumers; and insurance rates for doctors skyrocket, forcing them to abandon medical practice. In a society where students sue teachers, patients sue doctors, consumers sue businesses, and neighbors sue one another, trust is undermined. Doctors practice defensive medicine, teachers hesitate to discipline students, and people walk on eggshells. According to this narrative of "hyperlexis," the United States has become a nation in which individuals sue at the drop of a hat and blame others for their problems rather than assume individual responsibility for their actions (L. Friedman 1994: 16).

Caesar Barber is exhibit A of the litigation explosion. At the time of his legal suit, Barber was a 56-year-old maintenance worker who was 5 feet, 10 inches tall and weighed 270 pounds. He filed a legal action claiming that fast-food chains failed to disclose the fat and salt content in their food and that their cuisine had endangered his health (Haltom and McCann 2004: 179–181).

Nutritionists, doctors, and dieticians appreciated the important dietary issues raised by Barber's lawsuit. The popular reaction in the media, however, was to ask whether it was fair for Barber to argue fast-food restaurants were legally liable for the fact that he ate too much inexpensive, fattening food. Critics humorously asked whether Barber wanted "fries with his lawsuit."

6.1 YOU DECIDE

In 2002, a suit was filed on behalf of two Bronx, New York, teenagers who alleged that McDonald's had made them "fat and sick." One plaintiff was a 51-year-old woman who was 5 feet, 6 inches tall and weighed 270 pounds, and the other plaintiff was 14 years old and 4 feet, 1 inch tall and weighed 170 pounds. The case was thrown out by the judge on the grounds that the plaintiffs had failed to demonstrate that McDonald's food was more dangerous to health than was entirely obvious and that McDonald's food was responsible for their condition. In reaction to this case and other cases, twenty-six states enacted "commonsense consumption" laws prohibiting consumers from suing food sellers for making them fat, giving them diabetes, or creating high blood pressure. Proponents of these "cheeseburger" laws argued that individuals' physical challenges result from a combination of genetics and poor choices in nutrition

and in personal lifestyle. Prohibiting individuals from suing and blaming fast-food companies for their physical challenges has the beneficial effect of encouraging individuals to take responsibility for their own health and to lose weight. On the other hand, individuals who advocated imposing responsibility on fast-food companies argued that the companies conceal the high salt and fat content of their food; the companies spend billions of dollars on advertising, particularly targeting children; and the food that fast-food outlets sell is psychologically and physically addictive.

Should individuals be prohibited from suing fast-food companies for the health risks created by fast-food?

In 1976, Judith Richardson Haimes sued Temple University Hospital. She claimed that an iodine-based dye used in conjunction with a CAT scan had caused an extreme and serious allergic reaction, including headaches, and sued, based in part on the claim the headaches had ended her practice as a professional psychic. In the past, she claimed to have assisted the police in solving crimes. The jury deliberated forty-five minutes before returning a verdict in her favor for $600,000 and interest for a total of close to $1 million. The judge overturned the monetary award as "grossly excessive" and ordered a new trial. A second judge dismissed Haimes's case, and she was left with nothing to show for her efforts. Despite the fact that it ultimately was dismissed, the Haimes case became a frequently cited example of the litigation explosion in the United States (Haltom and McCann 2004: 1–2).

Other instances of so-called nonsense cases include suits against a woman for standing up a man for a date, legal actions brought by a child against his parents for failing to properly raise him (L. Friedman 1994: 21), a self-described "milk-a-holic" suing the dairy industry for clogged arteries, an individual suing the phone company for the loss of a leg that occurred when a car hit the phone booth he was using, and a man who sued an industrial manufacturer because the stress caused by pushing the lawnmower the company manufactured caused a heart attack. In another example, California teenager Rick Bodine climbed onto the roof of a high school to steal a floodlight. He fell through a covered skylight, and the resulting injuries left him a quadriplegic. He sued the school on the grounds school officials were aware of the danger on the roof because of an injury that had occurred to a worker several months earlier (Haltom and McCann 2004: 64–66).

William Haltom and Michael McCann studied newspaper coverage of litigation. They conclude that the media coverage overrepresents "crank cases." It is the old story that "human bites dog" is covered while "dog bites human" is not considered newsworthy. They find that the outrageous "tort stories" reported in the newspapers are an insignificant percentage of the cases litigated in court. The media is under pressure to sell papers, so they focus on controversial cases and rarely cover cases in which plaintiffs are unsuccessful or reports that a verdict was overturned on appeal (Haltom and McCann 2004: 174–177).

Lawrence M. Friedman cautions against accepting claims of a litigation explosion. He echoes Haltom and McCann in arguing that most of the cases featured in the media are unrepresentative of the typical tort case and there is no evidence of a litigation explosion. Despite the fact the American population has increased, the number of cases filed per hundred thousand people has remained relatively stable. Thus, although the number of cases filed has increased, the rate has remained relatively stable. The figures that typically are relied on to support the claim there is a litigation explosion are based on filings in federal courts, yet 95 percent of cases in the United States are

brought in state courts. A determination of the number of cases filed in state courts is complicated by the fact that state court statistics are notoriously inaccurate. Laurence Baum, after examining the number of case filings in state courts in recent years, concludes that filings have been "flat or [have] decreased" and that the "arrow is either flat or facing down" (Baum 2013: 224–225).

Friedman also notes there are problems in measuring the concept of "litigation." Do we include cases that are filed? Cases that are filed and settled before trial? Cases that are dropped during the trial? An increase in the number of cases filed in court does not necessarily mean judges are overwhelmed. In California, the largest category of cases that are filed is divorce. These cases typically are not time-consuming. Divorce orders are drafted by lawyers prior to divorce hearings and rubber-stamped by the judge. Most automobile accident claims in California are settled prior to trial: less than 1 percent of automobile accident claims result in a trial (L. Friedman 1994: 17–19).

The United States undoubtedly has experienced an increase in the number of laws as society has become more complex, although this does not necessarily translate into increased litigiousness. The automobile, for example, has led to volumes of new traffic laws, the licensing of drivers, registration of vehicles, environmental regulations, laws on taxis and ride services, trade agreements regulating the import of foreign automobiles, consumer protection laws, franchise agreements between manufacturers and dealers, and laws regulating the content of fuel as well as countless other rules and regulations. Some lawyers make a living by concentrating on arrests for drunk driving and moving violations.

The increase in the number of laws has not necessarily translated into an increase in the amount of litigation. One explanation is that the law is fairly predictable and certain in certain areas. For example, state courts follow established formulas for the amount of child support required following a divorce, and there is very little room for argument and the parties have no reason not to reach a settlement.

Businesses try to anticipate problems when they enter into contracts in order to avoid litigation. Most apartment leases and car sales contracts cover every conceivable issue that may arise and leave little room for litigation. Next time you check a bag with an airline, take a look at the baggage claim tag to see how the airline has limited its liability for lost or damaged baggage. Businesses, landlords, and employers also have developed mediation or arbitration mechanisms for resolving and settling disputes. The end result is that there is an increase in legal activity by lawyers in writing contracts, in drafting leases, and in representing clients in arbitration and mediation although this does not translate into an increase in litigation.

Lawrence M. Friedman concludes that although the number of cases filed has not greatly increased, there are new types of cases being brought to trial in areas that formerly were not viewed as subject to legal regulation. He characterizes the development of these new areas of litigation as an expression of Americans' desire for "total justice." Many of these cases are complicated, and this accounts for the fact that judges feel overwhelmed. Friedman cites several areas in which we have seen an increase in litigation; see Table 6.1 (L. Friedman 1994).

Friedman's argument is supported by a study by J. Mark Ramseyer and Eric B. Rasmusen, who found that the amount and type of litigation in the United States generally was the same as in Canada, France, Germany, and the United Kingdom. The court dockets in all these countries focused on bankruptcies, divorces, and automobile accidents. However, Americans radically differed in what the authors term "second order litigation," cases that would never be litigated in other countries. These "second order" cases included legal actions seeking significant amounts of damages against tobacco companies and asbestos and automobile manufacturers and litigation against

Table 6.1 ■ New Areas of Litigation	
Civil rights	Federal civil rights laws in the late 1960s and the Americans with Disabilities Act and other laws have resulted in the filing of employment discrimination cases, voting rights cases, and cases on university admissions and disability access that largely were unknown in the past. In some cases, individuals sue on behalf of themselves as well as on behalf of similarly situated individuals (a class action).
Judicial intervention	Courts have responded to legal actions by intervening to monitor the treatment of prisoners and residents of mental institutions and the clean-up of environmental hazards. In a significant number of cases, judges have found violations of civil liberties and have appointed "special masters" to implement court-ordered reforms.
Megacases	Megacases are "monster" lawsuits. In 1969, the federal government filed suit against IBM, claiming that the company's size had provided a monopoly over the market for business technology. The complicated case did not go to trial for six years; during this period, hundreds of witnesses testified, nine thousand documents were received into evidence, and ten thousand pages of pretrial testimony were recorded.

Pokémon Go for the invasion of privacy by causing individuals to trespass on private property (Kritzer 2002a; Ramseyer and Rasmusen 2010).

Litigation that some people regard as interfering with the sound judgment and flexibility of public administrators is regarded by other individuals as protective of rights and liberties. In past decades, law students have been able to enroll in a class on education law, an area of the law that did not even exist fifty years ago. In the 1960s and 1970s, there were seventy-five federal cases addressing students' hair length, sideburns, and mustaches. There also are countless cases on desegregation, the rights of students with mental and physical challenges, and bilingual education. These developments, on the one hand, may be viewed as expanding the rights and liberties of public school pupils. On the other hand, other individuals regard this expansion of the law to be part of an overbearing and intrusive activist judiciary (L. Friedman 1994: 22–34).

An important perspective discussed in the next section is that "clogged" courts are not the major challenge confronting the justice system. The primary problem with the legal process is that it is too complicated and expensive and is not serving the needs of the average person.

6.2 YOU DECIDE

On February 27, 1992, Stella Liebeck, age 79, bought a cup of coffee from the drive-through window at a McDonald's in Albuquerque, New Mexico. Her grandson, Chris Tiano, drove the car out of the drive-through and stopped in the parking lot. Liebeck placed the coffee between her legs and used both hands to open the lid. As she removed the lid, the cup spilled into her lap. Liebeck screamed in pain and went into shock, and Tiano rushed her to the hospital. The doctors concluded that Liebeck suffered

(Continued)

(Continued)

third-degree burns that resulted in permanent scarring over 16 percent of her body, including her thighs, buttocks, genitals, and groin area. Liebeck was diagnosed with one of the worst burn cases from hot liquids the doctors had ever seen and remained in the hospital for over a week, where she was subjected to a series of painful skin grafts. She was partially disabled for roughly two years following the accident.

Liebeck initially wrote McDonald's, asserting that coffee "that hot" should "never have been given to a customer." She requested McDonald's to evaluate the temperature at which coffee should be served to customers and asked for compensation for her medical expenses and related costs. Liebeck's request for McDonald's to change its policy was rejected, and the company offered to pay $800 in compensation (her expenses were roughly $20,000).

McDonald's sells a billion cups of coffee per year, which results in daily revenues of $1.35 million.

Liebeck retained an attorney who filed suit and unsuccessfully offered to settle for $300,000. A mediator recommended a settlement of $225,000, which McDonald's rejected.

At trial, Liebeck's attorney contended that the coffee was an "unreasonably dangerous product" and that McDonald's had placed consumers at risk. McDonald's company manual stated that coffee should be served at temperatures of between 180 and 190 degrees, a temperature that can cause severe skin burns if not removed within seven seconds. McDonald's coffee was served at a temperature above that of other fast-food restaurants, and McDonald's had received over seven hundred complaints regarding hot coffee over the previous decade. The company had paid nearly three-quarters of a million dollars to settle these claims. The warning on the cup ("Caution: contents hot") was difficult to read because of its color, size, and position.

McDonald's responded that Liebeck had spilled and failed to remove the coffee from her skin and that McDonald's should not be held responsible for her negligent conduct. According to McDonald's, Liebeck's legal suit exemplified the over-litigiousness of American society.

The jury held McDonald's liable for $160,000 in compensatory damages and roughly $2.7 million in punitive damages. The jury concluded that Stella Liebeck was responsible for 20 percent of the accident, which led to a reduction in the award for compensatory damages. The $2.7 million in punitive damages was intended to discourage fast-food restaurants from continuing to serve hot coffee. The $2.7 million comprised roughly two days' revenue for McDonald's from coffee sales. Trial judge Robert H. Scott later reduced the punitive award from $2.7 million to $480,000 using the formula of three times the compensatory damages. Liebeck later reached a settlement with McDonald's on the compensatory damage award presumably to avoid the expense and risk of defending the verdict on appeal.

McDonald's reported that it had reduced the temperature of the coffee at the Albuquerque outlet to 158 degrees. Coffee lids carried the warning "HOT, HOT, HOT," and signs at local McDonald's warned, "Coffee, tea, and, hot chocolate are VERY HOT!"

William Haltom and Michael McCann find that the media coverage focused on four elements of the Liebeck case: the severity of her injuries, the large jury award, the claim that McDonald's coffee was too hot, and a description of the coffee spill (Haltom and McCann 2004).

Why did this case receive extensive coverage in the media? As a juror, would you have ruled in favor of Liebeck?

■ ALTERNATIVE DISPUTE RESOLUTION

A growing movement toward **alternative dispute resolution** (ADR) developed in the last several decades of the twentieth century. ADR involves the use of negotiation, mediation, arbitration, and other methods as an alternative to the formal judicial adjudication of disputes.

We previously learned there are various forms of dispute resolution. Negotiation involves the parties to a dispute sitting down and talking in an effort to reach an agreement that both sides can accept. An example may be plea bargaining between prosecutors and defense attorneys before trial. Mediation involves a neutral individual who attempts to encourage discussion between the parties. The mediator helps the parties focus on the main points of agreement and disagreement and assists them in crafting a solution. The disputants in a negotiation or mediation must voluntarily accept the results of the process. The most formal form of ADR is arbitration, in which a neutral third party hears the claims of the two parties and reaches a binding decision. Most union contracts (collective bargaining agreements) provide for the mandatory settlement of disputes.

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PHOTO 6.2 Alternative dispute resolution provides a method of resolving disputes without resorting to the courtroom.

One goal of ADR is to expand the availability of the legal process to the poor, elderly, and working class. The expense and intimidating nature of the traditional legal process may discourage people from taking a landlord to court for failing to provide adequate heat, challenging the legality of an exploitative consumer contract, or seeking protection from domestic or family violence. The streamlined and simple procedures of ADR and the absence of lawyers and judges provide a more equal and less intimidating playing field than the courtroom (Kidder 1983: 171–174).

A History of Alternative Dispute Resolution

Jerold Auerbach traces the American origins of ADR to the early colonial settlements. These tight-knit religious communities of believers were based on harmony and devotion to religious doctrine. Individuals were expected to embrace their fellow believers with love and tolerance and to put aside their disagreements to preserve unity and stability. The reliance on courts and lawyers to settle disputes was discouraged because it was feared that legal actions would promote even greater divisions and disagreements. Attorneys were caricatured as weeds that extinguish every plant and every vegetable that inhabits the same soil. Whenever possible, conflicts and disputes were to be decided outside of the legal system through the use of mediation (Auerbach 1983: 3–5, 10).

The Puritans settled individual disputes before the entire congregation; this encouraged members to forgive and forget and to embrace one another in the spirit of Jesus. The congregation was empowered to expel individuals who did not follow the "church way" (Auerbach 1983: 23–25).

The distrust of law and reliance on alternatives to adjudication characterized settlements throughout New England. In the big and busy city of Boston, a town meeting in 1635 directed that inhabitants should not sue one another until an arbitration panel had heard the dispute. In Connecticut, local towns were advised to consider arbitration as an alternative to jury trials. Outside of New England, New Jersey, Pennsylvania, and South Carolina experimented with dispute resolution. The Quakers in Pennsylvania preached that disputes should be resolved with love and gentleness among friends of the parties, and if this failed, individuals were to submit their disagreement to arbitration by disinterested Quakers. A refusal to accept the judgment of arbitration resulted in expulsion from the Society of Friends (Auerbach 1983: 25–31).

The Dutch colony of New Netherlands, during the tenure of Governor Peter Stuyvesant between 1647 and 1664, established a rotating arbitration board to mediate disputes involving wages, debts, and contracts. Individuals who filed legal suits were referred by the court to arbitration, and courts resisted efforts to adjudicate disagreements (Auerbach 1983: 31–32).

Despite the gradual development of fully functioning state judicial systems, alternative forms of dispute resolution existed in religious and political communities, including the Shakers, Seventh Day Baptists, and Mormons (Auerbach 1983: 47–68). The Scandinavian immigrant groups arriving in the early twentieth century in Minnesota and in North Dakota had strong traditions of conciliating disputes, and the Chinese continued the practice of looking to family elders to settle disputes. Newly arriving Jews relied on rabbinical courts to settle disagreements. These groups all stressed the importance of preventing disputes from disrupting their communities and did not want to display their dirty linen to outsiders.

In the twentieth century, the growing embrace of alternatives to the formal judicial system was motivated by a disillusionment with the fairness of the judicial system and by a desire to provide the working class and poor with greater access to the legal system. Roscoe Pound, professor of law at Harvard, in a 1912 address to the American Bar Association condemned the "horse-and-buggy" character of the urban legal system. Courts were crowded, the costs prohibitive, and legal representation out of the financial reach of the working class. There was a drive to develop faster, more affordable, and less divisive alternatives to the adjudication of disputes in courts. There was the added recognition that not all disputes belonged in court or could be easily settled by a judge without a formal trial. Issues ranging from child custody to disputes between neighbors were best settled by the parties themselves.

The famed legal reformer Reginald Heber Smith observed that whereas litigation inflamed the parties and fueled anger, reconciliation offered "moderation" and "honorable compromise" (R. H. Smith 1919).

The city of Cleveland, in 1912, pioneered conciliation of disputes. Parties in a dispute involving $35 or less were encouraged to appear without lawyers before a judge who would work with the parties to reach a mutually satisfactory result based on reason rather than on anger or recrimination. The "Cleveland plan" spread to major cities, including Chicago, Philadelphia, and New York.

Store owners historically have agreed to rely on commercial arbitration. Eighteenth-century New York merchants complained that the legal process was slow and expensive and created bad blood and that few judges understood technical business questions. In 1768, the merchants established a private tribunal staffed by an impartial referee to settle commercial disputes.

The acceptance of commercial arbitration is indicated by the founding of the American Arbitration Association in 1926. Arbitration is used today to determine whether an employee has been justifiably penalized, suspended, or terminated by his or her employer or to iron out disputes in business and industry. Various professional sports leagues such as Major League Baseball and the National Hockey League provide for arbitration of salary disputes between players and management. There also is an arbitration court that presides over disputes within the Olympic movement.

In recent years, even the most diehard opponents of ADR have accepted that court procedures are too complicated and slow and too expensive. There also is a realization that a "winner-take-all" approach does not resolve a dispute. The losing party carries resentments that may result in an increase in tension and conflict. In some instances, a specialized panel may possess more expertise than a court to resolve questions like medical malpractice.

In 1980, the U.S. Congress adopted the Dispute Resolution Act and declared that for most citizens, legal mechanisms for the resolution of "minor" disputes were "largely unavailable, inaccessible, ineffective, expensive, or unfair." Congress provided financial assistance for states and industry to offer inexpensive ADR procedures. Ten years later, Congress adopted the Administrative Dispute Resolution Act, which required federal agencies to offer to settle disputes through mediation and arbitration. The solution was to provide access to community-based dispute resolution mechanisms that are "effective, inexpensive, and judicious." In 1998, the Congress passed the Alternative Dispute Resolution Act, which requires federal district court judges to offer parties in civil disputes access to ADR before the case proceeds to trial.

On taking office, President Barack Obama appointed Harvard law professor Laurence Tribe as senior consular for access to justice with a mandate that included, among other goals, the improvement in access of the poor and middle classes to alternative forms of justice. ADR takes various forms. Several innovative methods are listed in Table 6.2.

Table 6.2 ■ Innovative Litigation Methods

Court-annexed arbitration	Judges refer civil suits to an arbitrator, who issues a quick, non-binding decision. Either party can return the case to court if the arbitration award is viewed as inadequate.
Med-Arb	The disputing parties agree to a third party acting as a mediator and consent to the mediator arbitrating any unresolved issues.
Rent-a-judge	The parties agree to accept the decision of a privately retained judge, often a retired judicial official.
Multi-door courthouse	A center offers the parties a range of ADR services.
Screening panels	Various states have created medical arbitration. A patient bringing a medical malpractice case must first go before a panel of doctors who decide whether the case has sufficient merit to proceed to court.
Ombudsmen	A corporation or government institution employs an individual to handle the grievances of customers or citizens.

One example of the type of initiatives pioneered by local governments is neighborhood justice centers. These centers hear all types of disagreements and are not limited to legal conflicts. The centers provide an inexpensive form of dispute resolution for minor housing, family, and criminal

disputes. They tend to rely on mediators from the local community, who tend to be available at all hours of the day.

Supporters of ADR point out that disputants who rely on ADR and disputants who pursue their claims in courts are equally as pleased with the results. Studies indicate that the small, intimate setting of ADR in which the mediator or arbitrator provides both parties with a fair opportunity to talk tends to result in less heated discussion than disputes settled in a courtroom (Travers 2010: 130–131).

ADR is not free from criticism. Critics claim individuals deserve their day in court regardless of income and education, and there is reason to believe individuals often are pressured into outcomes that are not in their best interest. According to critics, ADR is not about ensuring justice to the disenfranchised; it is about efficiently riding the judicial system of what powerful interests regard as "garbage" cases. The focus should not be on providing people remedies for yapping dogs or screeching cats or rowdy teenagers who keep people up at night; rather, the focus should be on providing individuals with access to health, healthy food, and the tools to control the environmental hazards that litter their communities (Auerbach 1983: 144). A focus on solving a particular problem, like teenagers who gather on the corners and intimidate residents, fails to address the underlying justice issues that cause the problem. Defenders of ADR respond that these larger concerns are questions of public policy that are better suited for the legislature than for the courts (Auerbach 1983: 144) (see You Decide 6.5 on the study site for the use of dispute resolution to settle injury claims of the victims of the 9/11 terrorist attacks).

6.3 YOU DECIDE

American corporations as a matter of routine include clauses in their contracts that are written in fine print that require individuals to agree in advance to arbitrate any disputes that arise rather than pursue a remedy in court. In 2009, the public interest group Public Citizen found that 80 percent of credit card companies, 70 percent of banks, and 90 percent of cell phone companies currently have arbitration clauses in their consumer contracts (Staszak 2015: 19, 38). The proliferation of these clauses is troubling because individuals in many instances are unknowingly forfeiting their constitutional right to file a legal action against the company. American consumers, as a result of these arbitration clauses, in many cases have lost the right to pursue legal actions against automobile dealers, banks, construction firms, and a large number of other types of businesses.

Arbitration clauses, in addition to restricting individuals from bringing legal claims in court, also typically prohibit individuals from organizing class action suits in which individuals combine their individual small claims so as to make the claims economically worthwhile for a lawyer to bring to court. Absent a class action, it simply is not financially feasible to pursue a legal action for even several thousand dollars.

Corporations under arbitration clauses typically have the right to name the arbitrator and to establish rules of evidence and at times shift the cost of unsuccessful claims to individuals. The arbitration proceedings, other than the names of the complaining party and the corporation, typically are sealed from public examination. Some contracts contain opt-out clauses that allow an individual to avoid the arbitration clause if invoked within thirty to forty-five days of signing the contract although most people are unaware of this provision. The data indicate that companies select the same arbitrators to conduct arbitrations, which gives arbitrators seeking continued

employment an incentive to rule for the company. The *New York Times* found that forty-one arbitrators each handled ten or more cases for a single company between 2010 and 2014. In one instance, an arbitration firm had handled over four hundred cases for a corporation.

The evidence suggests that individuals are reluctant to pursue arbitration. The *New York Times* found that between 2010 and 2014 only 505 consumers went to arbitration over a claim of $2,500 or less. Verizon, with more than 125 million subscribers, only confronted sixty-five consumer arbitrations between 2010 and 2014; Sprint, with more than 57 million subscribers, only entered into six arbitrations; and Time Warner Cable, with 15 million subscribers, only confronted seven arbitrations.

Consumers perhaps realize that they are not likely to be successful in company-required arbitration. One study in 2007 found that arbitrators in California ruled against consumers 94 percent of the time (Staszak 2015: 19, 38).

The use of forced-arbitration clauses was upheld by the U.S. Supreme Court in decisions in 2011 and in 2013, and in response to these decisions, the use of arbitration clauses has rapidly increased. It is difficult to obtain a credit card, cable service, or cell phone or to shop online without agreeing to an arbitration clause, buried in the contract. The use of arbitration clauses is not confined to disputes about money. Doctors, nursing homes, and private schools are increasingly relying on forced-arbitration clauses to limit claims for discrimination, elder abuse, fraud, medical malpractice, and wrongful death. The family of a 94-year-old woman in a nursing home in Murrysville, Pennsylvania, who died from a head wound, was required to settle the dispute through arbitration, as was a woman in Jefferson, Alabama, who sustained injuries when the brakes failed on her Honda automobile. The parents of an infant born with serious deformities in Tampa, Florida, had their lawsuit filed in state court dismissed because there was an arbitration clause that precluded a legal action against the hospital. A cruise ship employee who claimed that two crew members had drugged and raped her and left her unconscious also had her case for an unsafe workplace filed in court dismissed because of an arbitration clause.

Another example of a class action that was barred from being litigated was a claim by African American employees at Taco Bell who claimed they were denied promotions, required to work the least desirable shifts, and subjected to degrading comments by supervisors.

The baby of Leydiana Santiago of Tampa, Florida, was born with hearing loss and thumbs that required amputation. She claimed that her doctor had mistakenly determined that she had a miscarriage and, as a result, she resumed taking medication for lupus, which caused birth defects. In April 2014, a Florida appeals court held that Ms. Santiago was required to enter into arbitration. Judge Chris Altenbernd held that "I obey what appears to be the rule of law without any enthusiasm. . . . I have disappointed Thomas Jefferson and John Adams."

The *New York Times* found 1,179 class action suits filed between 2010 and 2014 that companies objected should be filed in arbitration. Judges ruled in their favor in four out of five cases. In 2014 alone, judges ruled for corporation class action bans in 134 of 162 cases.

The arbitration clause reportedly was developed in a series of meetings between credit card companies, businesses, and lawyers at large firms. The lawyers who developed the arbitration clause explained in their defense that arbitration clauses advantage consumers because they do not have to undergo the expense of litigation. However, the *New York Times* found that approximately two-thirds of consumers with claims of credit card fraud, fees, or other issues received no monetary awards in arbitration.

In 2013, Supreme Court Justice Elena Kagan in dissenting from the Court's upholding of an arbitration clause in an American Express contract noted that "the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse" and wrote that the Court was telling the victims, "Too darn bad" (*American Express Co. v. Italian Colors Restaurant*, 570 U.S.___ [2013]). The Consumer Financial Protection Bureau plans to issue a rule prohibiting financial institutions from using arbitration clause. Congress has threatened to revoke the rule.

Do you agree with Justice Kagan's characterization of arbitration clauses?

INTERNATIONAL PERSPECTIVE: GACACA COURTS IN RWANDA

In the past decades, countries across the globe have confronted the challenge of putting the country back together following years if not decades of massive human rights violations in which people were arrested, imprisoned, and executed without trial. Once a new government comes to power, the regime confronts the challenge of creating a society in which people no longer live in fear and instead feel safe and secure.

Transitional justice is the process by which a newly installed regime seeks to redress the human rights violations and wrongs committed by members of the previous repressive government. One of the challenges of transitional justice is creating a sense of respect for the law. This requires confidence in the fairness of legal procedures. Another important goal is to educate the next generation about what occurred in the country to ensure that people will appreciate the importance of maintaining a democratic government that respects the rights of individuals.

Countries across the globe confront the challenge of transitional justice, including states in Africa, Eastern Europe, and South Asia. There are various mechanisms used in transitional justice. One is a truth commission. South Africa for decades languished under an apartheid (racial separation) regime in which the majority African population lived under harsh and unequal conditions. Following the fall of the apartheid regime, South Africa adopted a truth commission in which individuals who come forward and testify about their crimes are relieved of criminal and civil liability for their acts. The theory is that individuals, by admitting their crimes and by acknowledging the harm their acts caused, help bring people together.

Another approach, adopted in Argentina, Chile, and Guatemala, is truth and reconciliation commissions, composed of a panel of distinguished individuals who investigate and compile a historical record of events. South Africa and a number of other countries combined these two mechanisms of transitional justice with monetary reparations for victims.

The international community in Sierra Leone, East Timor, and Cambodia established mixed tribunals comprising domestic judges along with judges representing the international community.

Most of these approaches to transitional justice stress reconciliation rather than vengeance or retribution (Van Der Merwe, Baxter, and Chapman 2009).

You might ask yourself, why not merely criminally prosecute the perpetrators? It often is difficult to determine the identity of individuals who engaged in torture or carried out assassinations. A regime would have to conduct thousands of trials, anger the supporters of the previous government, and risk igniting social conflict and animosity. It also is problematic to hold individuals criminally liable for following what at the time were the lawful orders of government officials.

Between April and mid-July 1994, as many as one million individuals were slaughtered in the Rwandan genocide. Rwanda had experienced almost fifty years of ethnic violence that pitted the majority Hutu population against the minority Tutsi population. In April 1994, the plane carrying the presidents of Rwanda and Burundi was shot down, triggering the slaughter of Tutsi civilians. Lists of Tutsi and moderate Hutu were circulated to killing squads. The radio urged Hutu to kill the "cockroaches" and vowed that in the future young children would have to consult books to see a Tutsi because they all were to be slaughtered. The Rwandan Patriotic Front (RPF), a Tutsi guerrilla organization, responded by launching attacks against Hutu in Rwanda. The RPF ultimately proved successful in defeating the Hutu forces and installing a Tutsi-led government (Des Forges 1999).

In the aftermath of the 1994 Rwandan genocide, the United Nations formed the International Criminal Tribunal for Rwanda (ICTR) to prosecute "serious violations" of international law. The theory behind the tribunal is that the global community has an interest in bringing to justice high-ranking Rwandan government leaders and officials responsible for the major international crimes of genocide, torture, and systematic rape. The ICTR focused its prosecutions on top-ranking Hutu government, military, and political party leaders and declared an end to the "culture of impunity" for government leaders (N. Jones 2010: 104–131).

Rwanda announced it would bring every individual accused of crime and anyone who was not prosecuted by the ICTR before domestic courts. The Rwandan justice system had been destroyed during the genocide, and although several thousand individuals were brought to trial, the prisons overflowed with an estimated 130,000 individuals awaiting trial (Burnet 2010: 98).

The international community pressured Rwanda to prosecute lower-level criminals detained in prison. The solution developed by Rwanda in 2005 was to return to a traditional form of village dispute resolution, the **gacaca** court. The gacaca is a patch of grass in the inner courtyard of a village home, which is the location for private discussions. Roughly twelve thousand gacaca courts were established, which were staffed by twenty thousand lay judges. In June 2012, the jurisdiction of the gacaca courts expired, and the courts were closed.

The official goals of gacaca were to reveal the truth about the Rwandan genocide, expedite the prosecution of serious crimes, and hold individuals (regardless of their official status) responsible for their crimes, thereby demonstrating that Rwandans were able to settle their own differences (Meyerstein 2011).

The fundamental idea behind gacaca was for the local community to listen to the testimony of surviving victims, perpetrators, and witnesses and to ask questions and discuss the case. Following the hearing, the judges were to meet in private and arrive at a verdict and an appropriate sentence. A defendant who confessed to his or her crimes received a lesser sentence, half of which might be served in community service. Defendants were encouraged to combine their confessions with pleas for forgiveness. A defendant also could be ordered to pay reparations to victims or to pay damages into a fund established for the victims of genocide. Appeals were permitted from gacaca to a special appeals panel.

The vast majority of the roughly one million cases before the gacaca resulted in defendants confessing their guilt. The confession was the first step toward individuals publicly accepting responsibility for their crimes and seeking forgiveness from the victims and from the local community. This allowed family members and friends to learn the fate of their loved ones and, in some instances, to unearth their remains. The confession also eased the perpetrators' return to the village. Victims who had kept their suffering to themselves were provided the public opportunity to describe their pain and suffering.

The gacaca is credited for bringing Hutu and Tutsi together after years of separation and animosity. The local community was educated on the events surrounding the genocide and learned to work with one another to solve problems. Critics of gacaca point out that the idealistic picture painted by the Rwandan government of perpetrators and victims reconciling with one another overlooks that the Tutsi victims often continue to live in fear and cannot forgive or forget the death of their family members and friends at the hands of the Hutu (P. Clark 2010: 195, 224). The perpetrators have not always let go of their resentment toward the Tutsi who at the time of the genocide were viewed as a privileged group that monopolized the best education and the best jobs and enjoyed the highest incomes (Hazfeld 2005, 2007). The process also has been criticized for focusing exclusively on

crimes committed by Hutu and for disregarding killings committed by Tutsi militia groups invading the country from Uganda.

Gacaca courts, despite their shortcomings, were a unique village-based experiment in transitional justice, which combined punishment of defendants with restorative justice. Some individuals have argued the United States should create a truth commission to document American abuses of detainees during the war on terror. Do you agree?

6.4 YOU DECIDE

In the 1975 case *Goss v. Lopez*, the U.S. Supreme Court held that high school students were entitled to a hearing before being suspended (*Goss v. Lopez,* 419 U.S. 565 [1975]). A number of students were suspended from high schools in Columbus, Ohio, based on disobedient and disruptive conduct committed in the presence of a school administrator.

In 1971, high school students in Ohio organized a series of protests against school policies. Tyrone Washington disrupted a class in the school auditorium at Marion-Franklin High School and was ordered to leave by the school principal. He refused and was suspended. Ralph Sutton attacked a police officer who was attempting to remove Washington from the auditorium and also was suspended. Four other students were suspended for joining Washington in protesting school policy. None of the students was provided with a hearing although they were invited to attend a conference along with their parents to discuss their suspensions.

Dwight Lopez and Betty Crome were students involved in the protest at Central High School and McGuffey High School, respectively. Lopez was suspended during a disturbance in the lunchroom, which resulted in the destruction of property. Lopez alleged that he was not a party to the destruction of property and was an innocent bystander. Crome also was present at the incident at Central High School and was suspended for a ten-day period. Roughly seventy-five students along with Lopez and Crome were suspended.

The Fourteenth Amendment to the U.S. Constitution applies to the states and provides that an individual may not be deprived of liberty or property without due process of law. Ohio, according to the U.S. Supreme Court, had chosen to provide a free education to all young people between the ages of 5 and 21 years of age and to require these individuals to attend school for at least thirty-two weeks per year. The state, once having created this entitlement, may not deprive students of this entitlement by suspending them without a due process hearing. A hearing also is required because a suspension interferes with a student's liberty by damaging a student's reputation in the school and opportunity to pursue higher education and employment. The Supreme Court explained that "having chosen to extend the right to an education Ohio may not withdraw that right on the grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred."

At a minimum, students confronting a suspension have the right to oral or written notice of the charges against them, an explanation of the facts on which the charges are based, and the opportunity to be heard. This due process requirement is intended to ensure that decision-makers base suspensions on accurate facts. The Supreme Court noted that fairness "can rarely be obtained by secret, one-sided determination of facts."

The Court stopped short of requiring that students be provided with a lawyer or with the opportunity to

confront the witnesses against them or to call their own witnesses. These types of requirements would make suspensions so time-consuming and burdensome that they rarely would be employed. The Court cautioned that suspensions beyond ten days may require more extensive procedures.

Justice Lewis Powell, writing in a dissenting opinion joined by three other judges, criticized judicial interference with the decision-making of school authorities. He argued that suspensions are one of the traditional mechanisms that administrators rely on to maintain school discipline. The requirement that students should be provided with a hearing interferes with the ability of administrators and teachers to rely on suspensions to ensure the security and stability of the school. Requiring an adversarial hearing before a suspension is made is incompatible with the teacher–student relationship in which the teacher guides the development of the student. The next step toward the erosion of the authority of teachers and administrators undoubtedly will be to require that judges review the decision to give a student a B rather than an A or a decision to deny a student promotion to the next grade.

Powell also argued that education is a state and local responsibility, and the federal courts do not have a role in local educational policy. The country has relied for generations on the judgment and good sense of teachers and administrators, and judicial intervention only can undermine their authority.

Do you agree that students should be provided with an informal hearing prior to their suspension?

CHAPTER SUMMARY

A dispute is a disagreement between two or more individuals or groups. A legal dispute involves conflicting interests. Usually one person has something the other wants, and both parties make claims of entitlement. A dispute goes through various stages in which an individual recognizes that he or she has been harmed, identifies the cause of the harm, and confronts the individual or group thought to be responsible for the harm.

There are various styles of dispute resolution, including acceptance, avoidance, self-help, and talking. Talking may involve negotiation, mediation, arbitration, and/or adjudication. Various procedural hurdles typically must be satisfied before pursuing a "talking remedy." Both the social structure of a society and a society's legal culture influence the form of disputing that is practiced in a society.

A number of studies have explored the legal consciousness of Americans. Legal consciousness is the attitudes and views of individuals toward the law and how these attitudes and views influence individuals' willingness and ability to pursue legal remedies.

Americans have a strong commitment to the Constitution and to the core principles of the American Republic. Regardless of their social class and income, Americans strongly believe that they are entitled to their "day in court." Contrary to common belief, Americans are not "quick to pull the trigger" and view the filing of a legal challenge as a last resort. Americans' interaction with the legal system leaves them with a sense of being disrespected and disappointed. They are confused by legal procedures and quickly come to understand that they must fight to be heard and to enjoy their "day in court." The end result is that the average American "lumps it" rather than pursues legal remedies. It is the better-off members of society who are less likely to "take no for an answer."

An individual's perception as to whether a case is "justly" decided is dependent on whether the procedures

are viewed as fair. Americans are concerned about whether they are given the opportunity to articulate their views and to be heard and whether the decision-maker is neutral and unbiased and treats them with respect and regard.

The conventional wisdom is that America is a litigious society. This is challenged by commentators who contend that unrepresentative "nonsense" cases are overly represented in the media and question the accuracy of the data. The alternative dispute resolution movement is premised on the view that disputes can be resolved efficiently through mediation, arbitration, and other methods as an alternative to the formal judicial adjudication of disputes.

CHAPTER REVIEW QUESTIONS

1. Distinguish between a grievance and a dispute.
2. Discuss the stages of a dispute.
3. What are various ways in which individuals may respond to a dispute?
4. List various methods of dispute resolution.
5. How does the social structure of a society and a society's legal culture influence the form of disputing?
6. What are the main characteristics of the legal consciousness of Americans?
7. Is America a "rampantly litigious society"?
8. Discuss the development of the alternative dispute resolution movement and the types of ADR. What are the arguments for and against ADR?

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ANSWERS TO TEST YOUR KNOWLEDGE

1. True
2. True
3. False
4. False
5. False

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